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Corporate law in New Zealand

2021

Corporate law in New Zealand

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Chambers Asia Pacific 2021

Key points about corporate law in New Zealand

Overseas entities proposing to set up business in New Zealand have four main structures available to them

- Register a branch
- Form a subsidiary company
- Acquire an existing New Zealand company
- Form a partnership, including a limited partnership

The most effective way for an overseas company to operate in New Zealand will depend upon the nature of its intended business activities in New Zealand, the method of cooperation intended to be formed between the overseas company (or its New Zealand registered entity) and local partners, as well as each method's respective tax consequences.

The detail

Registered branch

An overseas company wishing to register a branch in New Zealand must:

- reserve its name with the Registrar of Companies, and
- file an application for registration within ten working days of commencing business in New Zealand.

Australian companies wishing to register a branch in New Zealand benefit from:

- an information sharing arrangement between the Companies Office and the Australian Securities and Investments Commission ('ASIC'), and
- reduced compliance requirements on an ongoing basis.

Forming and registering a subsidiary company

Companies incorporated in New Zealand are registered under the Companies Act 1993 ('the Act'). Some of the major features of the Act are set out below.

DIRECTORS AND SHAREHOLDERS

A company must have:

- a name;
- at least one director living in New Zealand or living in an enforcement country and being a director of a company incorporated in that enforcement country. At present only Australia has been confirmed as an enforcement country; and
- at least one shareholder. Unlike for directors, there is no residency requirements for shareholders. The rights and powers of the shareholders are laid out in the Act as modified by the company's constitution (if it has one). Shareholders' liability is generally limited to the price payable for the shares for which they subscribe. The same person can be both shareholder and director.

CONSTITUTION

Under the Act there is no distinction between a public or private company. Additionally, there is no obligation to have a constitution. If no constitution is adopted, then the provisions of the Act govern the conduct of the affairs of the company.

Most companies elect to have a constitution in order to take advantage of certain powers not otherwise permitted under the Act, such as the ability to take out directors' and officers' liability insurance.

Each company must maintain registers of shareholders, directors, directors' interests, and certificates given by directors and such other company records as directors' and shareholders' resolutions and financial statements, all of which must be kept at the company's registered office unless otherwise approved by the Registrar of Companies.

CAPITAL

Under the Act, shares have no par value and there is no concept of nominal capital. There may be different classes of shares.

Financial assistance to purchase shares and, if expressly authorised by the constitution, share buybacks are permitted if certain procedural requirements are followed.

One procedural requirement is the directors must certify that the company passes the solvency test. Creditors are protected from inappropriate reduction of capital by the need for the directors of the company to certify that the company will remain solvent at the time distributions are made to shareholders. Directors may be personally liable if a distribution is made when the company cannot pass the solvency test.

MANAGEMENT

In New Zealand, the ownership and management of the company are distinctly separate. A director must be a natural person, and a shareholder can be a natural person or a legal entity. A natural person shareholder does not necessarily have to be a director, and vice versa.

The board of directors is responsible for managing the company's business affairs. The board must keep minutes of their meetings.

Subject to a company's constitution, the Act sets out the methods by which a company may enter into contracts and other obligations. This method is dependent on the type of obligation and the form of the contract.

There is no requirement for a company seal and most companies do not execute documents under seal.

Directors duties are set out in the Act. Where expressly allowed by a company's constitution, the Act also permits directors of wholly-owned subsidiaries or joint venture companies to take into account the interests of the holding company or the shareholder, in priority to the interests of the company itself.

PUBLIC DISCLOSURE

The Act and the Financial Reporting Act 2013 prescribe the requirements for companies to prepare, have audited and file with the Registrar of Companies financial statements. The requirement to audit and file will differ between companies depending on factors such as the level of overseas ownership of the company, the size and scale (measured on the basis of revenue and value of assets) of the company and other relevant factors.

Generally speaking, most New Zealand incorporated companies that are owned by large overseas persons and have a substantial business presence will need to prepare and file audited financial statements.

SHAREHOLDER RIGHTS

Under the Act, unless the constitution provides otherwise, shareholders have pre-emptive rights on the issue of new shares but not in respect of the transfer of shares. However, it is common for constitutions of closely held companies to incorporate pre-emptive rights on the transfer of shares.

Companies cannot undertake transactions with a value exceeding 50% of the gross assets of the company without approval by a special resolution (which requires the vote of at least 75% of shareholders). In such cases, dissenting minority shareholders whose dissenting votes have been recorded may require the company to purchase their shares.

Acquire an existing New Zealand company

SHARE SALE VERSUS AN ASSET SALE

Before commencing an acquisition it is important to decide on how the acquisition is structured. The two most common types of structures are:

- acquisition of the shares in the target business; or
- acquisition of the assets of the target business.

A share purchase is typically a simpler transaction as all contracts, employees and assets remain with the target business with only the ownership of the business' shares changing. However, the downside to a share purchase is that a purchaser has to acquire all the assets of the business (and also the business' liabilities) and is unable to 'cherry-pick' those it wants. There are a range of factors to consider when structuring an acquisition so it is important to consult your legal and financial advisors before entering into a transaction.

MERGER OR TAKEOVER PROPOSAL

An overseas person considering merging with or buying a New Zealand company must be aware of the restrictions on business acquisitions contained in the Commerce Act 1986 and the Overseas Investment Act 2005 ('OIA'). If the New Zealand company is listed on the New Zealand Stock Exchange, or has more than 50 shareholders, the Takeovers Code is also likely to apply.

THE TAKEOVERS CODE

The Takeovers Code ('Code') regulates the conduct of takeovers in New Zealand. The Code applies to companies ('Code Companies') which meet one of the following:

- are listed on the New Zealand Exchange ('NZX').
- were listed on the NZX and have ceased to be listed for less than 12 months before the date of the relevant event referred to in the Code.
- have 50 or more shareholders who hold voting rights, and have 50 or more share parcels in a company that in the most recently completed accounting period and either or both of the following is true: The total assets of the company and its subsidiaries is at least NZ$30 million and/or the total revenue of the company and its subsidiaries is at least NZ$15 million.

The main feature of the Code ('fundamental rule') restricts the ability of a person and that person's 'associates', to increase or acquire voting rights in a Code Company beyond 20%.

Under the Code:

- a person who holds or controls less than 20% of the voting rights in a Code Company cannot acquire an increased percentage of voting rights if such an acquisition would put that person and their associates over the 20% threshold, unless such acquisition is by way of one of the permitted exceptions listed in the Code (and summarised below)
- a person already holding or controlling more than 20% of the voting rights of a Code Company cannot acquire an increased percentage of voting rights other than by way of one of the permitted exceptions
- once a person holds 90% or more of the shares in a Code Company, they become a 'Dominant Owner'. Upon becoming a Dominant Owner:
    - The Dominant Owner has the right to acquire all the outstanding shares
    - The outstanding security holders have the right to sell their shares to the Dominant Owner.

The Code does not distinguish between voluntary or involuntary increases in voting rights. Therefore, a person whose voting rights cross the 20% threshold by involuntary means (e.g., a non-pro rata buyback, transfers by operation of law, or an undersubscribed rights issue), will be in the same position as if they had actively purchased shares, although some general exemptions allow a period for the holder to reduce their holding back to where it was. The Takeovers Panel is able to grant exemptions from the Code where appropriate.

CODE PERMITTED EXCEPTIONS

- A full offer to acquire all the voting and non-voting equity securities in a Code Company will comply with the Code so long as the offer is fair and reasonable between all classes of shares held in the company.
- A partial offer to acquire a specific percentage of all voting securities will comply with the Code so long as the offer will have the effect of the offeror owning more than 50% of the voting rights in the company. A partial offer must be for the same percentage in each share class and be fair and reasonable between all share classes.
- Shareholders of the target company may resolve by ordinary resolution to approve a particular issue of new shares or the acquisition of existing shares that would otherwise be restricted by the Code. The intended purchaser, and any other interested person, are not permitted to take part in the vote.
- Where a person has an existing holding of between 50% and 90% of voting rights, they are permitted to increase their holdings by up to 5% of the total voting rights in any one 12-month period. The maximum increase permitted is calculated from the lowest percentage of voting rights held by that person in that 12-month period.

The Code sets out more fully the procedure as to what is required to be in the offer, what the target company must do upon receipt of the offer, and certain restrictions upon the offeror and the target company during this process.

Partnership and limited partnerships

PARTNERSHIP

The definition of 'partnership' is provided in the Partnership Law Act 2019, as the relationship that subsists between persons (which can be companies) who carry on a business in common with a view to profit. The relationship between shareholders or members of certain entities, including a limited partnership, is not a partnership.

Unlike companies, a partnership is not considered a separate legal entity. Each partner is liable jointly and severally for the liabilities of the partnership with no limited liability. This means that a claim made against a partnership can be enforced against any partner in the partnership.

The partnership relationship is ordinarily documented by way of a partnership agreement, which is governed by the Partnership Law Act 2019 and common law. Partners can, in writing, contract out of certain general provisions in the Partnership Act.

LIMITED PARTNERSHIPS

The Limited Partnership Act 2008 introduced a limited partnership model into New Zealand similar to those in some Australian states, Delaware, and the Channel Islands. Effectively, the model provides investors with the protection of limited liability, with some of the flow-through tax and confidentiality advantages of a partnership.

A limited partnership must be registered with the Companies Office and must be composed of at least one general partner and at least one limited partner, both of which can be companies.

General partners are:

- responsible for the management of the general partnership.
- jointly and severally liable with the limited partnership for the debts and liabilities and for any wrongs or omissions of the partnership. General partners' liability for the debts and liabilities is limited (subject to the partnership agreement) to the debts and liabilities that the limited partnership cannot pay.

Limited partners are:

- passive investors and are not entitled to take part in management outside certain specified activities.
- not liable for the debts and liabilities of the limited partnership, provided that they do not take part in the management of the limited partnership.

Both general and limited partners may make capital contributions to the limited partnership.

How we can help you

For more information contact

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Structure your investment in the way that best suits your business model and investment plans.

Advise on compliance and best practice, on all aspects of a merger or acquisition, from initial planning to post-completion, including undertaking due diligence, negotiating terms, providing regulatory advice (including consent applications to the Overseas Investment Office under the OIA), enabling ongoing project management, as well as helping you understanding shareholder rights and negotiate and resolve disputes.

Our Takeovers Code experts provide specialist advice to companies, investors, stock brokers, and other market participants. We can help you to understand your obligations, whether you're a Code Company, a substantial product holder, a holder of voting rights, or an offeror.

Navigate the Financial Markets Conduct Act and ongoing compliance with relevant listing rule and market participant requirements to become listed on the NZX.

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