FDI and M&A Legal Guidelines[i]: FDI in New Zealand

The below summary of foreign investment regulation in New Zealand is a high level summary only and is not intended to be legal advice. The application of the laws relating to investment in New Zealand will differ depending upon, amongst other things, the structure of the investment and the business of the target. Specific legal advice should be sought from a lawyer qualified in New Zealand before making any investment into New Zealand.

1. Foreign Direct Investment (Greenfield investment)

1.1. What are the principal laws and regulations applicable to FDI in your jurisdiction? Are there special rules for certain foreign investors, including state-owned enterprises (SOEs)?

*New Zealand's foreign investment restrictions are set out in the Overseas Investment Act 2005 (**OIA**) and associated regulations e.g. Overseas Investment Regulations 2005.*

Which foreign investors are covered by New Zealand's Foreign Direct Investment Regulations?

A foreign investor is anyone defined as an "overseas person" under the OIA, and this definition is not limited to particular countries.

"Overseas persons" include (but are not limited to):

(a) persons who are neither New Zealand citizens nor ordinarily resident in New Zealand;

(b) body corporates that are incorporated outside New Zealand or are more than 25% owned by another overseas person (noting that higher thresholds apply to New Zealand Listed issuers, which looks at whether that issuer is at least 50% owned or controlled by New Zealanders); and

(c) other "managed investment schemes", partnerships, joint ventures, unincorporated bodies and trusts the overseas ownership of which hits specified thresholds (typically around 25%, by reference to the ownership and control of those bodies).

What restrictions apply to "Overseas Persons" under the OIA and associated regulations?

*Under the OIA, Overseas Persons may not, without the consent of the New Zealand Overseas Investment Office (**OIO**) or the relevant Minister:*

*(a) Acquire interests in certain categories of "sensitive" land- for example residential land or marine and coastal areas (**Sensitive Land**);*

(b) Establish a business in New Zealand where the total expenditure expected to be incurred, before commencing the business, in establishing that business exceeds NZ$100,000,000;

*(c) Acquire assets used to carry on business in New Zealand where the consideration for those assets exceeds NZ$100,000,000 (**Significant Business Assets**);*

(d) Acquire a greater than 25% "ownership or control interest" in an entity (or, subject to certain thresholds, increase such an interest) where that entity itself owns Sensitive Land or Significant Business Assets; nor

(e) Acquire certain fishing quota.

Answers are prepared by Simpson Grierson in New Zealand.

*Even if the proposed transaction does not fall within one of the restricted categories referenced above, Ministers have the power to "call in", review and, ultimately, prohibit transactions involving any level of overseas investment in a "strategically important business" (**SIB**). An SIB is defined in the OIA and includes producers of military technology as well as those involved in the provision of certain categories of critical infrastructure.*

<u>Are there special rules for particular foreign investors?</u>

While the regime doesn't focus on persons from particular jurisdictions, preferential treatment is afforded to certain trading partners (for example, Australia, Hong Kong and Singapore) in the form of increases to the NZ$100,000,000 thresholds referenced above, including:

- *NZ$536,000,000 for certain Australian non-government investors (subject to GDP adjustment each year); and*
- *NZ$200,000,000 for certain countries that have free trade agreements with New Zealand.*

Although State Owned Enterprises don't have specific rules, there are additional thresholds for overseas persons who have more than 25% upstream ownership or control by non-New Zealand government investors, which would ordinarily capture SOEs. Applications for consent made by investors with foreign-government ownership have to satisfy an additional test - that the acquisition would not be contrary to New Zealand's national interest. Where acquisitions fall into this national interest test, consent must be granted by the Minister of Finance (as opposed to the decision being made by the OIO), which has additional time and cost considerations.

1.2. Are there any governmental and regulatory approvals required for FDI? If so, please give brief details (such as trigger threshold, relevant authority and timing requirements)?

If the transaction requires consent under the OIA (refer to the summary provided in response to question 1.1), an application must be made to the OIO.

Time frames for the processing of these applications vary depending on the type of application, such as 35 working days for a consent to acquire Significant Business Assets, or 70 working days for consent to acquire Sensitive Land. Consent must be received before the transaction is given effect to. Failure to do so is a breach of the OIA.

1.3. Are there any industry sector controls on foreign investment?

<u>Does the regime under the NZ OIA focus on particular industries?</u>

Whilst the basic consent regime is applicable across all industries, as noted in response to question 1.1, the acquisition of assets in certain industries, known as "strategically important businesses (or "SIBs"), are subject to higher levels of review.

If consent <u>is</u> required for an acquisition involving a SIB (i.e. the transaction falls within one of the categories noted in response to question 1.1), an additional consent is required under the national interest test- i.e. the NZ authorities must agree that the acquisition would not be contrary to New Zealand's national interest. Where acquisitions fall into this national interest test, consent must be granted by the Minister of Finance (as opposed to the decision being made by the Overseas Investment Office), which has additional time and cost considerations.

Even if consent <u>is not</u> otherwise required (i.e. the transaction does not fall into one of the categories set out in the response to Question 1.1), an acquisition into certain SIBs may, nonetheless, be caught by the "call-in" national security and public order regime.

**Answers are prepared by Simpson Grierson in New Zealand.*

In most cases the regime has a $0 and 0% ownership and control threshold; but there are some exceptions to that general rule in respect of which, although investment in SIBs, are not subject to the "call-in" regime, notably:

- *investments that result in an investor holding less than 10% of a publicly listed entity's shares – unless the investment grants disproportionate access to, or control of, that entity (for example, the right to appoint a board member), or*
- *investments in media entities or related property, where the threshold for screening is:*
  - *more than 25% ownership or control interest in the entity, or*
  - *the value of the target property (used by the media business) being more than 25% of the value of all property owned by the media business; or*
- *investments in assets or property, if the overseas person becomes a SIB, or becomes capable of being a SIB if it were to use the property for a SIB activity (for example, significant electricity generation capacity, or large volumes of sensitive information).*

If the "call-in" regime apples, notification of the transaction must be given to the OIO if the target business or entity:

- *researches, develops, produces, or maintains military or dual-use technology, or*
- *is a "critical direct supplier" (published or unpublished) to the New Zealand Defence Force, the Government Communications Security Bureau, or the New Zealand Security Intelligence Services.*

For mandatory notifications, clearance must be given by the Minister of Finance before the transaction is given effect to.

In circumstances in which an overseas person seeks to make an investment into an SIB and the notification is not mandatory, consideration should be given to making a voluntary notification of the transaction to the OIO. A voluntary notification may be given either before, or up to six months after, the transaction is given effect to. The benefit of a voluntary notification prior to the transaction taking effect is that, if the OIO finds that the investment does not pose significant risks to New Zealand's national security and public order, the acquirer will obtain a "safe harbour" from later government intervention.

The safe harbour means that once the OIO has made a decision about the transaction, it won't look at the investment again – unless it is warranted for another reason (for example, if the notification contained false or misleading information).

1.4. Are there any government free carry interest requirements on special industry sector?

No.

1.5. Are there any localization requirements (e.g. minimum ratio of local employees, minimum ratio of local procurement) for FDI in your jurisdiction?

No. Please note, however, that, in certain circumstances, the OIO may impose conditions upon an investment which could relate to local employment or economic benefits.

For completeness, we note that every company incorporated in New Zealand must have at least one director who is ordinarily resident in New Zealand, or who is an Australian resident and a director of an Australian company.

**Answers are prepared by Simpson Grierson in New Zealand.*

1.6. Are there any exchange control restrictions in terms of remittance of capital, profits and dividends?

No.

Again, for completeness, we note that the OIO may, impose conditions upon an investment which could include requirements for additional investment into the NZ assets acquired.

1.7. What are the most common types of corporate legal entities established for FDI?

For each type of corporate legal entities, please introduce the internal corporate governance structure. What types of corporate legal entities are recommended for partially or wholly foreign owned corporate legal entities?

Companies are the most common corporate legal entity established to facilitate FDI. A company, governed by its board of directors and controlled by its shareholders, is the most straightforward and easiest entity to utilise. It is common that New Zealand companies are incorporated specifically for the purposes of acquiring interests on behalf of foreign parent entities.

Limited partnerships (established under the Limited Partnerships Act 2008 (NZ)) are also sometimes used for acquisitions. A limited partnership is a corporate structure with separate legal personality (similar to a company) which offers limited liability to investor partners provided that they do not take part in management of the entity. A limited partnership has full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction, both within and outside New Zealand. On the other hand a limited partnership has "pass-through" tax treatment in New Zealand, which means the tax consequences of the partnership's activities flow directly to the investor partners. There is no separate layer of corporate tax.

A limited partnership must have a written partnership agreement containing certain matters specified by law. The agreement can be amended at any time in accordance with procedures specified within it. The partnership agreement is not required to be registered and therefore is able to be kept private as between the partners.

1.8. What is the procedure of registration and incorporation of foreign-owned companies?

Registration of a New Zealand company

Incorporating a new company in New Zealand, regardless of whether the shareholding is based in New Zealand or overseas, is a relatively straightforward process that can be completed in a number of days. The process is conducted online via the New Zealand Companies Office website.

All relevant information is included in the link below. In summary:

1) *Reserve the company name*
2) *State the details of the company directors*
3) *State the details of the share capital and shareholder(s)*
4) *Provide a New Zealand registered address*
5) *State the annual filing return month – this is elected at the choice of the company*
6) *State the financial balance date of the company*
7) *Provide a company constitution (if it has one)*

**Answers are prepared by Simpson Grierson in New Zealand.*

https://companies-register.companiesoffice.govt.nz/help-centre/before-you-start-a-company/

Registration of an overseas company in NZ

Registering an existing foreign-owned company in New Zealand is also a relatively straightforward process that can be completed in a number of days. The process is conducted online via the New Zealand Companies Office website.

All relevant information is included in the link below. In summary:

1) *Reserve the company name*
2) *State the principle place of business in New Zealand, and person(s) authorised to receive service and documents on behalf of the business.*
3) *State the date when the business starts carrying on its business in New Zealand.*
4) *State the annual filing return month – this is elected at the choice of the company.*
5) *State the financial balance date of the company.*
6) *Provide proof of incorporation*
7) *Provide a company constitution (if it has one)*

How overseas companies set up as a NZ business | Companies Register (companiesoffice.govt.nz)

1.9. What are the documents and materials that the foreign investors need to prepare for that purpose? Is notarization or certification required?

See our response to question 1.8.

Notarisation / certification is only required where copies of original documents are specifically requested (e.g. where proof of the validity of a document is not able to ascertained digitally).

1.10. How long does it normally take to complete the entire registration and incorporation process?

If all of the information is readily available (including consents from directors to their appointment to the company board) registration/incorporation can usually be achieved within 5 working days (noting that the timing remains within the discretion of the New Zealand Companies Office).

---

[i] ***The series on the investment and M&A laws in the member countries of RCEP is launched by DeHeng Law Offices. In each article of the series, a leading local law firm is invited to offer an overview of investment and M&A laws in the jurisdiction.***

The above answers are prepared by
- ***James Hawes, Partner***
- ***Holly McKinley, Senior Solicitor***

from Simpson Grierson in New Zealand by March 31st, 2022.