

INWARD INVESTMENT INTO NEW ZEALAND AND THE OVERSEAS INVESTMENT REGIME AS IT APPLIES TO LAND

1. **Introduction**

Historically, successive New Zealand Governments have welcomed and encouraged overseas investment. New Zealand's world-leading agribusiness sector is expected to continue to be a strong area for investment with New Zealand's substantial fresh water resources being a significant competitive advantage.

Like most other countries, New Zealand has overseas investment controls that require overseas persons to obtain approval before they can invest in the country in certain types of assets. These controls have been amended in recent years, somewhat piecemeal, as a political response to certain proposed transactions.

The principal restrictions on an overseas person establishing or acquiring a New Zealand business are contained in the Overseas Investment Act 2005 (the **OIO Act**) and the Overseas Investment Regulations 2005 (the **OIO Regulations**).

Broadly speaking, an "overseas person" is a person who is not a New Zealand citizen nor ordinarily resident in New Zealand, a company that is incorporated outside of New Zealand or a company, partnership or other body corporate that is 25% (or more) owned or controlled by an overseas person or persons. Whether or not consent is required will depend on:

- the amount of money involved;
- the type of investment proposed; and
- the sector in which the investment is to be made.

2. **Type of investment**

The OIO Act will require consent for a transaction if it involves an overseas investment in:

- significant business assets;
- sensitive land;
- farm land; and/or
- fishing quotas.

This article focuses on sensitive land and farm land.

2.1 Overseas investment in sensitive land

Consent will be required for an overseas person to purchase or acquire an interest (for greater than three years) in land which is “sensitive”, either directly or indirectly, which, together with any associated land:

- exceeds five hectares and is non-urban land (being farm land or any land other than land in an urban area that is used for commercial, industrial or residential purposes);
- is part of the foreshore and/or seabed;
- exceeds 4,000 m² and:
 - (a) is part of the bed of a lake;
 - (b) is part of certain named islands;
 - (c) is held for conservation purposes, is provided as a reserve, a public park, for recreation purposes or as a private open space; or
 - (d) is subject to a heritage order or a requirement for a heritage order, is an historic place, historic area, wahi tapu (sacred to Maori) site or for which there is an application or proposal for registration under the Historic Places Act 1993;
- exceeds 2,000 m² and adjoins the foreshore; or
- exceeds 4,000 m² and adjoins certain land, such as a lake bed.

2.2 Overseas investment in farm land

The OIO Act defines “farm land” as land exclusively or principally used for the purpose of agriculture, horticulture, or pasture; or the keeping of bees, poultry or livestock. The Overseas Investment Office (the OIO) cannot approve the purchase of farm land by an overseas person unless the farm land has first been offered on the open market in New Zealand in accordance with the OIO Regulations. The Minister for Land Information can waive this requirement, but only if the purchase is likely to result in substantial and identifiable benefits to New Zealand.

3. Factors considered by the Overseas Investment Office

3.1 Criteria for investment in sensitive land

When considering an application for an overseas investment in sensitive land, the OIO must be satisfied that the relevant overseas persons have necessary business experience and acumen, have demonstrated financial commitment to the investment and are of good character. The OIO must also be satisfied that:

- Either:
 - (a) the overseas person is, or (if that person is not an individual) all the individuals with control over the overseas person are, New Zealand citizens, ordinarily resident in New Zealand or intending to reside in New Zealand indefinitely; or
 - (b) the overseas investment will, or is likely to, benefit New Zealand (or any part of it or any group of New Zealanders) (as discussed below) and, if the relevant land includes non-urban land that in area (either alone or together with any associated land) exceeds five hectares, that the benefit will be, or is likely to be, substantial and identifiable.
- If the relevant land is or includes farm land, (subject to limited exceptions) either that farm land or the securities to which the overseas investment relates have been offered for acquisition on the open market to persons who are not

overseas persons in accordance with the OIO Regulations.

In assessing whether a transaction will result in a benefit to New Zealand, consideration must be had to whether the overseas investment will, or is likely to, result in:

- the creation of new, or the retention of existing, jobs in New Zealand;
- the introduction into New Zealand of new technology or business skills;
- increased export receipts for New Zealand or exporters; added market competition, greater efficiency or productivity, or enhanced domestic services, in New Zealand;
- introduction into New Zealand of additional investment for development purposes;
- increased processing of New Zealand's primary products; and/or
- assisting New Zealand to maintain New Zealand control of strategically important infrastructure on sensitive land.

The OIO Regulations were amended to include the last factor above (i.e., regarding "strategically important infrastructure") in response to, and relied upon by the Labour Government to block, the proposed sale of 40% of Auckland International Airport to the Canadian Pension Plan Investment Board.

In January 2011, the Government amended the OIO Regulations to include two further factors, namely:

- whether New Zealand's economic interests will be adequately promoted by the overseas investment (what is termed the "economic interests" factor); and
- the extent to which New Zealanders will be, or are likely to be, able to oversee, or participate in, the overseas investment and any relevant overseas person (what is termed the "mitigating" factor).

In the most recent Ministerial directive letter (which took effect on and from 13 January 2011), the Minister of Finance directs that these two factors are of “high relative importance to the determination of whether overseas investment in ‘large’ areas of farm land will, or is likely to, benefit New Zealand and whether that benefit will be, or is likely to be, substantial and identifiable”. As an indicative guide, the Minister of Finance provides that “an overseas investment in farm land would be considered ‘large’ if it were to result in the relevant overseas person owning or controlling an area of land that is more than ten times the average farm size for the relevant farm type”.

3.2 Criteria for foreshore/seabed/riverbed/lakebed

Where the relevant land that is the subject of the overseas investment is or includes foreshore, seabed, river bed or a lake bed, it is deemed to be “special land” under the OIO Act (being a subset of sensitive land) and the land must first be offered by the current owner back to the Crown in accordance with the procedures set out in the OIO Act and the OIO Regulations. If the Crown accepts the offer, it can only acquire the part of the sensitive land that constitutes “special land”.

3.3 Criteria for farm land

In addition to the criteria used for overseas investment in sensitive land, the following requirements must also be considered when dealing with any farm land application:

- whether the investor intends to reside in New Zealand;
- whether experimental or research work will be undertaken on the land;
- the proposed use of the land;
- whether the investor intends to farm the land and is capable of doing so; and
- whether the land has first been advertised on the open market in accordance with the OIO Act and the OIO Regulations.

4. Conclusion

The OIO Act and the OIO Regulations are hurdles to inward investment in New Zealand land. However, with appropriate and correct advice, the door certainly remains open to overseas investment. With the recent amendments to the OIO Regulations, the purchase of 'large' parcels of land may prove more difficult than overseas investment in, for example, milk processing facilities.

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This article was written by David Flacks of Bell Gully. For further information, please visit www.BellGully.com.

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