

Regulating overseas investment in forestry

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Introduction

Overseas investors' wanting to buy New Zealand forestry blocks are generally required to obtain the consent of the Overseas Investment Commission (the OIC) before the purchase can proceed. Usually, the parties enter into a conditional agreement to purchase land and then look to obtain consent before finalising the purchase.

The OIC acts as a watch-dog to foreign investment in New Zealand by administering the Government's inward foreign investment rules. The OIC has a broad discretion under the Overseas Investment Act 1973 and the Overseas Investment Regulations 1995 (the **Regulations**) to grant consent to a proposed acquisition by an overseas person (with or without conditions), or to turn down an application.

Much has been said about regulating foreign investment in New Zealand. Many believe that the level of foreign investment in New Zealand is too high and argue that opportunities are being lost to foreigners. Others argue that foreign investment is integral to bringing resources and social benefits to New Zealand.

In this article we provide a general overview of when OIC consent is required and what criteria the OIC uses in assessing applications. We identify an important forestry related exemption to the overseas investment requirements and touch on future changes that will have an impact on overseas investors acquiring land for forestry purposes.

When is OIC consent required?

OIC consent is required when an "overseas person" is acquiring control of significant assets in New Zealand. This includes both land and non-land acquisitions (e.g. the acquisition of shares in a company).

Overseas person

Generally, an "overseas person" includes, but is not limited to, the following:

- (a) any individual who is not a New Zealand citizen and who is not ordinarily resident in New Zealand;
- (b) a company that is incorporated overseas; and
- (c) a New Zealand company, partnership or joint venture with 25% or more of its voting power held overseas.

Significant assets

Generally, an overseas person takes control of "significant assets" when they acquire or take control of:

- (a) any business acquisition where the value is + NZ \$50m;
- (b) any land with an unimproved value of +NZ \$10m;
- (c) any land that exceeds 5 hectares in area;
- (d) any land forming part of an island;

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(e) any land that exceeds 0.4 hectares in area and that includes or adjoins (the following land is known as sensitive land):

- (i) the foreshore;
- (ii) a lake over 8 hectares in area; or
- (iii) a reserve, land held for conservation purposes or a historic area where such land is over 0.4 hectares in area.

Accordingly, if an overseas person wishes to acquire a forestry block, or farmland to use for forestry purposes, and the land area exceeds 5 hectares or exceeds any of the other thresholds above, then OIC consent will be required.

It should be noted that if an overseas person is acquiring land in New Zealand that physically adjoins land already owned by that person, then the combined land area of the two properties is used to see if the thresholds are met. For instance, if the overseas person owns a 4 hectare forestry block and proposes to purchase an adjoining 2 hectare forestry block, OIC consent will be required as the aggregate area is 6 hectares which exceeds the 5 hectare threshold set out above.

OIC consent will also be required when an overseas person acquires 25% or more of the shares or voting rights in a New Zealand company that owns land that exceeds the threshold set out above.

Exemptions

There are a number of circumstances where OIC consent is not required. In particular, OIC consent is not required for the acquisition of a forestry right or a right to harvest a crop of trees under a contract or arrangement. This is a significant advantage to overseas investors who are satisfied with taking a forestry right over land instead of buying the land outright.

Other exemptions of note include:

- (a) leases of less than three years duration (including any rights of renewal) where the expenditure incurred does not exceed \$10 million.
- (b) the acquisition of Maori freehold land where the transaction has been approved by the Maori Land Court.

Obtaining OIC consent

When OIC consent is required, the overseas person must make an application to the OIC. There is no specific application form but the OIC has released guidelines on what information should be included in an application.

The overseas purchaser should ensure that the agreement for sale and purchase is conditional on obtaining OIC consent, and on the purchaser being satisfied with any conditions imposed under the consent.

While it is usual to make an approach for each purchase separately, for investors which make many purchases in a year, it is possible to get pre-approval for a buying programme.

Who determines the application?

The Ministers (the Treasurer and Minister of Lands) jointly determine all land applications involving sensitive land. Other land applications are determined under delegated authority as a means of speeding up the decision making process (usually 10 working days under delegated decision making as opposed to 20-30 working days for Ministerial decisions).

Criteria used to approve/reject an application

The OIC must be satisfied that the applicant meets the investor test and that the investment is in the national interest, before approval is granted.

Investor test

The OIC must be satisfied that:

- (a) the overseas person (or persons in control) has business experience and acumen relevant to the particular investment;
- (b) the overseas person has demonstrated financial commitment to the overseas investment; and
- (c) the overseas person (or persons in control) are of good character.

National interest

In assessing whether the investment is in the national interest the following matters must be considered:

- (a) Whether the overseas investment will or is likely to result in:
 - (i) the creation of new job opportunities in New Zealand or the retention of existing jobs in New Zealand that would or might otherwise be lost; or
 - (ii) the introduction into New Zealand of new technology or business skills; or
 - (iii) the development of new export markets or in

creased export market access for New Zealand exporters; or

- (iv) added market competition, greater efficiency or productivity, or enhanced domestic services in New Zealand; or
 - (v) the introduction into New Zealand of additional investment for development purposes; or
 - (vi) increased processing in New Zealand of New Zealand's primary products.
- (d) Where land is currently being used for agricultural purposes:
- (i) whether experimental or research work will be carried out on the land;
 - (ii) the proposed use of the land by the applicant; and
 - (iii) if the overseas person is an individual, whether the overseas person intends to farm the land for his or her own use and benefit and is capable of doing so.
- (e) Whether the overseas person or any individual who exercises control over the overseas person, intends to reside permanently in New Zealand.
- (f) Such other matters as thought fit having regard to the circumstances of the particular overseas investment.

The OIC also considers many other matters that must be addressed in the application, such as the reasons for the acquisition and the proposed use of the property. Mid-last year the Ministers directed the OIC to seek further information so that it can be assured of the accuracy of information supplied by the applicant. Such information is likely to include indicative business plans for the proposed acquisition setting out any intended development expenditure as well as projected production levels. Although yet to come into force, the Government has passed legislation imposing further requirements - see below.

Failing to comply

Where an overseas person acts in contravention of the Regulations, a prison sentence or substantial fines may be imposed on the offender. The OIC may also force the person to sell the asset by obtaining a court order to this effect.

Keeping information in the application confidential

If for reasons provided in the Official Information Act 1982 there is a good reason to withhold the existence of



When experience counts

■ The Bell Gully Forestry Team has provided legal advice on major New Zealand forestry transactions over the last two decades.

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an application from the public domain, e.g. the information is commercially sensitive, the OIC will not disclose the existence of the application while it is being considered.

Once an application is determined the OIC issues a public decisions sheet. The OIC will always consult with the applicant and their representatives before releasing any information. Where the applicant can show that good reason exists for withholding some or all of the information in the respect of the application, the OIC will agree to withhold that information. A decision to withhold information by the OIC can be overruled by the Ombudsman.

Future changes to foreign investment requirements

In 1998 the Overseas Investment Amendment Act 1998 (the **Amendment Act**) was passed by Parliament. Although passed, the Amendment Act does not come into force until an appropriate order is given by the Governor-General. The Amendment Act is intended to implement the key policy initiatives on overseas investment of the coalition government, namely; to ensure that overseas investors demonstrate a commitment to New Zealand and that overseas investment involving farm land will only be approved if it results in substantial and identifiable benefits to New Zealand. In particular the Amendment Act provides that consent will not be given for the acquisition of farm land unless there is evidence that the farm land has initially been offered on the domestic market to persons who are not overseas

persons. For these purposes, the definition of farm land does not include land used for forestry purposes. Accordingly, it would seem that land covered in plantation forest falls outside the scope of the legislation. However, pastoral land being acquired for the purposes of conversion to forestry will be covered.

Recently, there have been calls for increased scrutiny of foreign investment in New Zealand. Parliament's Finance and Expenditure Committee wants the OIC to consider the impact on social wellbeing, environmental sustainability and economic sovereignty when considering whether the investment will be of benefit to New Zealand.

Government and Green members have suggested that the Government should consider appointing an additional commissioner to represent the wider community. Changes to the current foreign investment requirements look inevitable, and the coming into force of the Amendment Act may only be the first of such changes.

Concluding comments

It is likely that investment in forestry (other than by forestry rights) by overseas persons will need OIC consent. This is usually given - provided the application is made properly and includes the required information. Care needs to be taken in making the application.

It is possible the Government will make changes to tighten up the present regime - keep an eye out in this journal for an update.

Alcohol and drug free workplace kit

A new alcohol and drug free workplace toolkit was launched last October. The toolkit idea was initiated by the New Zealand Forest Owners Association (NZFOA) and the New Zealand Forest Industries Council (NZFIC), and is sponsored by Forest Industries Training (FIT) and ACC.

A recent study found that 59 percent of silviculture workers were regular or heavy users of marijuana, while 70 percent had used cannabis within the past year. Anecdotal evidence suggests the same people have twice as many on-job accidents and double the number of days off. In other industries alcohol and drug impaired workers are five times more likely to cause accidents and cause 40 percent of industrial fatalities.

Overseas studies have shown that drug-positive employees have significantly higher rates of absenteeism, dismissal, medical claims and disciplinary actions. The most effective method of eliminating the effect of alcohol and drug abuse in the workplace is to introduce a comprehensive Alcohol and Drug Free Workplace programme.

The new Alcohol & Drug Free Workplace Toolkit has been developed to help forestry companies, contractors sawmillers and others build their own programmes.

The emphasis is practical – why you should take action, how to go about it, who can help make it happen

and how to ensure the programme delivers what you want. It includes policies and procedures, drug testing, education and prevention activities, training, employee assistance and rehabilitation.

The toolkit has a strong focus on education and training, and addresses issues such as:

- how to ensure acceptance of Alcohol and Drugs Policies and Procedures by management and employees
- how to help employees experiencing personal problems to maintain or return to high level levels of productivity
- how to provide support, effective solutions and individual case management to employees with personal problems, primarily alcohol and drug abuse.

The toolkit, (the latest Peoplesafe initiative) is a logical extension of the work FIT and the industry have carried out in developing the unit standards, *Effects of Hydration And Nutrition On Safety Health And Performance*, and, *Factors Which Impair the Performance of Forestry Workers*.

The toolkit is available from the NZ Forest Owners Association, Phone 04 473 4769.