An overview of the Overseas Investment Amendment Act 1995

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In this article, Joanna Treacy, a solicitor with the Overseas Investment Commission, outlines changes made to New Zealand's foreign investment approval regime by the Overseas Investment Amendment Act 1995. The changes relate principally to foreign investment in land.

I New Zealand's overseas investment regime

The Overseas Investment Act 1973 sets up the framework for the administration of the Government's foreign direct investment policy by the Overseas Investment Commission ("OIC"). More detailed policies and requirements are set out in the Overseas Investment Regulations 1985 made under that Act, and in written directives given to the OIC by the Minister of Finance. In August 1995 the Overseas Investment Act 1973 was amended by the Overseas Investment Amendment Act 1995, and a new set of regulations is being drafted to replace the existing Overseas Investment Regulations 1985. The legislative amendments will come into force at the same time as the new regulations, which is expected to be at the end of 1995.

The OIC operates under a delegated authority from the Minister of Finance to process and consider all applications for foreign investment under Overseas Investment legislation. The OIC consists of two members appointed by the Governor-General on the recommendation of the Minister of Finance (one of whom is Chairman), together with the Secretary of Commerce and the Governor of the Reserve Bank. The appointed members have traditionally been business people from the private sector.

The OIC is served by a Secretariat (the provision of which is one of the Bank's nine functions). The Secretariat carries out the daily functions involved in considering and processing applications. The members of the OIC meet, as required, to consider the more significant applications.

II Government foreign direct investment policy

The Government's policy is that an open economy both for trade and capital flows is in the interests of New Zealand. The welcoming policy on foreign direct investment, that is foreign investors establishing a business presence in New Zealand, recognises that the inflow of such investment provides a net benefit to the New Zealand economy by:

- bringing a reasonably permanent inflow of capital, which contributes to long term economic growth;
- increasing efficiency within the New Zealand economy by stimulating local firms to become more competitive;
- facilitating exports, either through multinational corporations or through other linkages the foreign investor has in overseas markets;
- bringing an inflow of knowledge, skills and technology to the New Zealand economy;
- generating considerable employment both through direct employment by foreign owned companies and through forward and backward linkages with enterprises in New Zealand, eg, the linkages through the purchasing of raw materials, parts, components and services from sub-contractors;
- helping to develop New Zealand's offshore networks.

III Regulatory regime

The following foreign investment proposals require consent under the Overseas Investment Regulations 1985:

- acquisition or control of 25 percent or more of any class of shares or voting power in a company where the value of the shares exceeds $10 million;
- commencement of business in New Zealand where the cost of setting up the business exceeds $10 million;
- acquisition of the assets of a business where the value of the assets exceeds $10 million;
- an increase in the proportion of shares held by foreign investors in a New Zealand company (via a new share issue) where the total value of all the shares issued or allotted exceeds $10 million, or the consid-

eration payable on a new issue or allotment exceeds $10 million; *unless* the total overseas shareholding is less than 25 percent;

- any investment (regardless of dollar value) which results in an 'overseas person' controlling 25 percent or more of an entity involved in commercial fishing or which owns rural land;

- any direct acquisition (regardless of dollar value) of rural land or assets used for commercial fishing.

IV The Overseas Investment Amendment Act 1995

The Amendment Act is neither about, nor changes in any significant manner, foreign direct investment policy. The Amendment Act is concerned mainly with replacing an outmoded and sometimes confusing system for foreign investors wishing to purchase land in New Zealand with a simple and transparent one. This is to help ensure that New Zealand continues to attract mutually beneficial foreign direct investment, while retaining some controls on the acquisition of some land.

The Amendment Act leaves the process for non-land purchases by foreigners largely unaffected. Instead, it focuses mainly on altering the approval process relating to foreign land purchases.

The main purpose of the Amendment Act is to bring controls on significant inward land investments under one regime. Previously, controls over overseas investment in land were governed by two conflicting pieces of legislation, the Overseas Investment Act 1973 and the Land Settlement Promotion and Land Acquisition Act 1952 ("the LSP Act"). These two Acts defined both overseas persons and various types of land transactions requiring approval differently. Furthermore different processes and criteria were used for considering applications under the two pieces of legislation. This situation created confusion and imposed significant unnecessary costs on all concerned.

The key points of the Amendment Act:

- repeal of the Land Settlement Promotion and Land Acquisition Act 1952, bringing controls governing overseas investment under one Act, (the Overseas Investment Act 1973). The result will be that any foreign investment proposal will require one application, to one body, and will receive a decision based on one set of foreign investment criteria, (although it is possible that other consents may be required in relation to other aspects of economic policy eg, competition policy, which is governed by the Commerce Act). Repeal of the LSP Act also removes provisions to prevent the undue aggregation of land ownership, whether by foreigners or New Zealanders. The provision which repeals the LSP Act will be brought into force at the same time as the new Overseas Investment Regulations are made;

- a new definition of "overseas person". Only transactions involving non-resident, non-citizens will require approval;

- a new prescription of the categories of land subject to the regime. The LSP Act and the Overseas Investment Regulations 1985 were different in this respect. The new prescription is set out in table 1 below;

- a requirement that applications from foreigners to buy land be decided by the Ministers of Finance and Lands jointly;

- establishment of a monitoring regime under which the OIC will monitor compliance with conditions attached to approvals for foreign investment;

- a requirement that the OIC report to the Minister of Finance on its operations every six months. This report will be tabled in Parliament for public scrutiny;

- a new power for the OIC to charge fees;

- a High Court power to order disposal of property acquired where the acquisitions are shown to have contravened the legislation;

- increased penalties for non compliance with the legislation;

- specification of the criteria to be used for considering applications. The criteria involve a two-tier test. First, the suitability of the investor will be looked at. Secondly, there will be a national interest test for land investments.

V The New Overseas Investment Regulations

The new regulations are likely to capture the same type of transactions as the present regulations. However, there will be some alterations and the range of exemptions will extend to where:

- no change in ultimate ownership is involved (eg, to exempt internal restructuring of a group of companies);

- transactions involving the transfer of property to a bona fide lender where the transfer is a result of the exercising of a security taken over that property;

- leasehold or other non-freehold interests of less than three years (including renewals) is involved, and where the consideration is less than $10 million;

- the transfer of assets is to a beneficiary of a trust or will.

The new regulations should also clarify how a corporate restructuring effected via the amalgamations provisions in the Companies Act 1993 are to be treated. The new regulations should make it clear that amalgamations, where there is no change in ultimate beneficial ownership, will not require OIC consent (which under the present regulations would likely be required). By contrast, amalgamations which are part of a broader takeover-type proposal, will require consent where the generic investment thresholds are exceeded.

The new regime is expected to be in place in late December 1995 or early January 1996.

Land Transactions Subject to Approval

LAND TYPE	LSP ACT	OVERSEAS INVESTMENT REGULATIONS	
		1985	1995
Freehold interests			
Offshore islands	Caught (any area)	Not caught	All caught, except those listed in new schedule to the Act, the latter being caught if over 0.4 hectares
Reserves, conservation land, heritage and historic areas	Caught over 0.4 hectares	Not caught	Caught over 0.4 hectare
Land adjoining foreshores or lakes	Not caught	Not caught	Caught over 0.4 hectares
Rural land	Caught 2 hectares and over	Caught all areas	Caught over 5 hectares or $10 million
Other land (industrial, commercial, residential)	Not caught	Caught over $10 million	Caught over 5 hectares or $10 million
Non-freehold interests			
Forestry cutting rights	Exempted	Caught where exceeds 3 months	Caught where exceeds 3 years or over $10 million
Profit à prendre	Not caught	Caught where exceeds 3 months	Caught where exceeds 3 years or over $10 million
Leases	Caught where exceeds 3 years including any renewal	Caught where exceeds 3 months	Caught where exceeds 3 years or over $10 million
Easements	Not caught	Caught where exceeds 3 months	Caught where exceeds 3 years or over $10 million

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