

31 October 2007

Chief Executive
Land Information New Zealand
Private Box 5501
WELLINGTON

Dear Sir

1. The Overseas Investment Act 2005 (the Act) forms one part of a wide portfolio of policies that the Government uses to encourage both ongoing economic growth and economic transformation.
2. The New Zealand overseas investment regime welcomes overseas investments that are able to generate sustainable economic growth. However, the inclusion of further non-economic criteria during the review of the Act in 2005 increased the Government's emphasis on sustainable development that provides protection for New Zealand's cultural, social, and environmental resources. These non-economic factors include the protection of areas of great cultural sensitivity, provision of public access, and the ongoing sustainability of New Zealand's unique landscape and biodiversity.
3. The expansion of criteria beyond just economic criteria recognised that the ongoing attractiveness of New Zealand to investors, residents, and visitors requires good custodianship of our current natural and cultural resources for future generations.

Ministerial Directive Letter

4. This Ministerial directive letter is made pursuant to section 34 of the Act and provides direction to you as the regulator about:
 - a. the Government's general policy approach to overseas investment in sensitive New Zealand assets, including the acquisition of special land and the "intention to reside in New Zealand indefinitely" criterion;
 - b. the criteria for including reserves, public parks, or other sensitive areas on the list kept by the regulator under section 37 of the Act;
 - c. the level of monitoring of conditions of consent; and
 - d. the powers of the regulator, with regard to compliance with specific conditions of consent and enforcement of overseas investment in sensitive New Zealand assets;
5. In providing advice on the matters set out in this Ministerial directive letter, your advice must provide recommendations to relevant Ministers (Ministers) and should provide

this advice in a time frame that does not discourage overseas investment or create undue compliance costs.

Part One: General Policy Approach

6. The government's general policy approach is to facilitate the flow of overseas investment needed to support New Zealand's sustainable economic growth. However, the Act also recognises that it is a privilege for overseas persons to own or control sensitive New Zealand assets. The Overseas Investment Act 2005, compared with the 1973 Act, requires consideration of a wider set of factors – both economic and non-economic – to ensure consistency with wider government objectives.
7. The key public policy objectives of the Act are to:
 - a. facilitate overseas investment;
 - b. recognise that it is a privilege to own or control sensitive New Zealand assets;
 - c. recognise the growth benefits of foreign investment;
 - d. encourage overseas investment through a reduction in compliance costs;
 - e. assess the benefits received from overseas investment applications;
 - f. support sustainable development in New Zealand;
 - g. provide ongoing protection for New Zealand's natural resources and cultural or heritage sites; and
 - h. encourage the provision of public access to sensitive New Zealand land.
8. Section 17 of the Act lists a series of economic and non economic factors that must be taken into account in determining whether an overseas investment in land is likely to benefit New Zealanders, and includes several factors set out in regulation 28 of the Overseas Investment Regulations 2005.
9. Under Regulation 28 overseas investors may propose that an investment is likely to create a benefit by giving effect to or advancing a significant Government policy or strategy. Investments that for example shift economic activity to New Zealand, introduce new technologies, or improve New Zealand productivity and export performance may support Government economic development strategies.
10. However, Government policy and strategy is also more widely concerned with the social and environment factors that support long-term sustainable development. This includes for example the Government's climate change and energy policies. Overseas investments could support these policies and strategies if, for instance, they enhanced carbon sinks, or introduced improved technologies, production processes or outputs that reduced greenhouse gas emissions or improved energy efficiency.
11. In providing advice to Ministers you, as the regulator, must consider these objectives and adopt operating procedures that are consistent with the Government's intention to facilitate beneficial overseas investment. Accordingly, the regulator must:
 - a. perform its functions in a timely, consistent, and efficient manner;
 - b. seek sufficient information from applicants for it to be assured of the accuracy of any information, advice, recommendations, or assessments of any relevant benefits provided to Ministers;

- c. verify information provided by applicants by seeking evidence or input from third parties at the Regulator's discretion;
 - d. seek to recover its operating costs in relation to applications for consent from applicants through Cabinet approved fees; and
 - e. monitor compliance with any conditions of approval, consent, permission, or exemption granted under the legislation.
12. The regulator's functions also include providing general information to applicants, compiling and keeping records, and making available statistics. This should include the dissemination of information on investment in New Zealand and publicly explaining the nature of our regulatory regime.

Conditions of Consent – Monitoring and Enforcement

13. Overseas investors are required to comply with any specific conditions of consent imposed on overseas investments unless compliance should reasonably be excused. In deciding whether compliance with a specific condition should be excused, consideration should be given to any realised benefits and the extent to which compliance with a particular condition may be out of the applicant's control.
14. In exercising its powers under subpart 4 (Monitoring) of the Act, the regulator should monitor compliance with the conditions of consent for at least five years or until in the opinion of the regulator the benefits have been realised or compliance has reasonably been excused, whichever is the earlier. Within the monitoring period, the regulator may decide how frequently it should monitor (for example once, biannually, annually or biennially) based upon a risk assessment and consideration of suitable completion benchmarks.
15. The exercise of powers under subpart 5 (Enforcement) of the Act is at the regulator's discretion.

Parks, Reserves and Other Sensitive Land

16. Under section 37 of the Act the regulator must compile and keep a list (the list) of reserves, public parks, and other areas described in the section. Such land has the effect of making land sensitive. It is expected that you, as the regulator, would ensure that this list is kept up to date by amending its content as required.
17. In determining what to include on the list, consideration should be given to designations under any relevant gazette notice, regional or district plans, or proposed district plans. Reserves of a less sensitive nature, most of which are likely to be local purpose or government purpose reserves, such as drainage or hospital reserves, would not normally need to be included.
18. National Parks under the National Parks Act 1980, wildlife management reserves, foreshore reserves, and lake or riverfront reserves must be included on the list.
19. The area screening threshold applied to any land listed as sensitive under section 37 should be 0.4 hectares in order to be consistent with the area thresholds that apply to similar types of land in Table 2, Part 1 of Schedule 1 of the Act. If the land on the list adjoins other land on this list, or land in Table 2 that is held for similar purposes, the land areas can be aggregated for calculating the area threshold.

Intention to Reside in New Zealand Indefinitely

20. Overseas investment policy must be consistent with and reinforce New Zealand's immigration policy, which aims to attract skilled migrants. Under section 16(1)(e)(i) of the Act, overseas persons intending to reside in New Zealand indefinitely are not required to show that their investment is likely to benefit New Zealand because that ownership of land will assist new migrants to settle in New Zealand and that the benefits of the proposed migration will be considered under immigration legislation.
21. An intention to reside in New Zealand indefinitely must involve a definite plan and accompanying action within a reasonable timeframe. In determining whether a person is intending to reside indefinitely the regulator must give consideration to any active steps that have been taken by the investor to actually reside in New Zealand. In order for the section 16(1)(e)(i) criterion to apply, the applicant must:
 - a. have applied to Immigration New Zealand for a visa or permit under any of Immigration New Zealand's residence policies; and
 - b. provide the regulator with evidence that the application for the visa or permit is likely to be successful; and
 - c. show other actions consistent with an intent to reside in New Zealand in the near future.
22. The regulator may impose a time limit within which the applicant must become permanently resident in New Zealand. As a general rule the Government would expect that this would require that the overseas person must be resident in New Zealand within 5 years of the date of application.

Part Two: Special Land

23. Section 17(2)(f) of the Act requires that Ministers must consider whether any special land has been offered to the Crown in accordance with the Regulations. Special land is defined under Regulation 12 of the Overseas Investment Regulations 2005 ("the Regulations") as being "the foreshore, seabed, riverbed, or lakebed".

Government's General Policy Approach to Special Land

24. The Crown may acquire special land to either recognise the attitude of New Zealanders to that land or class of land or to protect or preserve that land for future generations. Thus in recommending to purchase special land advice must consider the Government's general policy approach, which is to:

- (a) **Recognise an attitude of New Zealanders to a piece or type of special land**

Where the Crown chooses to acquire special land in order to recognise the attitude of New Zealanders (or a group of New Zealanders), these attitudes could relate to a specific piece of special land or may relate to a more general class of special land, e.g. foreshore or seabed. The regulator is not expected to provide advice beyond recognising that an attitude may exist in New Zealand to that land.

- (b) **Protect, recognise or preserve some value that can best be protected by Crown ownership**

In making recommendations to Ministers as to whether or not to acquire special land in order to recognise or preserve some value that can best be protected by Crown ownership, the regulator is required to consider all relevant matters set out under the

heading “Matters for Consideration”, taking into account the particular circumstances of the special land.

25. There is a presumption that special land will be acquired by the Crown where it is offered to the Crown for nil consideration, and the costs and liabilities associated with the acquisition do not outweigh the benefits, and there is no negative or only a negligible impact on the overseas investment transaction.

Acquisition and Waiver

26. Special land includes land that forms part of the owner’s registered freehold title to the relevant land or that is held under common law (in relation to riverbed or lakebed) by the owner under the *ad medium filum aquae* rule.
27. In circumstances where a river is navigable, the Crown will already own the riverbed. Due to the problems of determining the navigability of a river the regulator is not expected to consider whether a river is navigable within its advice to Ministers. For this reason, the regulator should make clear on its website, in advice, and any supporting documentation that the decision to acquire or not acquire special land for whatever purpose is not a statement inferred or implied about whether a river is or is not navigable, or whether the Crown does or does not own the special land in question. Further, any decision will be based purely on consideration of the merits of only the piece of land in question and so any decision will not imply the status of any other property.

Matters for Consideration

28. Advice to Ministers must specify whether a view or value attributed to New Zealanders is one that may be attributable to all New Zealanders or specifically to a group of New Zealanders and should include but not be limited to:

- (a) **The Purpose of the Act**

In making its recommendations to Ministers, the advice must take into account the purpose of the Act.

- (b) **Protection**

Advice that considers the purchase to special land for the purpose of protection should consider the costs, benefits, and effectiveness of providing this protection through ownership. Some factors that advice should consider include but are not limited to:

- i Protection of indigenous biodiversity and valued exotic species and their habitats*
The regulator may recommend that special land be acquired in order to protect or enhance significant habitats for trout, salmon, wildlife and/or significant indigenous vegetation and fauna. Where the regulator recommends that Ministers acquire the special land, the regulator must advise Ministers in what way the acquisition will protect or enhance such areas.

- ii Protection of public access and use*
The regulator may recommend Crown acquisition of special land for the purpose of protecting or promoting public use of or access to special land. This advice should consider the feasibility of providing for public access, and the size of the group or portion of New Zealanders that are reasonably likely to access or use the land.

Where there is currently no provision made for access to the special land, or to travel along the edge of the special land (special land is in most cases below the high water line)¹, the regulator should note the potential costs (both present and ongoing) associated with the provision, protection, and maintenance of public access across, along, or to special land.

iii The interrelationship with the surrounding area

The acquisition of special land provides the Crown, as owner, with rights only within that area section of special land. Where special land has been acquired for the purpose of protecting a specific characteristic of that land, the regulator should consider the interrelationship between the land in question and the surrounding land. Advice should recognise when this interrelationship may compromise the ability of the Crown, as an owner, to protect the sensitive characteristic that acquisition is supposed to protect.

iv The cost effectiveness and purpose of protection

The regulator's advice should consider in a qualitative sense whether ownership is likely to be the most cost effective form of protection of the special land and whether ownership can achieve the purpose for which the land might be acquired. For this reason the regulator should consider and include in the advice whether there are any more effective protective mechanisms (in addition to or apart from Crown ownership) which could be utilised, for the Ministers' consideration.

(c) Costs and Potential Associated Liabilities

Advice to Ministers must consider the costs of acquiring the land and whether ownership of the land may bring liabilities that outweigh the estimated benefits of ownership. Costs include the cost of acquisition and ongoing or associated costs, including contingent liabilities. Examples of such ongoing costs include, but are not limited to:

- the cost of monitoring and maintaining the use of the special land;
- costs associated with repairs, maintenance and management of special land;
- costs associated with clean up of pre-existing contaminants, and any other environmental or hazardous substances or structures; and
- the cost of regulatory compliance.

(d) The Public Interest

Advice to Ministers should consider whether the acquisition is in the public interest, by considering whether the overall benefit of acquiring the special land exceeds both the cost of purchasing the land and any associated liabilities.

(e) Information About the Overseas Investment Transaction

Advice to Ministers should consider the details of the substantive application. Whether special land has been offered to the Crown in accordance with the regulations is only one of the factors that must be considered by Ministers in determining whether an overseas investment is likely to benefit New Zealanders. Thus advice should place the public interest in acquiring special land in the context of the wider benefits that the

¹ Exact definitions of what land is included within foreshore, seabed, river and lakebed are included in the *Overseas Investment Act 2005*.

overall investment is likely to provide to New Zealand. Relevant information could include:

- to whom the land will be sold;
- the size and nature of the investment;
- past ownership history of the land (including special land);
- whether the special land constitutes a significant proportion of the investment; and
- whether the investment may create significant economic benefits to New Zealand or New Zealanders.

Consultation

29. The regulator must consult with the Department of Conservation in preparing advice on decisions relating to special land, unless there is clearly no reason to do so. The regulator should clearly specify the timeframe by which comments are to be provided, taking into account the time limits as set out in the Regulations. If no comments are received within that timeframe, it can be assumed that the Department of Conservation agrees with proposed advice.

Revocation of Previous Letter

30. The Ministerial directive letter dated 1 August 2005 is revoked on and from the date this Ministerial directive letter takes effect.

Date Letter takes Effect

31. This Ministerial directive letter shall come into effect on and from 31 October 2007.

Yours sincerely

Hon Dr Michael Cullen
Minister of Finance