

[s 9(2)(a)]

22 December 2021

Overseas Investment Office
PO Box 5501
Wellington

For Rebecca McAtamney

By email: rmcatamney@linz.govt.nz and oiio@linz.govt.nz

Dear Rebecca

Briefing Letter – Proposed New Zealand Solar Energy and Energy Storage Projects – Clarification of Overseas Investment Act Consent Requirements

- 1 As discussed previously with Phil Anderson and further to our enquiry submitted on 24 September 2021, I am currently advising a New Zealand registered company, which is an “overseas person”, as a result of being [REDACTED] % owned by two limited liability corporations incorporated in the United States of America (*US*) and which is looking to identify and develop a number of sites in New Zealand to establish significant solar energy and energy storage projects.
- 2 I understand that the vast majority (if not all) of the proposed projects are likely to involve land that is classified as “sensitive (but not residential) land” for the purposes of the Overseas Investment Act 2005 (*OIA*), although it is possible (if relatively unlikely) that some or part of the proposed sites could also involve residential land.
- 3 As a result, the acquisition of the relevant interests in land to allow specific projects to proceed will most likely require consent under the *OIA*, as an overseas investment in sensitive land. To obtain consent, my client will apply under the benefit to New Zealand test pathway.

Background and Template Documentation

- 4 My client is currently in the process of identifying potential sites for the projects and has started initial discussions with landowners to facilitate the acquisition of the necessary property interests (whether by lease or purchase) that would allow the development of specific projects.
- 5 As part of this process, my client has commissioned the drafting of template documentation to secure its interest in the relevant land, during the period where my client will be investigating the specific site to determine the suitability of the site for solar energy generation and storage purposes and the feasibility of the site for a solar project.

- 6 The template documents prepared include both:
- 6.1 an Investigation Licence and Option to Lease Agreement (*Licence and Option to Lease*); and
 - 6.2 an Investigation Licence and Option to Purchase Agreement (*Licence and Option to Purchase*) (together, the *Investigation Licences*),
- depending on whether the preference of the relevant landowner is to sell or lease the relevant land for the purposes of the specific project.
- 7 Before finalising the form of Investigation Licences and entering into specific agreements with landowners, my client is very interested in arranging a pre-pre-application meeting with the Overseas Investment Office (*OIO*) to:
- 7.1 introduce the proposed projects, explain the intended approach and outline the potential benefits that will be created as a result of the projects; and
 - 7.2 discuss the proposed approach to securing the necessary interests in land via the Investigation Licences and to work through some specific technical issues with you in relation to:
 - (a) the nature/structure of the options to lease or purchase to be granted in the Investigation Licences; and
 - (b) the potential impact of the farm land advertising requirements in section 16(1)(f) of the OIA on the Investigation Licences and the process for obtaining an exemption (or exemptions) from this criterion.
- 8 In order to provide you with context for the technical questions raised above and to provide you with a more detailed overview of what the proposed projects will involve, we have set out below an illustrative example of how a specific project is likely to work (*Illustrative Example Project*), together with a couple of variations/permutations that may occur.
- 9 Based on this Illustrative Example Project, we then set out the specific questions and issues that we would like to discuss with you from a technical standpoint prior to finalising the documentation and my client commencing detailed negotiations with landowners in relation to the projects.

Illustrative Example Project

- 10 As noted above, my client would be the Project sponsor and is a New Zealand registered company, which is [REDACTED] % owned by New Zealand persons and [REDACTED] % owned by two US limited liability corporations (which are both 100% owned by US persons).
- 11 For each project a special-purpose entity (*SPE*) would be established, with the *SPE* to (at least initially) be owned by my client. The *SPE*'s sole assets would be the development rights, including grid connection agreements, environmental studies and necessary resource consents, all of which together would be intended to culminate in construction of a large-scale solar PV electricity generation facility forming the proposed Project.
- 12 The Project is likely to be sited on land that is sensitive (but not residential) land for the purposes of the OIA, with the land likely to be owned by a New Zealand person

(Landowner). The SPE's rights in relation to the land will initially be secured through a negotiated Licence and Option to Lease with the Landowner for a term of around five years.

- 13 As part of the negotiations for the Licence and Option to Lease, the SPE and Landowner will have agreed the terms of an exclusive lease for solar energy and energy storage purposes (Lease) for up to 35 years. Agreeing the terms of the lease in advance enables the SPE to undertake grid connection analysis, site due diligence, various environmental assessments, and to progress the application for a resource consent with confidence that it will have an option to enter into a bankable lease once these activities have been completed.
- 14 The grant of the option to lease by the Landowner and the right of the SPE to exercise the option under the Licence and Option to Lease will be expressly conditional upon the SPE first securing OIO consent to the overseas investment in sensitive land (with that overseas investment comprising the exercise of the option, which will result in the SPE acquiring the estate or interest in the land granted by the Lease).
- 15 Subsequent to securing OIO consent for an overseas investment in sensitive land via the Lease, the SPE would exercise the option and enter into the Lease and the SPE would proceed to build, own and operate the Project as lessee subject to the terms of the Lease.

Benefits from Illustrative Example Project

- 16 My client has advised that during the course of construction and operations over a 35 year period, a proposed Project such as that outlined above could generate significant benefits to New Zealand, including:
 - 16.1 infrastructure investment of potentially more than NZ\$100 million;
 - 16.2 up to 100 full time equivalent (FTE) jobs during the 6-12 month construction period for a Project;
 - 16.3 up to five FTE jobs for the duration of a Project;
 - 16.4 the generation of renewable electricity sufficient to power approximately 25,000 homes; and
 - 16.5 support for New Zealand's Climate Change Response (Zero Carbon) Amendment Act 2019.

Potential Variations to the Illustrative Example Project

Variation 1

- 17 Another potential option for such a Project would involve the same assumptions outlined above, except that the SPE and the Landowner instead enter into a negotiated Licence and Option to Purchase with the Landowner, with the grant and exercise of the option to purchase again entirely conditional on the SPA obtaining OIO consent to the overseas investment in sensitive land.
- 18 The Licence and Option to Purchase would include a provision whereby the SPE could nominate a 100% New Zealand owned third party (*Nominee*) to purchase the site from the Landowner on the same terms as SPE has agreed with the Landowner. The Nominee and

the SPE would then enter into a pre-negotiated exclusive lease for solar energy and energy storage purposes.

Variation 2

- 19 Again, the assumptions would be the same for the Illustrative Example Project above except that upon completion of the Project's development phase (but prior to start of construction), my client would sell the SPE to a buyer group consisting of entities representing more than 75% NZ ownership (*NZ Owner Group*). The NZ Owner Group would then fund the cost of construction and own the Project throughout its operating life.

Variation 3

- 20 Finally, another variation would again involve the same assumptions as for the Illustrative Example Project above, except that upon completion of the Project's development phase (but prior to start of construction), my client would sell the SPE to a buyer group consisting of entities representing more than 25% non-New Zealand ownership (*Non-NZ Owner Group*). The Non-NZ Owner Group would fund the cost of construction and own the Project throughout its operating life.

Options to Lease and Options to Purchase

- 21 Based on the above Illustrative Example Project and the Variations outlined, the first technical issue that my client would like to discuss with you is the grant and exercise of the options under the two Investigation Licences (i.e. the Licence and Option to Lease and the Licence and Option to Purchase) to confirm that these template documents align with the requirements of the OIA and do not themselves constitute an "overseas investment in sensitive land" for the purposes of section 12.

- 22 I refer to my previous correspondence with Phil Anderson from the OIO in October 2021 (**attached**), specifically in relation to an option to purchase sensitive land. Based on this advice, the option contained in the two Investigation Licences has been drafted:

22.1 for a term of less than 10 years for sensitive (but not residential) land or for a term of less than 3 years for residential land; and

22.2 to be clear that both the grant of the option to lease or purchase by the Landowner and the exercise of that option to lease or purchase by the SPE is entirely conditional on the SPE obtaining consent to the overseas investment in sensitive land (being the grant of the Lease or the purchase of the land).

- 23 My client would appreciate the opportunity to talk through this approach with you, to confirm that this is sufficient to ensure that OIO consent for the grant of the Lease or purchase of the land is not required prior to entry into the Investigation Licence, meaning that:

23.1 the SPE can enter into an Investigation Licence (which will allow the SPE to commence the necessary due diligence and investigations to confirm suitability and feasibility for a site) without having to obtain OIO consent for the potential subsequent grant of the Lease or purchase of the land prior to entry; and

23.2 OIO consent to the grant of the Lease or the purchase can be obtained during the term of the Investigation Licence, with the grant and exercise of the option to grant the Lease or purchase being entirely conditional on consent being obtained.

Farm Land Advertising Provisions

- 24 As per the email from Phil Anderson, the other key technical issue for my client is the impact of new section 16(1)(f) of the OIA on the proposed Investigation Licences. Section 16(1)(f) includes as a criterion for an overseas investment in sensitive land that:
- if the relevant land is or includes farm land, before a transaction is entered into with the relevant overseas person, the farm land or section 12 interest has been offered for acquisition on the open market to persons who are not overseas persons as required by the regulations (but see section 20):
- 25 Given the approach to the Illustrative Example Project set out above, with my client intending to enter into an Investigation Licence with a landowner at the outset and undertake the necessary due diligence and investigations required to confirm suitability and feasibility of a site during that initial licence term, the requirement for relevant land that is or includes farm land to be offered for acquisition on the open market "before a transaction is entered into" is problematic.
- 26 I understand that with the recent changes to the OIA, this farm land advertising requirement will now clearly apply to both a transaction that involves the purchase for farm land and to the granting of a lease of farm land (where that lease falls within the requirements in section 12 of the OIA, as the Lease proposed here would).
- 27 Based on the Illustrative Example Project and the Investigation Licences described above, my client may be placed in a position where following execution of the Investigation Licence and completion of the necessary work required to confirm suitability and feasibility of the site, the sensitive land (including farm land) would then need to be offered to the market before OIO consent could be obtained and the relevant option to purchase or lease could be granted and exercised.
- 28 This obviously creates significant commercial risk for my client, as significant effort and resources (i.e. well over \$9(2)(b)(ii)) will likely have been already expended in order to determine feasibility, with these efforts potentially being lost if the advertising by the Landowner on the open market results in the land being sold or leased to a third party (whether to a competitor of my client or another party).
- 29 With these concerns in mind, my client would like to discuss the new farm land exemption regime with you, including specifically:
- 29.1 how the new farm land advertising requirements in the OIA and the Overseas Investment Regulations 2005 will apply to section 12 interests other than a purchase of the freehold land (such as the granting of the Lease); and
- 29.2 the new section 20 exemption regime that has recently come into force, including:
- (a) the specific exemption for a particular overseas investment or section 12 interest in section 20(1)(a) and its potential application to overseas investments like the Illustrative Example Project discussed above; and
 - (b) the exemption for a class of transactions in section 20(1)(b) and whether there is a possibility of an exemption being granted for overseas investments for solar energy generation or development.

General Discussion

30 In addition to the above, my client would also be interested in a general discussion on Illustrative Example Project outlined above and the suggested variations, including:

30.1 in relation to Variation 2, the potential impact of the SPV optioning the land, nominating a New Zealand entity to complete the purchase and then grant a lease over the land back to the SPE to construct and operate the Project (specifically in relation to where OIO consent would be required in relation to the purchase and/or lease); and

30.2 in relation to Variations 3 and 4, how sale of the SPE to New Zealand or overseas entities (whether prior to or after exercise of the option to purchase or lease) may impact OIO consent requirements.

Conclusion – request for pre-pre-application meeting

31 I hope that the above gives you a clear idea of my client’s proposed projects, an indication of the proposed benefits that these projects could deliver and the specific technical issues that my client is keen to discuss with you in relation to the OIA regime.

32 Based on these factors, my client requests a pre-pre-application meeting with the OIO in person to further discuss these matters and look to obtain further clarification.

33 In my client’s view, such a meeting is essential prior to it proceeding with specific Projects and before my client enters into binding contractual arrangements with landowners and other third parties.

34 Attending the proposed meeting on behalf of my client are as follows:

9(2)(b)(ii), 9(2)(a)

[Redacted names and details of attendees]

35 We suggest the following dates for the meeting:

35.1 January 26 between 11 AM and 3 PM;

35.2 January 27 between 10 AM and 1 PM; or

35.3 January 28th between 10 AM and 3 PM.

36 I look forward to hearing from you in relation to the proposed meeting request and to discussing the above with you in due course.

Kind regards

[s 9(2)(a)]



Released under the Official Information Act 1982

From: Phil Anderson <panderson@linz.govt.nz>
Sent: Friday, 1 October 2021 10:42 AM
To: 9(2)(a); OIO_Enquiries_Advisors
Subject: RE: Confirmation of Contact us enquiry to the Overseas Investment Office

Follow Up Flag: Follow up
Flag Status: Completed

Morning 9(2)(a),

I have discussed your query with senior colleagues and now have received the following advice:

"When does an option to purchase sensitive land need consent?"

Under the Overseas Investment Act 2005, consent is required before an overseas person or associate of an overseas person acquires an estate or interest (legal or equitable) in sensitive land. The grantee of an option acquires an equitable interest in the land that is the subject of the option.

The grant of an option will therefore require consent if:

- the grantee is an overseas person, or an associate of an overseas person;
- the option relates to sensitive land;
- if the land that the interest relates to is residential land, the option is for 3 years or more (as calculated in accordance with Schedule 1A);
- if the land that the interest relates to is sensitive (but not residential) land, the option is for 10 years or more (as calculated in accordance with Schedule 1A); and
- the grant of the option is not conditional upon consent being obtained.

An overseas person or an associate of an overseas person will commit an offence under section 42 of the Overseas Investment Act 2005 if consent is not obtained."

The other thing to be aware of is the approaching new [farm-land advertising provisions](#). An overseas person will need to satisfy themselves that those new provisions allow for what is proposed (noting that the new s16(1)(f) requires advertising to occur prior to the transaction being entered into).

Hope helps.

Phil Anderson
Senior Advisor
Overseas Investment Office

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From: 9(2)(a)
Sent: Friday, 24 September 2021 3:13 p.m.
To: OIO_Enquiries_Advisors <OIOEnquiriesAdvisors@linz.govt.nz>
Subject: RE: Confirmation of Contact us enquiry to the Overseas Investment Office

Thanks very much.
Please note, the purpose of the "option to purchase" outlined below is to allow the purchaser time to undertake due diligence investigations on the land.

Thanks and kind regards

[s 9(2)(a)]



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From: OIO_Enquiries_Advisors <OIOEnquiriesAdvisors@linz.govt.nz>
Sent: Friday, 24 September 2021 2:49 pm
To: 9(2)(a)
Subject: RE: Confirmation of Contact us enquiry to the Overseas Investment Office

Hello 9(2)(a)

This query has been escalated for internal advice to one of our senior solicitors.

We will be in touch with a response as soon as practicable.

Thank you for your patience

Overseas Investment Office

From: Overseas Investment Office <oio@linz.govt.nz>
Sent: Friday, 24 September 2021 12:33 p.m.
To: 9(2)(a)
Subject: Confirmation of Contact us enquiry to the Overseas Investment Office



Thank you for your enquiry to the Overseas Investment Office. Below are the details you have given us.

You can find more information about the Overseas Investment Office on our website by clicking [here](#).

Submitted Enquiry Details

Submitted on Fri, 24/09/2021 - 12:32

First name: 9(2)(a)

Last name: 9(2)(a)

Email address: 9(2)(a)

Phone number: 9(2)(a)

Submitter type: representing someone

Company name: 9(2)(a)

Enquiry category: Other

Enquiry details:

Good afternoon,

I have a question regarding options to purchase sensitive land. There was previously guidance on this topic on the OIO's website, however, I can no longer find it.

Am I correct in thinking that the granting of an option to purchase sensitive land does not require OIO consent itself, provided that the exercising of the option is subject to OIO consent? For example, I am currently reviewing an agreement that includes the following:

- 1) granting an overseas person an option to purchase sensitive land; and
- 2) the overseas person may exercise the option conditional on obtaining OIO consent.

Secondly, if the relevant sensitive land includes farm land, I assume that the farm land advertising requirements could be met if before the option is exercised, the agreement requires the vendor to advertise the farm land in accordance with the Regulations and the vendor has the ability to cancel the option during the advertising period.

Please let me know the OIO's thoughts. Happy to discuss if you require further information or have any queries.

Thanks and kind regards

9(2)(a)

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