BUDDLE FINDLAY

Are you ready? Changes to New Zealand's overseas investment regime

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There are less than two weeks left before the main changes to New Zealand's overseas investment regime come into force, on 22 October 2018. The changes will bring in new rules that further restrict the kind of property that overseas persons can acquire in New Zealand without first obtaining consent under the Overseas Investment Act 2005 (the Act). In this article, we provide tips to navigate the transition to the new rules. We also summarise changes to the corporate reorganisation exemption.

Tips for overseas buyers of residential land

As has been widely publicised, residential land will be classed as 'sensitive land' from 22 October 2018. The change applies only to transactions entered into on or after 22 October 2018. This means that, unless the land is sensitive for some other reason (eg, it is non-urban land over 5 hectares), consent will not be required for an overseas person who, before 22 October, enters into a transaction to acquire residential land, even if settlement occurs on or after 22 October.

There is a degree of uncertainty as to a robust way to identify whether land is 'residential'. Residential land is land that is categorised as residential or lifestyle for the purposes of the relevant district valuation roll. The Overseas Investment Office (OIO) has stated that one way to check whether land is categorised as 'residential' or 'lifestyle' is to use a property website (like QV), and look at the 'Building Type'. The OIO has also stated that some councils provide this information. However, some properties are not listed on QV, and the QV website and publicly available (online) council records may not clearly match up, for example where a property has mixed uses, and multiple parties have separate legal interests (eg freehold, multiple leasehold). Ultimately, it might be the case that local councils experience an increase in calls and requests for confirmation about the appropriate ratings category, given the significance for an overseas person of getting the assessment wrong. Accredited property agents should also expect an influx of work from people seeking sensitive land certificates.

Persons who are not ordinarily resident in New Zealand will generally require consent to purchase residential land (Australian and Singaporean citizens are an exception). To avoid an inadvertent breach of the Act, it will also be essential to ensure that any contract to purchase residential land is conditional on getting consent under the Act (entering into an unconditional contract will breach the Act).

Purchasers should also bear in mind that the consent process can be time consuming. While the OIO is increasing staff numbers to deal with residential land consents, and will be aiming to make the consent process as smooth as possible, the current timeframes for consent are long, even for applications based on the existing residency criteria (averaging 97 working days).

Another option for some overseas purchasers will be to apply for standing consent. This is a pre-approval that can be granted in advance of finding a specific property to buy. A standing consent cannot be used for land that is sensitive for another reason (for example, land that adjoins a reserve), so purchasers will need to assess this carefully when carrying out due diligence on properties.

Tips for forestry investors

New consent pathways for forestry activities

The changes introduce two new consent pathways for forestry activities. The first new pathway involves a modified benefits test, which simplifies the approach for assessing the likely benefits of a proposed investment in forestry.

The OIO's current approach is to assess the benefits of the investment, and compare those benefits to the benefits that would arise without the investment (ie, in the counterfactual). Only net benefits (the benefits that would arise only with the investment, and would not arise otherwise) are counted. Under the current counterfactual approach, the OIO adopts a rebuttable presumption that an adequately funded alternative New Zealand purchaser will acquire the land.

For many (non-forestry related) sensitive land applications, the hypothetical nature of the analysis can lead to a significant divergence of views between the OIO and an applicant about what will occur without the investment.

In contrast, for forestry related acquisitions, there is often a good level of agreement about what will happen - trees will be maintained, then harvested, potentially some New Zealand based processing, followed by export. This makes it difficult for an overseas person to show that the benefit of their investment will bring benefits that are both substantial and identifiable, compared with the benefits that would result from the acquisition by a hypothetical alternative New Zealand purchaser.

The modified test is more certain, and its application is less likely to lead to a significant divergence of views between the OIO and the applicant. In short, this is because the overseas person must only show benefit compared with what the existing owner would do - ie, the overseas person must be better than the current owner, not a hypothetical alternative New Zealand purchaser.

The second new pathway involves a special benefits test. This has been represented as a 'checklist' approach. Essentially, forestry purchasers will need to show that existing arrangements, consent conditions, and supply obligations for the forest will be complied with/maintained.

Despite the 'checklist' tagline, forestry investors should not rely on an application under the special benefits test (or the modified benefits test) being processed by the OIO with significantly more haste than any other sensitive land application.

More specifically, even though the benefit tests under the new pathways are more straightforward, it will still take time for the OIO to assess and confirm the analysis. In addition, an overseas person must still satisfy the investor test. Based on the OIO's published decision statistics for the 12 months to July 2018, applications involving only the investor test have taken, on average, 82 working days. We think another 15-20 working days should be allowed to assess/apply the modified benefits test/special benefits test, at least at the outset while the OIO is coming to grips with its new responsibilities.

Timing considerations

Forestry rights will come within the overseas investment regime from 22 October 2018. For an overseas person thinking about acquiring forestry rights (but no other forestry land interests), it might be advantageous to enter into the transaction now, before the changes to the Act come into force on 22 October. Doing so will mean that consent will not be required, and the area of forestry rights acquired won't be counted for the purposes of applying the screening threshold of 1,000 hectares of forestry rights in a calendar year.

If a transaction involves a freehold or long-term leasehold interest in forestry land, consent is required under the current regime, and the changes to the Act do not affect that. However, from 22 October, it will be possible to seek consent for such transactions on the basis of the new (less onerous) consent pathways - even if the transaction is entered into before 22 October. Therefore, for forestry-related transactions entered into between now and 22 October, it might be worthwhile to wait until 22 October to make a consent application.

Standing consent option

Finally, the changes include a new standing consent option, which relies on the special benefits test. However:

- To be granted a standing consent, an applicant must be able to demonstrate a 'strong track record' of compliance with the Act, or a corresponding regime in another jurisdiction. New investors, or investors new to the OIO regime, may find it difficult to meet this criterion, and may need to apply for consent for individual transactions until they can build up a track record
- Time consuming process requirements may still apply. For example, if the relevant forestry land includes farm land, the farm land advertising process must still be followed.

Extended corporate reorganisation exemptions

The overseas investment regime has always included certain exemptions for corporate reorganisations. Those exemptions have been extended.

Corporate dealing exemption

The 'corporate dealing' exemption will refresh and extend the current 'internal restructuring' exemption in regulation 33(1)(a) of the Regulations. The corporate dealing exemption (new regulation 37) will exempt a person (A) from the requirement to obtain consent for the acquisition of property from another person (B), where:

- A owns all of the securities in B
- B owns all of the securities in A that are owned by overseas persons
- Another person (C) owns all of the securities in A and in B that are owned by overseas persons, and owns no more of the securities in A than it owns in B (proportion-wise)
- Two or more persons own, in the same proportions, 100% of the securities in A and B that are owned by overseas persons.

Shareholding 'creep' exemption

The shareholding 'creep' exemption will also be extended. Currently, the exemption only applies to certain acquisitions by a person (A) of further securities in another person (B) if the total number of further securities is less than 5% of the total number of

securities initially acquired by A. For example, if A initially acquired 40% of the ordinary shares in B, A would not require consent to increase its shareholding to 42% of the ordinary shares in B.

Under the new regulation 38, A will also be able to increase its shareholding by 10 percentage points, provided that A does not cross the key control thresholds of 25%, 50%, 75% and 90%. For example, if A initially acquired 35% of the ordinary shares in B, A would not require consent to increase its shareholding to 45% of B's ordinary shares. If A initially acquired 42% of the ordinary shares in B, A could still use the exemption, but would require consent to increase its shareholding to 50% or more of the ordinary shares in B.

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