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RE: OVERSEAS INVESTMENT ACT REVIEW

Dear Rosemary

Thank you for your email of 20 April 2004 seeking comment on proposed changes to the Overseas Investment Act as they relate to land. In particular, I have been asked to comment on the workability of clauses relating to environmental, heritage and walking access provisions, how the proposals can be 'operationalised', how specific the plans will need to be and how they should be monitored. My comments are given as numbered points below, with references to clauses in the paper provided to me.

1 Under the Reserves Act 1977, conservation covenants have been created over private land (with the agreement of the landowners) to restrict land use to the extent required for the protection of conservation values (for example). In some cases, these covenants include provision for public access onto the private land covered by the covenant. For these reasons the Reserves Act 1977 warrants inclusion in the list of 'other mechanisms' in clause 5.

2 The Crown Pastoral Land Act 1998 provides for the creation of public access over reviewable land (including land under pastoral lease) that is designated to become freehold land through high country tenure review. Because considerable increases in public access are resulting from high country tenure review under this Act, it too warrants inclusion in the list of 'other mechanisms' in clause 5.

3 The protection/access arrangements provided by <u>some</u> mechanisms under the statutes cited are already quite secure and arguably do not require reinforcing (clauses 6 and 29). However, in such cases the additional enforcement measures of the OIA might at least help to reduce public unease about certain land being in overseas ownership.

4 Clause 9 and subsequent clauses refer to 'adjoining' land. The expression may need modification ('neighbouring' perhaps) and/or definition in the Act to clarify whether land separated by narrow strips such as legal roads, marginal strips, section 58 strips (Land Act 1948), esplanade reserves or esplanade strips is to be regarded as 'adjoining'. Although such strips usually allow public access where they exist, they are not always unbroken (even some legal roads begin and end on private land) and, even where they are continuous, do not necessarily connect to an accessible public place or provide practical access. In considering this matter, it might be helpful to check to see how the OIC currently interprets the term 'adjoining'.

5 Clause 11 implies that the sole rationale for including certain adjoining land in the regime is to help to ensure public access, rather than to limit potential external impacts on adjoining sensitive land. If this interpretation is correct, it should probably be made explicit. This would also to tie in with the comments in clause 18. If, on the other hand, the external impacts on adjoining sensitive land were to be relevant matters for consideration (rather than public access alone), then the comments in point (4) above become relevant. The existence of a twenty-metre strip between two properties is generally unlikely to be of practical significance in buffering the external impacts on neighbouring foreshore, conservation area or other sensitive areas. For some properties, this point may also be relevant to the 'ownership values' referred to in clause 10.

6 The Overseas Investment Act's inclusion of 'associated land' in certain land types to be screened should be maintained (clause 9). This will help to prevent avoidance, deliberate or otherwise, by the simultaneous or staged sale of several titles one or more of which would not be covered by the screening regime. For example, even the large South Island high country runs sometimes include several very small freehold titles, usually sold in conjunction with the surrounding land. Some of these very small titles straddle or adjoin (possibly with ad medium filum rights) waterways that are highly valued for public access yet along which no marginal strips, section 58 (Land Act) strips or any other forms of legal access exist.

7 For consistency and to ensure the intended focus on sites of critical interest, serious consideration should be given to including land held under the Reserves Act 1977 in the screening regime (clauses 9 and 11). For example, an overseas person can enter into a 33-year lease over a scenic or historic reserve or acquire an interest in protected private land (s76) or private land subject to a Conservation Covenant (s77.). An overseas owner of land in New Zealand could also exchange all or part of that land for land held under the Reserves Act (s15).

8 Further to point (7) above, the next question is whether land that adjoins land held under the Reserves Act 1977 should be included in the screening regime (clause 9 and clause 14), given that Reserves Act land may be more 'sensitive' than some Conservation Act land. Again, for consistency and to ensure the intended focus on sites of critical interest, serious consideration should be given to including such land in the criteria.

9 'Foreshore' (clause 9) may require definition in the Act, in part because existing legislation contains differing interpretations (for example, the Resource Management Act contains a narrower definition of foreshore than the Reserves Act does).

10 There is very significant public pressure for rights of practical foot access to many waterways (other than foreshore or lake front) or to reserves adjoining such waterways. There is even more public pressure for access along the many waterways where no public access rights currently exist. Although the proposed screening regime (especially the >5 hectare criteria) will 'catch' most land with such access values, it should be made explicit in the Act whether access to or along rivers and streams will be a relevant consideration in determining applications (clauses 9, 14 and 16). Clause 28 (4th bullet) implies that it will be and therefore appears to contradict clause 14. If access to or along rivers and streams or to adjoining reserves will not be a screening criterion, the paper should explain why because the issue is certain to arise later in the review process.

11 In practice, the 'agreed access plans' for heritage sites (clause 12) would probably best be in the form of registered easements that secure the desired access arrangements. This approach would remove the need for any compliance monitoring by the OIC (or other OIA regulator) once the easements were in place (the easements would contain their own disputes

provisions). Clarification may be required on whether the 'agreed access plans' must be binding on New Zealanders who are successors in title. Ideally, the transferee of any such easements should be the appropriate Heritage Protection Authority, such as the Minister of Conservation or the Minister of Maori Affairs. The Department of Conservation, for example, has the statutory interest (section 7(2) Conservation Act 1987, for example), has standard easement documentation available, could provide advice to the OIC (or other regulator) and could take action if disputes arose, even many years later.

12 The rationale given in clause 16 to 'protect access to certain reserves' implies that a right of access to these reserves already exists, when the intention actually seems to be to create new rights of access or to formalise existing informal arrangements. Strips created under section 58 Land Act 1948 should also be included in this provision, if any exist on foreshore or lakefront reserves. [See also the comments on rivers and streams in point (10) above]

13 The example used in clause 18 should read '… if a farm of less than 5 hectares that borders…' However, this then reduces the relevance of the example. An alternative is to simply say that land will no longer require screening solely on the grounds that it borders a property containing a wahi tapu site.

14 To secure the desired walking access or to achieve protection of environmental and heritage values, the emphasis should generally be on using legal instruments such as easements and covenants (via the appropriate statutory bodies) rather than management plans or agreed access plans. This approach would help to reduce the need for the OIC (or any other future OIA regulator) to monitor compliance with access or protection conditions. There is already a suite of suitable instruments available for most foreseeable purposes and a range of authorities/bodies with the relevant statutory interests and expertise.

- After an initial assessment of an application under the OIA, the regulator would consult with the relevant agency (eg. Department of Conservation, Historic Places Trust).
- The agencies consulted would advise whether protection/access was desirable and suggest legal options, possible providing draft documentation.
- The regulator would determine whether granting consent subject to such legal protection was desirable and possible.
- Ideally, the regulator would require any legal instruments to be registered prior to transfer. The regulator would then have no need to monitor ongoing compliance on the matter covered by the instrument. The regulator would also have greater confidence that any instruments were legally correct. A South Island high country pastoral lessee, for example, cannot grant consent to an easement over a pastoral lease (and the District Land Registrar is aware of this). For this reason, any undertaking by a prospective transferee of a pastoral lease to grant such an instrument would be meaningless and could not be enforced. [As a matter of interest, the Commissioner of Crown Lands can grant consent to an easement over a pastoral lease without the consent of the lessee, subject to compensation provisions of the Land Act 1948].
- The regulator could provide information to potential overseas buyers (as discussed in clause 39) on legal protection mechanisms and the relevant agencies. Potential applicants could then choose to liase directly with such bodies to negotiate proposed protection/access arrangements prior to making an OIA application.

15 Compliance with any legal instruments should still be a condition of consent under the OIA. Non-compliance would be reported to the regulator by the relevant agency and the

enforcement provisions of the OIA could then be applied as necessary in addition to the disputes/breach provisions in the legal instruments and associated legislation.

16 Covenants can still include provisions for a management plan. A conservation covenant under the Reserves Act, for example, can include provision for an approved management plan describing how the provisions of the covenant will be met. In such cases, the management plan would be a matter to be agreed between the parties to the covenant (the overseas investor and the Minister of Conservation) and would therefore not require detailed assessment by the OIA regulator.

17 If suitable legal instruments were used to secure walking access and environmental/heritage protection, as proposed above, the management plans could focus primarily economic development. In the absence of any other obvious existing agency to monitor compliance with such management plans, the responsibility will probably have to remain with the regulator. Clearly, the regulator will need to develop or purchase appropriate expertise, both for assessing management plans and for ongoing monitoring.

18 Unless plans are reasonably comprehensive, it will not be possible to adequately consider the matters listed in clause 28. Management plans will require critical appraisal to ensure they are realistic and to ensure that any required consents have been or are likely to be obtained. There have certainly been proposals in the past from potential overseas investors with land development plans which were not technically feasible and which could not be implemented without consents under other legislation (eg Resource Management Act, Land Act 1948 and Crown Pastoral Land Act 1998). It will not be difficult for the regulator to develop guidelines on the requirements for management plans.

19 The regulator will need to formally liase/consult with the Commissioner of Crown Lands on any management plans put forward by prospective overseas investors in pastoral leases in the South Island High Country. The regulator cannot assume that the Commissioner's consent to the transfer of a pastoral lease constitutes consent for proposed developments or new land uses. Among other things, pastoral lessees require the consent of the Commissioner for most development activities, to carry stock in excess of the stock limit in the lease and to undertake non-pastoral commercial land uses such as tourism. Without the necessary consents, an overseas investor could not implement development plans for a pastoral lease (it is likely that the OIC has not adequately taken this into account in the past). To obtain the necessary consents from the Commissioner, comprehensive information will be required - refer to the sections 15 to 18 Crown Pastoral Land Act 1998 and to the Crown Pastoral Land Standards developed by Land Information New Zealand.

20 If it is decided not to rely primarily on legal instruments to secure walking access and environmental/heritage protection, as suggested above, or where such instruments are not appropriate, then management plans will need to contain provisions for these matters as well as for economic development. The plans will need to reflect the sorts of provisions contained in other relevant instruments such as easements and covenants as appropriate. For high value sites, this will require detailed and comprehensive information.

21 Subject to the comments above, the proposal to put the onus for monitoring on the overseas investor is feasible, although audits would be desirable.

I hope these comments are helpful Rosemary. You will see that I have suggested that management plans be confined as far as possible to economic development and that full use be made of other mechanisms to secure access and environmental/heritage protection. If you do not favour the use of such mechanisms, I would be happy to provide more comment on management plan requirements for such values and on how such plans should be monitored.

You are welcome to contact me at any time.

Yours sincerely

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