

The Treasury

Ministerial Directive to Overseas Investment Office Information Release

Release Document

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Treasury Report: Including forestry in the Ministerial Directive Letter to the Overseas Investment Office

Date:	Tuesday, 21 November 2017	Report No:	T2017/2592
		File Number:	IM-5-1

Action Sought

	Action Sought	Deadline
Minister of Finance (Hon Grant Robertson)	Agree to the forestry directive in the attached Ministerial Directive Letter.	As soon as possible
Associate Minister of Finance (Hon David Parker)	Agree to the forestry directive in the attached Ministerial Directive Letter.	As soon as possible
Minister of Forestry (Hon Shane Jones)	Agree to the forestry directive in the attached Ministerial Directive Letter.	As soon as possible

Contact for Telephone Discussion (if required)

Name	Position	Telephone	1st Contact
[3]	Analyst, International	[5]	N/A
Erin King	Senior Analyst, International		N/A
Dasha Leonova	Manager, Financial Markets and International	[5]	✓

Actions for the Minister's Office Staff (if required)

Return the signed report to Treasury.

Note any feedback on the quality of the report

Enclosure: Yes

Treasury Report: Including forestry in the Ministerial Directive Letter to the Overseas Investment Office

Purpose of Report

1. On Monday 20 November, Cabinet noted the Minister of Finance's intention to issue a new Ministerial Directive Letter to the Overseas Investment Office. Cabinet also invited a group of Ministers (the Minister of Finance, Associate Minister of Finance (Hon David Parker) and the Minister of Forestry) to agree a forestry directive for inclusion in the letter.
2. This report provides the Treasury's advice about including a forestry directive in the letter. Our advice is also reflected in the attached version of the Ministerial Directive Letter. We understand Minister Parker is seeking urgent agreement to the forestry directive so the letter can be issued, providing certainty to overseas persons looking to invest in New Zealand's sensitive assets.

Including a forestry directive

3. We understand Ministers are interested in a forestry directive that:
 - a supports transfers of forestry land between overseas owners and overseas investors; and
 - b sets out the Government's expectation that overseas investment in forestry should support downstream domestic processing.

Sales of forestry between overseas persons

4. As we advised last week (T2017/2553 refers), we do not recommend you include a forestry directive to progress the Government's forestry interests. However, we understand you do want a directive that facilitates overseas owners of forestry selling to overseas buyers. In the attached letter we have proposed a directive we consider goes as close to your suggested directive as the Overseas Investment Act allows. However, changes to the directive letter will not achieve all of the outcomes you have indicated. Our advice below explains the directive we have included.

What cannot be achieved with the Ministerial Directive Letter? (legally privileged)

5. [4]

6. [4]

What can be achieved with the Ministerial Directive Letter?

7. The Ministerial Directive Letter can, and does, address sales of existing forestry between overseas persons in two ways:
 - a a specific forestry directive that elevates the importance of two factors: the 'increased processing of primary products' factor and the 'advance significant Government policy or strategy' factor; and
 - b clarifying that the directives in the letter do not apply to minor shareholding changes.

'Forest land' directive

8. The 'forest land' directive in the attached letter focuses on current use of the land and elevates the 'increased processing of primary products' factor and the 'advance significant Government policy or strategy' factor. For the purposes of the directive letter, 'forestry land' means land that is non-urban and over 5 hectares in size, where the principal use of the land by the overseas investor is forestry.
9. The clearer and more detailed the Government's forestry policy is, the easier it will be for the Overseas Investment Office to assess forestry applications which rely on the 'advance significant Government policy or strategy' benefit factor. For applicants, a clear and detailed Government forestry policy will help to strengthen their application where their application seeks to rely on Government policy.
10. Defining a current overseas owner of forestry is a necessary element of your proposed 'forest land' directive but we have not been able to do this in the time available for preparing this advice.¹ A definition will be complex and we are not confident more time would result in an effective solution. Accordingly, we recommend the 'forest land' directive applies regardless of whether the current owner is an overseas person. We understand there are high levels of overseas ownership in the forestry industry, so expect there will not be many forest land transactions involving a New Zealand owner selling to an overseas person.

Minor shareholding changes

11. The letter clarifies that the 'rural land' and 'forestry land' directives in the letter do not apply to minor shareholding changes. This is intended to address, in part, the difficulty in demonstrating a substantial and identifiable benefit from minor shareholding changes. The direction on how minor shareholdings should be treated by the Overseas Investment Office is included in paragraph 11 of the attached letter.

¹ The directive letter attached includes a place holder definition.
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Placing conditions on overseas investment

12. The Overseas Investment Act allows consent to be unconditional or subject to the conditions that the relevant Minister or Ministers consider appropriate. [4.1]

13.

To reflect this we have included at paragraph 20 a statement that the Government expects the Overseas Investment Office to consider including conditions where appropriate that support downstream domestic processing.

14. You should note that imposing conditions to supply local processors will not change the fact that some grades of log may not be suitable for, or economically viable to, process at a domestic sawmill. The proportion of different log grades available for harvest within New Zealand forests depends on the regime that is used (which will include factors such as the way the trees are managed and the type of land the trees are on).

Effective date for the letter

15. The Overseas Investment Office have advised that an effective date of 15 December 2017 would enable those applications at the end of process to be considered under the current directive. A 15 December 2017 date would also enable the Overseas Investment Office to deal with the small number of large international transactions with tight commercial deadlines for which there will not be time for the applicant to make new submissions in accordance with a new letter. The letter can be signed ahead of the effective date.

Next steps

16. Once the detail of the forestry directive is agreed we will provide the Minister of Finance with a copy of the letter for signature. After signature, we will work with Minister Parker's office to arrange for publication in the *Gazette* and presentation to the House of Representatives. Both of those steps are required by the Overseas Investment Act within 6 sitting days of the letter being issued.

Recommended Action

We recommend that you:

- a **note** that Ministers have agreed (T2017/2553 refers) that the next phase of work on the Overseas Investment Act will consider the consent criteria for transfers of forestry land between overseas persons.
- b **note** that we have not been able to develop a 'forest land' directive which applies only to sales between overseas persons, [3]

- c **agree** that the 'forest land' directive applies to all forest land, regardless of whether it is currently owned by an overseas person.

Agree / disagree

Agree / disagree

Minister of Finance
Hon Grant Robertson

Associate Minister of Finance
Hon David Parker

Agree / disagree

Minister of Forestry
Hon Shane Jones

- d **agree** to a 15 December 2017 effective date for the new Ministerial Directive Letter.

Agree / disagree

Associate Minister of Finance
Hon David Parker

Erin King
Senior Analyst, International

Hon Grant Robertson
Minister of Finance

Hon David Parker
Associate Minister of Finance

Hon Shane Jones
Minister of Forestry

Andrew Crisp
Chief Executive
Land Information New Zealand
Private Box 5501
WELLINGTON 6145

Dear Mr Crisp

Ministerial Directive Letter

1. This Ministerial directive letter is made pursuant to section 34 of the Overseas Investment Act 2005 (the Act). It directs you, as the regulator, on:
 - 1.1. the Government's general policy approach to overseas investment;
 - 1.2. the relative importance of different factors in section 17(2) (including factors in regulation 28);
 - 1.3. the level of monitoring by the regulator; and
 - 1.4. other matters relating to the regulator's functions, powers and duties.
2. The Minister of Finance and the Minister for Land Information intend from time to time to delegate powers and functions to the regulator by separate instrument.
3. References to the Act and the Regulations in this letter refer to the Overseas Investment Act 2005 and Overseas Investment Regulations 2005 (respectively).
4. This directive letter applies to the regulator's consideration of all new and existing applications at the date it comes into force.

Government policy towards overseas investment

5. Overseas investment is important for New Zealand's economic growth. Overseas investment can provide capital for expansion and new projects; provide increased access to markets, new skills and technology; increase productivity / efficiency; create jobs; increase exports; and provide other benefits.

6. The Government welcomes high quality overseas investment that:
 - 6.1. Generates high levels of benefits to New Zealand;
 - 6.2. Creates new productive assets (e.g. 'greenfield' investments);
 - 6.3. Is environmentally sustainable, minimising adverse impacts on the natural environment, and is likely to create positive and long lasting environmental benefits;
 - 6.4. Provides economic, environmental, social and cultural benefits to regional communities;
 - 6.5. Significantly increases value added activities in New Zealand; and
 - 6.6. Provides for significant participation and oversight by New Zealanders.
7. However, the Government recognises that not all overseas investments provide high levels of benefits to New Zealand and overseas investment can result in the loss of New Zealand ownership and control of important productive assets such as farm land and strategic infrastructure.
8. The Government also recognises that while economic goals are important, so too are environmental, social and cultural goals. Overseas investment must deliver for all of New Zealand. It is a privilege, not a right, for overseas persons to own or control sensitive New Zealand assets and that privilege must be earned and maintained.
9. The Government's overall policy approach is to achieve a balance between the need for highly beneficial overseas investment and the need for New Zealand to maintain ownership and control of sensitive New Zealand assets.

Overseas investment in sensitive land: factors of high or low relative importance for certain investments

10. The Act allows the Minister of Finance to provide direction regarding the relative importance of different criteria or factors in relation to particular assets. Factors that the regulator should consider to be of high or low relative importance in certain scenarios of overseas investment in sensitive land are outlined below.
11. The Minister acknowledges that each application for consent for an overseas investment in sensitive land must be considered on a case-by-case basis and having regard to the particular facts. The directions below are therefore expressed in general rather than strict terms. For example, the Government does not expect the 'rural land' directive or the 'forest land' directive to apply to overseas investments involving minor changes in shareholdings.
12. The benefit assessment required under the Act must be undertaken using a with or without approach rather than a before and after approach in accordance with the decision of *Tiroa E and Te Hape B Trusts v Chief Executive of Land Information* [2012] NZHC 147 (known as the 'Crafar farms case'). This means the assessment is focused on the benefits from the overseas investment which are over and above those which would occur anyway (i.e. the point of difference between the overseas investment and the counterfactual).

Overseas investments in rural land

13. The primary sector, and the rural land¹ it is based on, forms a particularly important part of the New Zealand economy.
14. The Act acknowledges that the privilege associated with the ownership or control of rural land is greater than for non-rural land by requiring the benefits resulting from the overseas investment to be substantial and identifiable (a higher threshold).
15. The merits of overseas investment in the primary sector can be less compelling given that we are already world leaders in this area. The Government is therefore concerned to ensure that the benefits from overseas investments in rural land are genuinely substantial and identifiable.
16. The Minister therefore directs the regulator that the following factors will generally be of high relative importance for overseas investments in rural land (the rural land directive):
 - 16.1. The 'jobs' factor (section 17(2)(a)(i));
 - 16.2. The 'new technology or business skills' factor (section 17(2)(a)(ii));
 - 16.3. The 'increased exports receipts' factor (section 17(2)(a)(iii));
 - 16.4. The 'increased processing of primary products' factor (section 17(2)(a)(vi)); and
 - 16.5. The 'oversight and participation by New Zealanders' factor (regulation 28(j)).
17. This rural land directive does not apply to land covered by the 'forest land' directive in paragraphs 18 to 19.

Overseas investments in forest land

18. The Government recognises that overseas investment in the forestry sector, and the associated downstream processing industries, has the potential to add significant value to the overall economy and the environment.
19. The Government wishes to encourage an increase in the value added processing of raw products and the advancement of its forestry-related strategies. The Minister therefore directs the regulator that the following factors will generally be of high relative importance for overseas investments in 'forest land'² (the forest land directive):
 - 19.1. The 'increased processing of primary products' factor (section 17(2)(a)(vi)); and
 - 19.2. The 'advance significant Government policy or strategy' factor (regulation 28(f)).

¹ For the purposes of this directive letter, 'rural land' means land that is non-urban and over 5 hectares in size (excluding any associated land), but excludes 'forest land' as defined below.

² For the purposes of this directive letter, 'forest land' means land that is non-urban and over 5 hectares in size (excluding any associated land), where the existing principal use of the land is forestry.

20. The Minister would generally expect the regulator to impose specific conditions of consent on overseas investors whose investment plan involves processing in New Zealand. These could include, where appropriate, a condition requiring the overseas investor to enter into a supply arrangement with a local processor. Conditions imposed on overseas investments in forest land may need to be imposed for longer periods given the often long-term nature of such investments.

Sponsorship of community projects and donations

21. Regulation 28(a) provides that benefit may be demonstrated by an overseas investment providing consequential benefits to New Zealand, including sponsorship of community projects (the 'consequential benefit' factor). For the avoidance of doubt, the Government does not seek donations or sponsorship from overseas persons investing in sensitive land. The Minister of Finance, therefore, directs the regulator that, to the extent that the factor relates to the sponsorship of community projects and donations, the 'consequential benefit' factor is generally of low relative importance.

Intention to reside in New Zealand indefinitely

22. 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 in sensitive land is likely to benefit New Zealand. This supports migrants in the process of moving to New Zealand to make New Zealand their home and make a positive contribution to society.
23. An intention to reside in New Zealand indefinitely must involve a definite plan and accompanying actions. In determining whether a person is intending to reside indefinitely, the regulator must consider any active steps that have been taken by the investor to actually reside in New Zealand.
24. In order to meet the intention to reside in New Zealand criterion in section 16(1)(e)(i), the Government considers the overseas person will generally:
 - 24.1. hold a residence class visa or an entrepreneur work visa; and
 - 24.2. show actions and plans, with supporting evidence, consistent with an intent to reside in New Zealand within 12 months.
25. The regulator may impose as a condition of consent a time limit within which the overseas person must move to New Zealand and become ordinarily resident. The Government would generally expect the overseas person to move to New Zealand within 12 months from the date of consent and become ordinarily resident within 2 years³ from the date of consent.

Acquisition of special land

26. Section 17(2)(f) requires that Ministers (or the regulator acting under delegation) consider whether any foreshore, seabed, riverbed or lakebed (which the Regulations refer to as "special land") has been offered to the Crown in accordance with the Regulations.
27. The Government places a high value on special land. The Government's general policy approach to the acquisition of special land is that the special land should be acquired if it is in the public interest for the Crown to own the special land.

³ A longer period may be considered for migrants holding an entrepreneur work visa.

Operation of the Overseas Investment Office

28. The Government seeks to ensure that the process of granting or refusing consent is robust and generates high quality outcomes.

Consent conditions, monitoring and enforcement

29. Monitoring and enforcement of compliance with the consent requirements of the Act, and of compliance with conditions imposed on consents, maintains public confidence in the integrity of the regime.
30. The Government expects the regulator to monitor the conditions imposed for up to 5 years (recognising it may be appropriate to impose a different period of time to monitor some conditions).
31. This will assist in maintaining confidence in the overseas investment regime. It also ensures fair treatment for those who comply with the rules by ensuring those who break the rules are held to account and that others are deterred from doing so.

General matters relating to the regulator's functions, powers or duties

32. As the regulator, you will:
 - 32.1. provide recommendations to the relevant Minister or Ministers;
 - 32.2. perform your functions in a timely, consistent and efficient manner and with transparency, openness and accountability;
 - 32.3. via your website resource, provide a summary of the overseas investment regime, information on how to prepare and submit an application for consent, and specific details on your processes and timeframes;
 - 32.4. via your website resource, increase the level of information currently provided about applications under assessment and decisions made under the Act;
 - 32.5. develop and maintain systems to keep applicants apprised of the progress being made with their application;
 - 32.6. seek sufficient information through the application and assessment process to verify the information provided by applicants, and where appropriate involve third parties (including other government agencies) and third party resources to achieve this goal;
 - 32.7. adopt a risk-based and proportionate approach to application assessment;
 - 32.8. compile and keep records useful for the making available of statistics; and
 - 32.9. publish information on, and compliance with, any additional Government performance expectations.

Revocation of previous letter

33. The Ministerial directive letter dated 8 December 2010 is revoked on and from the date this Ministerial directive letter takes effect.

Date letter takes effect

34. This Ministerial directive letter takes effect on 15 December 2017. For the avoidance of doubt, this directive letter applies to the regulator's consideration of all new and existing applications at the date it comes into force.

Yours sincerely

Hon Grant Robertson
Minister of Finance