The Treasury

Ministerial Directive to Overseas Investment Office Information Release

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Office of the Associate Minister of Finance

Chair
Cabinet Business Committee

MINISTERIAL DIRECTIVE LETTER TO THE OVERSEAS INVESTMENT OFFICE

Proposal

1. This paper asks Cabinet to note the intention to issue a new Ministerial Directive Letter to the Overseas Investment Office. The letter provides direction and guidance to the Overseas Investment Office and overseas investors on the Government's general policy approach to foreign investment in sensitive assets.

Executive summary

2. This paper asks Cabinet to note a Ministerial Directive Letter to the Overseas Investment Office. The new letter outlines this Government's policy on overseas investment, and directs the Overseas Investment Office on matters relating to how overseas investment applications are assessed, particularly around rural land and residency-based applications.

3. On rural land, the directive in the letter will raise the bar for overseas investment in such land. For residency-based applications, the letter sets an expectation that migrants should already hold a relevant visa and have plans to move to New Zealand within 12 months.

4. The Minister of Finance intends to issue the letter as soon as possible after Cabinet consideration to provide certainty for overseas persons looking to invest in New Zealand's sensitive assets. This is an interim measure, and is not a substitute for the other work on a more durable reform of the Overseas investment Act and related regulations concerning non-urban land over 5 hectares.

Background

5. As a Government, we welcome high quality overseas investment in new, productive assets that add to the productivity of our economy. We also welcome those who have been granted residence and who live here and contribute to our country. The Overseas Investment Act is the main vehicle for regulating foreign investment.

6. The Overseas Investment Act allows the Minister of Finance to direct the regulator (the Overseas Investment Office) in the form of a Ministerial Directive Letter. The Minister may direct the Overseas Investment Office on certain matters including:

6.1 the Government's general policy approach to overseas investment in sensitive New Zealand assets; and

6.2 matters relating to how the Overseas Investment Office assesses applications and its general functions, powers and duties.

7. Once a new letter is issued, the Overseas Investment Office can start assessing applications in accordance with this Government's policy on foreign investment. There is a need for urgency in issuing the letter as the Overseas Investment Office are in the process of assessing a number of applications. Additionally, the new letter will provide more certainty to overseas investors considering investing in New Zealand's sensitive assets.

8. The Minister of Finance has agreed to this paper being lodged in accordance with the Cabinet Manual.

Comment

9. I propose that a new Ministerial Directive Letter is issued to the Overseas Investment Office which reflects this Government's policy on overseas investment. This new Directive Letter will replace the existing letter issued in December 2010.

10. The proposed letter is attached for consideration. In summary, the letter outlines the Government's:

10.1 the policy towards overseas investment;

10.2 direction to the Overseas Investment Office about which factors will be of high relative importance for overseas investments in rural land;

10.3 direction to the Overseas Investment Office that donations or sponsorship should generally be of low relative importance when making an assessment about overseas investment in sensitive land;

10.4 approach to the acquisition of special land; and

10.5 guidance to the Overseas Investment Office about residency-based applications

2010 Directive Letter

11. The 2010 Directive Letter raised two concerns with overseas investment in the land based primary sector. Specifically, a concern with vertical integration on a large scale and a concern with aggregation of farm land by overseas investors. It sought to address these concerns by introducing the 'large farm directive'. It also noted that the 'economic interests' factor and the 'oversight and participation by New Zealanders' factor were introduced to address these same concerns.

12. Under the large farm directive the Overseas Investment Office is directed to elevate certain benefit factors to be of high relative importance for overseas investments in 'large farms'. An overseas investment in farm land is 'large' if it results in the overseas investor owning or controlling an area of land that is more than ten times the average farm size for the relevant farm type. The directive makes it more difficult to gain consent because the overseas investor needs to show stronger economic benefits from the investment.

13. The benefit factors of high relative importance under the large farm directive are the six economic factors (i.e. jobs, new technology / business skills, exports, greater efficiency / productivity, additional investment and processing of primary products), the 'economic interests' factor and the 'oversight and participation by New Zealanders' factor.

Issues with the existing 'large farm' directive

14. The large farm directive only applies to overseas investors who acquire very large tracts of farm land. It does not apply where an overseas investor makes a one off purchase of land that is less than ten times the average size (e.g. a sheep and beef farm that is less than 7,146 ha or a dairy farm less than 1,987 ha) even though such investments are still significant.

15. The 'large farm' directive only applies to farm land as defined in the Overseas Investment Act 2005 and does not cover land uses such as forestry.

16. The large farm directive has the effect of encouraging intensification of farm land (e.g. by way of increasing stock units or dairy conversion). The directive is strictly worded and elevates the importance of factors such as greater productivity even where this would be inappropriate (e.g. where the land is a high country station with high ecological values).

17. There can also be difficulties in calculating the amount of farm land controlled by an overseas investor. For instance, as the large farmland criteria is based on type of farm, there can be problems where one farm is used for mixed uses (e.g. sheep and beef and deer), or where an investor has a range of different farms (e.g. kiwifruit orchards and dairy farms).

Rural land directive

18. The new directive letter will replace the existing 'large farm' directive with a new directive that applies to overseas investments in 'rural land' (being all non-urban land over 5 hectares).

19. The new rural land directive retains the elevated importance of the following factors for overseas investments in rural land:

19.1 The 'jobs' factor;

19.2 The 'new technology or business skills' factor;

19.3 The 'increased exports receipts' factor'

19.4 The 'increased processing of primary products' factor; and

19.5 The 'oversight and participation by New Zealanders' factor.

The greater efficiency and productivity factor, additional investments factor and 'economic interests' factor are not retained as factors with elevated importance.

20. The directive emphasises the privilege associated with the ownership or control of rural land, and the importance of such land to New Zealand. Together with the new policy approach set out in the directive letter, the rural land directive will raise the bar for overseas investments in rural land and better ensure that the benefits from overseas investments in such land are genuinely substantial and identifiable.

21. The directive does not prevent the Overseas Investment Office from elevating the importance of other factors where appropriate (e.g. walking access and environmental factors).

22. The key differences between this new directive and the existing 'large farm directive' are that:

22.1 It applies to all types of rural land including forestry;

22.2 It applies to all rural land over 5 hectares and not just 'large farms';

22.3 It elevates factors that align with the Government's policy on overseas investment; and

22.4 It is a general rather than strict directive. This will provide more flexibility for the Overseas Investment Office to consider the specific circumstances of each investment, and policy rationale, when applying directives.

23. I consider that using 'rural land' as the threshold for the new directive is appropriate as it aligns with an existing land sensitivity in the Overseas Investment Act 2005, corresponds to a change in the benefit threshold (benefits from overseas investments in rural land must be 'substantial and identifiable') and captures all land used for primary production. It will also provide greater certainty to investors as to when it will apply.

24. It is noted that ministerial directives change the relative importance to be attached to various factors that are able to be taken into account by the Overseas Investment Office exercising discretion under the Overseas Investment Act. It cannot change those criteria which are prescribed by the Overseas Investment Act.

Residency-based applications

25. I also want to highlight that the letter refines the position on residency based applications, setting an expectation that migrants should:

25.1 Already hold a relevant visa (the existing directive indicates an application for a visa being sufficient); and

25.2 Have plans to move to New Zealand within 12 months (the existing directive letter allows 5 years).

26. This change addresses the difficulty in determining whether a visa application will be successful and the likelihood of an overseas person moving to New Zealand. It also aligns with a policy view that the Government supports migrants in the 'process of moving to New Zealand to make New Zealand their home'.

Process and timing

27. The clear direction in the letter should provide more certainty for overseas persons seeking to invest in New Zealand's sensitive assets. The letter will also support the Overseas Investment Office in assessing applications and carrying out its general functions, powers and duties.

28. The letter will clearly state that it will apply to all new and existing applications at the date it comes into force. The Overseas Investment Office must continue to apply the existing letter until a new letter is issued.

29. The Minister of Finance intends to issue the Ministerial Directive Letter as soon as possible after Cabinet consideration to provide certainty for overseas persons looking to invest in New Zealand's sensitive assets.

Consultation

30. The Ministry of Foreign Affairs and Trade, Ministry of Primary Industries, Ministry of Business, Innovation and Employment, Te Puni Kōkiri, the Department of Conservation, Land Information New Zealand, and Crown Law were consulted about the proposed letter. The Department of Prime Minister and Cabinet was informed of this Cabinet paper.

Risks

31. The policy approach towards overseas investment set out in the directive letter, together with the rural land directive, signals a tightening in the regulation of overseas investment in New Zealand. It is possible this could negatively affect New Zealand's attractiveness as a destination for overseas investment. It may also generate some adverse publicity.

32. The 'rural land' directive is broad and will apply to a large number of overseas investments in sensitive land. While expressed in general rather than strict terms, it could still have unintended consequences and complicate the assessment of overseas investments the Government may wish to facilitate.

33. [Legally privileged] [4]

34. There is also a risk that New Zealanders who are currently in the process of selling their property to an overseas person may be affected financially due to the policy change in the new letter.

Financial Implications

35. In some situations, qualifying 'special land' must be offered back to the Crown before consent can be granted for an overseas investment in that land. The letter notes '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.' In addition to the cost of acquiring the land, the Crown will be responsible for surveying costs, conveyancing costs, valuation costs and legal fees as well as the ongoing cost of administering the land and any liability that arises from being the land owner. [2]

Human Rights

36. There are no further human rights, disability or gender implications arising from issuing the Directive Letter that are not already present in the Overseas Investment Act.

Legislative Implications

37. There are no legislative implications associated with this paper.

Regulatory Impact Analysis

38. Under the provisions for Regulatory Impact Analysis set out in the Cabinet Manual, departments are expected to provide systematic analysis and advice, in the form of a Regulatory Impact Assessment (RIA), to inform Ministerial decision-making at Cabinet on proposals on regulatory action such as this. The RIA requirements do not apply to the issuing of a Ministerial Directive Letter.

Publicity

39. The Associate Minister of Finance, Hon David Parker and the Minister for Land Information will make a public statement about the Ministerial Directive Letter once considered by Cabinet. The new letter will also be published in the Gazette and presented to the House in accordance with the requirement for publication in the Overseas Investment Act.

Recommendations

40. I recommend that the Cabinet:

1. **Note** that the Minister of Finance intends to issue a new Ministerial Directive Letter to the Overseas Investment Office.

2. **Note** the proposed new Ministerial Directive Letter outlines the Government's:

   2.1 policy towards overseas investment;

   2.2 direction to the Overseas Investment Office about which factors will be of high relative importance for overseas investments in rural land;

   2.3 direction to the Overseas Investment Office that donations or sponsorship should generally be of low relative importance in making an assessment about overseas investment in sensitive land;

   2.4 approach to the acquisition of special land; and

   2.5 guidance to the Overseas Investment Office about residency-based applications.

3. **Note** that acquiring 'special land', as outlined in the letter, will have financial implications for the Crown. [2]

4. **Note** that the Associate Minister of Finance, Hon David Parker and the Minister for Land Information will make a public announcement about the new Ministerial Directive Letter following consideration by Cabinet.

Authorised for lodgement

Hon David Parker
Associate Minister of Finance

Date:

Overseas Investment Office Ministerial Directive Letter

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.

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 land[1] it is based on, forms a particularly important part of the New Zealand economy.

14. The Act acknowledges 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)).

Sponsorship of community projects and donations

17. 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

18. 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.

19. 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.

20. 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:

1 For the purposes of this directive letter, rural land means land that is non-urban and over 5 hectares (excluding any associated land).

20.1. hold a residence class visa or an entrepreneur work visa; and

20.2. show actions and plans, with supporting evidence, consistent with an intent to reside in New Zealand within 12 months.

21. 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 years[2] from the date of consent.

Acquisition of special land

22. 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.

23. 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.

Operation of the Overseas Investment Office

24. 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

25. 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.

26. 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).

27. 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

28. As the regulator, you will:

28.1. provide recommendations to the relevant Minister or Ministers;

28.2. perform your functions in a timely, consistent and efficient manner and with transparency, openness and accountability;

28.3. 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;

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

28.4. via your website resource, increase the level of information currently provided about applications under assessment and decisions made under the Act;

28.5. develop and maintain systems to keep applicants apprised of the progress being made with their application;

28.6. 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;

28.7. adopt a risk-based and proportionate approach to application assessment;

28.8. compile and keep records useful for the making available of statistics; and

28.9. publish information on, and compliance with, any additional Government performance expectations.

Revocation of previous letter

29. 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

30. This Ministerial directive letter takes effect on [DATE]. 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