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Overseas Investment Act 2005 – Implications for forest owners

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Overseas Investment Act – brief overview



- The purpose of the Act – it is a privilege for overseas investors to own or control sensitive New Zealand assets (includes land)
- Overseas investors must meet criteria for consent
 - Investor test
 - Benefit to New Zealand test

Overseas Investment Act – brief overview



- 21 factors (listed in the Act) are used to assess “benefit to New Zealand”. Factors are:
 - Economic (e.g. creation of new jobs)
 - Environmental (e.g. protection of indigenous fauna and flora, walking access)
 - Other (e.g. viability of existing investments enhanced, previous investments that have been of benefit, additional investments in New Zealand or sponsorship of community projects)

Overseas Investment Act – brief overview



- If land is non-urban and over 5 hectares, the benefit must be “substantial and identifiable”
- A counterfactual test applies to the assessment of benefits
 - What is likely to happen “with” the investment (factual) vs what is likely to happen “without” the investment (counterfactual)
 - Imposed by the High Court in the Tiroa E (Crafar farms) case in 2012

Overseas Investment Act – brief overview



- If land is non-urban and over 5 hectares, the benefit must be “substantial and identifiable”
- Forestry rights are not “sensitive land” but consent could still be required if the value of the rights or price paid for the rights is more than \$100 million (the “investor test” only applies)
- Conditions will be imposed on any consent

Overseas Investment Act – the counterfactual

- In trying to determine what is likely to happen “without” the investment, the OIO needs to know
 - Whether it is likely that the land would be sold to an alternate New Zealand purchaser; and if so,
 - What would the alternate New Zealand purchaser (reasonably funded) likely do with the land?
- It is only the benefits over and above those that would likely be brought by the alternate New Zealand purchaser that can be taken into account

Overseas Investment Act – the counterfactual

- What if there is no alternate New Zealand purchaser? [e.g. the land has been on the market for a long time without any interest being shown]
- In that case, the status quo (i.e. the actual state of the land) will be the point from which benefits are measured.

Overseas Investment Act – Forestry issues

- Benefits of forestry are difficult to forecast due to the long term nature of the investment
 - Will the land be replanted?
 - Will logs be exported, or processed in New Zealand?
 - There may be few job opportunities created unless planting/harvesting occurs
- Often a sale may entail no change – i.e. likely benefits delivered by the vendor or the alternate New Zealand purchaser will be the same as the overseas purchaser's.

Overseas Investment Act – Forestry issues

- The challenge is for overseas purchasers is to find “new” benefits under the counterfactual, i.e. benefits that an alternate New Zealand purchaser would not likely deliver
- Alternatively, to be able to point to factors in the “benefit to New Zealand test” that do not have a counterfactual test applied to them (such as previous investments that have been of benefit to New Zealand).

Overseas Investment Act – Forestry issues

- Conversions are also difficult
- What delivers more benefits – an existing use or conversion into forestry?
- Often involves considering long term vs short term benefits
- The state of the land may be important – how marginal is the land?
- There can be community opposition to conversion.