

Overseas investment regime – the shape of things to come

The new fee structure for the Overseas Investment Office (OIO) screening regime, to come into force on 4 July 2016, was always only part of the solution to lifting the OIO's performance and turnaround.

Details around the rest of the response emerged at a workshop yesterday led by Land Information Minister Louise Upston and officials. An exposure draft of the new regulations is expected in August.

We report on the shape of things to come.

Policy objectives

The Overseas Investment Act 2005 purpose states that it is a "privilege for overseas persons to own or control sensitive New Zealand assets".

Particularly since the Crafar decision¹ in the High Court (upheld on appeal²) imposed a new counterfactual test, the OIO has been under considerable strain to process applications in a timely manner. Applicants have been required to provide significantly more information on, and commitments to, their investments, especially where "sensitive land" is involved.

The Minister's stated objective is to achieve a 20% reduction in decision-making times. This is to be achieved through a mix of capacity building, improvements to operational procedures and targeted exemptions. No legislative change is planned.

Capacity building

The increased fees will enable the OIO to recruit additional staff and move to a more "customer-centric" focus.

The OIO will further tighten its initial quality assurance application review to incentivise potential investors to provide complete information on lodgement.

It will also make greater effort to keep applicants informed through the assessment process and provide more clarity about when a decision can be expected.

The quid pro quo of the OIO is asking the business and legal community to do more as well. Currently the OIO is rejecting one in four applications at the initial quality assurance phase (although this is by no means Chapman Tripp's experience, reinforcing the importance of getting good advice).

Targeted exemptions

Part of the package to streamline the process, are proposals to provide exemptions for:

- acquisitions of leasehold farmland from the current requirement to first offer the property on the open market (this will be limited to leases of up to 20 years cumulative duration, including rights of renewal)
- the need to seek approval where a previously consented lease is being renewed or re-granted with no change in conditions or underlying ownership
- sensitive land transactions between overseas parties where consent has previously been granted, the transaction is incidental to a larger global transaction and the land concerned is urban land of less than five hectares which is classified as sensitive only because it abuts sensitive land
- transactions where approval is required because the land is vested under the Public Works Act 1981 and does not exceed five hectares and is not inherently sensitive
- overseas owned custodians who hold shares in their custodial capacity, fixing an issue that came to light earlier this year.

Exposure drafts of these exemptions will be released in the coming months for comment.

The government also considered creating an exemption for residential property developers and has not entirely ruled it out but has decided at this stage not to proceed because it is "higher risk" than the other options and it would mean exempting transactions that would not have previously received consent.

Decision-making processes

Improvements the OIO is exploring to sharpen efficiency include:

- changes to the management structure to free up capacity for the core function of reviewing consents
- delegating decision-making downwards for simpler matters, and
- relieving bottlenecks by developing parallel decision-making tracks.

Chapman Tripp comments

The changes are good so far as they go but we consider that there is scope to be bolder. In particular, we would like listed companies to be added to the exemptions list. We are continuing to engage with the Treasury on this and other matters.

We note that there has already been some uplift in the OIO's performance and we welcome that. But there is still a distance to go. Currently, for example, the OIO is meeting its targets only 40% of the time for sensitive land applications.

The Cabinet Paper is available online³ and the Regulatory Impact Statement online⁴.

Footnotes

1. <http://www.chapmantripp.com/publications/Pages/Court-throws-NZ-overseas-investment-regime-into-disarray.aspx>
2. <http://www.chapmantripp.com/publications/Pages/Court-of-appeal-upholds-crafar-decision.aspx>
3. <http://www.treasury.govt.nz/publications/informationreleases/overseasinvestment/oio-fees-exemptions/egi-16-sub-0079.pdf>
4. <http://www.treasury.govt.nz/publications/informationreleases/overseasinvestment/oio-fees-exemptions/egi-16-sub-0079.pdf>

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