

# FOREIGN INVESTMENT LAW AND POLICY

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## Abstract

New Zealand's foreign investment law and policy has traditionally reflected a concern to control the level of foreign investment in New Zealand and to protect specified areas of particular value to the country. In 1968, Part IIA of the Land Settlement Promotion and Land Acquisition Act 1952 was enacted to control the direct acquisition of certain classes of land by overseas interests. The enactment of Part IIA reflected the growing public concern over increasing sales of islands and areas having recreational or conservational values. In addition, it was felt that there was a need to control the possible serious economic consequences of unrestricted access to the New Zealand rural land market. In 1973 the Overseas Investment Act was passed establishing the Overseas Investment Commission. The Commission was charged with the responsibility of monitoring and controlling the level of foreign investment pursuant to detailed criteria and advising the Government on policy relating to foreign investment.

In the last decade, however, there has been a movement towards a deregulated investment environment. Many of the controls on foreign investment have been relaxed and there has been an emphasis on actively encouraging foreigners to invest their capital in New Zealand. These changes have led to increased foreign investment in a wide variety of areas including tourism, recreational facilities, mining, and commercial real estate. In addition, foreign investment in previously state-owned enterprises/assets such as Telecom and state forests has been welcomed. The present Government has made it clear that New Zealand needs more foreign investment in order to utilise its available resources and provide employment.

Further reforms in relation to foreign investment are currently being debated. In particular, the Minister of Lands has indicated that he considers the current legislation relating to foreign investment in land is inadequate, confusing and inefficient. The Minister has suggested that he would prefer a single consent authority to simplify and speed up the consent process and enable a clear set of rules to be established for foreign buyers.

## Introduction

New Zealand's foreign investment law and policy has traditionally reflected a concern to control the level of foreign investment in New Zealand and to protect "sensitive" areas of particular value to New Zealanders. Examples of this are Part IIA of the Land Settlement Promotion and Land Acquisition Act 1952 which was enacted in 1968 in response to growing public concern over increasing sales of rural land and islands to overseas interests, and the Overseas Investment Act 1973 which established the Overseas Investment Commission to monitor and control the level of overseas investment in New Zealand. However, during the term of the last Labour Government and under the present Government, there has been a movement towards a deregulated investment environment. Many of the controls on foreign investment have been relaxed and there has been an emphasis on actively encouraging foreigners to invest their capital in New Zealand in order to utilise its available resources and provide employment. These changes have led to a widespread increase in foreign investment including the purchase of previously state-owned enterprises/assets such as Telecom and State Forests.

Notwithstanding the deregulation of the investment environment and the increase in foreign investment especially in high profile areas such as state-owned enterprises and

commercial property, there is a view in the business community that New Zealand is still failing to attract its share of overseas investment. The Government has recognised this view and has made it clear that it intends to provide a more welcoming climate for foreign investors through further policy and legislative initiatives<sup>1</sup>.

In this paper, I discuss the legislative history of foreign investment law in New Zealand in the context of the relevant policy changes. I outline various recent examples of foreign investment in New Zealand and discuss these in the context of policy reaction and present moves to reform foreign investment legislation. I then discuss current proposals for legislative reform and the implications of these proposals for foreign investors. Finally, I discuss the current position in the oil exploration industry with regard to recent legislative reforms and Government policy on foreign investment.

## Legislative History of Foreign Investment Law

### Land Settlement Promotion and Land Acquisition Act 1952

Part IIA of the Land Settlement Promotion and Land Acquisition Act 1952 (the LSPLA Act) was enacted in 1968 to control the direct acquisition (including leasing) of certain classes of land in New Zealand by overseas interests. The

enactment of Part IIA was in response to growing public concern in the early 1960s over increasing interest in, and sales of, New Zealand land to overseas interests; in particular, islands or parts of islands and areas having recreational or conservation values. Further, it was considered necessary to control the possible serious economic consequences of unrestricted access to the New Zealand rural land market. Overseas interests with their greater buying power are generally able to pay more than what New Zealand interests perceive to be the current market value for land. This has the effect of increasing land values and the ripple effect of those increases being reflected in the community. The rural sector is the most capital intensive industry in New Zealand and it was considered unwise to expose the land values to the vagaries of international economies and currency fluctuations<sup>2</sup>.

Overall, while the provisions of the Act do not prevent the acquisition of land (and 100% ownership) by bona fide immigrants or overseas companies subject to the necessary approvals, they do contain restrictions to:

- prevent undesirable speculation in New Zealand by overseas interests;
- prevent or constrain absentee ownership of New Zealand land by overseas interests other than in exceptional circumstances;
- ensure that land which could be required as a reserve of some type or other does not pass out of New Zealand ownership except in certain circumstances;
- ensure land being or forming part of an island remains in New Zealand ownership except in certain circumstances;
- endeavour to ensure that land having a special nature or character or in a significant location remains in New Zealand ownership other than in special circumstances;
- ensure the acquisition of rural land by overseas interests will provide significant benefits to the agricultural industries and local community and be in the interests of the country generally.

Where a transaction is caught by the Act, the foreign purchaser/lessee must apply to the Land Valuation Tribunal for approval of the transaction on the basis of the criteria set out in the legislation. There are a number of transactions which the Tribunal cannot deal with i.e. transactions involving islands or land designated, zoned or required for a reserve or recreational purposes. In those cases, the applicant must apply for a Ministerial exemption pursuant to Section 35C(d) of the Act. In considering exemptions it has to be clearly shown that the intended use of the land would provide significant benefits to New Zealand and that it is in the national interest although the Government can take other factors into account when considering an application.

Since its enactment in 1968, a number of deficiencies have been exposed in Part IIA. In particular:

- the Act has been criticised for the lack of clear guidelines or criteria for the consideration of applications for consent (especially Ministerial exemptions);
- the Act does not allow for enforceable conditional consents with penalties for non-compliance; and
- the Act does not cover indirect acquisition of land or interests in land, i.e. by share transfers, and it does not cover the sale of Crown leases and licences held and administered by Land Corporation Limited.

These and other deficiencies in the legislation are well-known and amendments to Part IIA have been contemplated

by successive governments during the 1970s/1980s in response to submissions from interest groups. However, to date, no proposals for amendments have been put into effect. I will discuss the current proposals for reform of the legislation and the policy underlying the proposals later in this paper.

### **Overseas Investment Act 1973/Overseas Investment Regulations 1985**

The Overseas Investment Act 1973 established the Overseas Investment Commission. The Commission comprises four members; two appointed from the private sector by the Governor-General on the recommendation of the Minister of Finance, the Governor of the Reserve Bank and the Secretary of the Ministry of Commerce. The Commission's functions are to:

- advise the Government on all matters relating to overseas investment in New Zealand;
- determine whether proposals concerning overseas investment are in the national interest and whether any approval, consent, permission or exemption should be granted or refused as regards the investment proposals;
- control the level to which overseas persons may own or control property in New Zealand.

The Commission carries out its functions pursuant to the Overseas Investment Regulations 1985. In accordance with the policy of deregulation, the Regulations were amended in 1989 to raise the threshold for Overseas Investment Commission approval of a transaction to NZ \$10 million except for certain specified sectors (broadcasting, commercial fishing and rural land) which remained subject to tighter controls. Previously, the threshold level was NZ \$2 million. In summary, the effect of the amendment is that an overseas person wishing to invest in New Zealand now only needs to obtain consent from the Overseas Investment Commission for the transactions outlined below.

**Significant Investment:** acquisition or control of 25% or more of any class of shares or voting power in a company where the consideration for transfer, or the value of assets (as set out in the latest accounts), exceeds \$10,000,000.00; commencement of business in New Zealand where the total expenditure to be incurred in setting up the business exceeds \$10,000,000.00; acquisition of the assets of a business where the total consideration paid or payable for the assets exceeds \$10,000,000.00; for a body corporate incorporated in New Zealand, or an unincorporated body of persons, to issue or allot shares to an overseas person when the issue results in the proportion of equity owned by overseas persons increasing, and the body concerned is an overseas person or will become one as a result of the issue, and the total consideration paid or payable exceeds \$10,000,000.00.

**Investment in a "Specified Business":** any investment (regardless of dollar value) by an overseas person in a "specified business" where the investment results in the overseas person/s controlling 25% or more of any class of shares or voting power in the entity; any acquisition of assets (regardless of dollar value) used or proposed to be used in carrying on a "specified business".

The Commission has made it clear that the 25% threshold in relation to acquisition or control of shares is not an indication of preferred levels of investment but is merely a trigger point for involvement.

The criteria used by the Overseas Investment Commission when considering applications for foreign investment are set

according to Government policy. In the past, the criteria were very detailed. However, since 1979 the criteria have been simplified and have concentrated more on net economic benefits to New Zealand. In determining the economic benefits of a proposal, the following criteria are taken into account<sup>3</sup>:

- added market competition, lower prices, greater efficiency and enhanced consumer services;
- the introduction of new technology, managerial and/or technical skills;
- the development of new export markets or increased market access;
- the creation of new job opportunities or the retention of existing jobs; and
- the relevant opportunities for current owners to realise their investment to the best advantage and flow-on effects that would accrue from that realisation.

Additional information is required in relation to applications concerning rural land.

Since 1974 there has been a substantial increase in the level of applications by foreigners to buy New Zealand assets. During 1974, 278 applications were approved, compared with 1538 in 1989. A drop was recorded in 1990 when only 424 applications were approved. This has been attributed to the raising of the threshold for the Commission's approval to \$10 million<sup>4</sup>.

As discussed, the specified businesses are broadcasting, commercial fishing and rural land. The controls on commercial fishing relate to fishing within the 200 mile exclusive economic zone but outside New Zealand's 12 mile territorial waters. Generally, a maximum level of overseas ownership of New Zealand based enterprise engaged in commercial fishing of only 24.9% is permitted. There are no restrictions as to the maximum level of allowable foreign ownership in relation to rural land. However, as we have seen, transactions involving the purchase of rural land may be subject to the LSPLA Act<sup>5</sup>.

Part V of the Broadcasting Act 1989 restricted foreign ownership of any broadcasting company to 15% (extended to 25% with the approval of the Minister of Broadcasting in the case of a company that only broadcasts sound radio programmes). In May this year, the National Government repealed Part V, opening the way for 100% foreign ownership of New Zealand television and radio stations. The Government had originally proposed raising the ownership limit to 49% but later decided to lift controls altogether. New Zealand is now the only country in the world with no limits on foreign investment in broadcasting. Controls on foreign ownership in broadcasting are being tightened in Europe and Australia. One of the main reasons for the removal of the limits was to encourage foreign investment in TV3 in an attempt to save the third television station. It was understood that Channel 9 in Australia (owned by Kerry Packer) was interested in investing in TV3 and the receiver for TV3; and its major creditor, Westpac Bank, had constantly lobbied for removal of the foreign ownership limits since the channel went into receivership in May 1990. At this stage, it appears that Channel 9 is no longer interested in investing in TV3 but Westpac has indicated that it is prepared to replace its debt for equity in TV3 in a temporary deal that will also benefit from the foreign investment relaxation.

Notwithstanding the problems of TV3, it is clearly the Government's view that overseas capital and technology is

vital if New Zealand wants to develop a modern broadcasting system. The Government's plan is to keep Television One in state ownership and to sell Television Two and other commercial parts of TVNZ. The removal of foreign ownership restrictions has not been without controversy, and critics of the Government's policy say that 100% foreign ownership of a TV station would lead to undue foreign influence on New Zealand screens. However, the Government believes that foreign investment will lead to a better consumer product and that existing controls (i.e. the Broadcasting Commission, the Broadcasting Standards Authority and viewer response) will prevent cultural domination by any foreign owner<sup>6</sup>.

### Commerce Act 1986

The Commerce Act 1986 introduced fundamental change to the regulation of competition in New Zealand and is one of the most significant examples of the move towards a deregulated investment environment in New Zealand over the last decade. The Act is designed to promote competition in markets in New Zealand and to achieve this by controlling market dominance and prohibiting practices substantially lessening competition. Some of the major changes introduced by the Act were<sup>9</sup>:

- a move away from direct intervention by Government agencies, e.g. the introduction of private remedies (actions for damages or injunctions) and the re-introduction of the High Court as the forum for the determination of restrictive trade practice matters;
- emphasis on the economic substance of conduct rather than its strict legal form;
- abolition of ancient and inoperative trade practices, i.e. "hoarding" and "profiteering";
- retention of the existing prenotification system for mergers and takeovers, but with significantly higher financial thresholds (increased fivefold);
- abolition of the extensive monopoly provisions of the Commerce Act 1975 in favour of a new misuse of dominant position trade practice concentrating on purposive monopoly conduct rather than monopoly structure; and
- abolition of the 1947 price control regime.

The Act is the New Zealand equivalent of United States anti-trust law and in keeping with both the spirit and letter of the CER Agreement, the legislation draws heavily from the Australian Trade Practices Act 1974. This is significant with regard to foreign investment, as Australians have traditionally been the largest foreign buyer of New Zealand assets.

Substantial changes have been made to the business acquisition (mergers and takeovers) provisions (Part III) of the Commerce Act 1986 by the Commerce Amendment Act 1990. These provisions came into force on 1 January 1991. The amendments introduce a voluntary prior clearance and authorisation system. Under this system, parties to a proposal must themselves assess the competitive consequences of their proposal. They may seek clearance voluntarily or simply proceed with the merger or takeover, but if dominance exists then proceeding without clearance will be at the risk of prosecution by the Commission. The essential factor is the acquisition or strengthening of a dominant position in a market, and the industry activity and the value of the business assets or shares are no longer relevant. The Commission may grant a clearance or authorisation where there are no

concerns as to dominance or where the Commission perceives a public benefit. In considering public benefit, the Commission is to have regard to any efficiencies that will result or be likely to result from the acquisition. Overall, the amendments reinforce two primary objectives of the legislation, i.e. less direct intervention and emphasis on the economic substance of the conduct in question.

### **Income Tax Provisions**

For many years, non-residents have been required to pay non-resident withholding tax on certain classes of income derived from New Zealand, namely, dividends, royalties and interest. Non-resident withholding tax is a final tax calculated at 30% on dividends and 15% on all other classes. With regard to dividends, no credit or reduction to the tax is allowed for imputation credits. New Zealand has a number of double tax agreements with other countries which reduce the rate of non-resident withholding tax (i.e. on dividends to 15%) and also contain other provisions which are advantageous to foreign investors i.e. altering the incidence of income tax which may be payable in terms of the New Zealand Income Tax Act so that non-residents are only liable for tax in their own countries.

Notwithstanding the double tax agreements, resident withholding tax has been a deterrent to foreign investors. In particular, Australian companies have indicated that they face severe tax penalties by investing in New Zealand<sup>11</sup>. It is significant therefore that with effect from 1 August 1991, the Government has exempted interest from non-resident withholding tax. In theory, this should remove a major impediment to foreign investment in New Zealand although similar moves have not been made in respect of dividend payments or royalty payments (the Government is reviewing the situation with regard to dividend payments). The Government has also announced that it is concerned that double tax agreements have fallen out of step with current policy, and New Zealand's economic environment. It is intended that a review of double tax agreements will be carried out with major trading partners, particularly Australia. In addition, the Government has announced that it will be considering other changes in respect of the international tax regime.

### **Exchange Control Regulations/Import Licensing/ Customs Duties**

In line with the policy towards deregulation of the investment environment, Exchange Control Regulations which were in force during the 1970s and 1980s have now been totally removed. New Zealand has a floating, fully convertible exchange rate and there is no control on foreign exchange. There are no limits on the full remittance overseas of profits and capital by foreign investors.

In addition, import licensing and customs duties are being progressively phased out. All import licensing will cease with effect from 1 July 1992 and ultimately customs duties may also be removed altogether.

## **Recent Examples of Foreign Investment in New Zealand**

### **Forestry**

During the past 2 years the Crown through its agent, the Forestry Corporation, has been involved in selling New Zealand's 540,000 hectares of forests and associated assets.

Both the previous Labour Government and the present Government have actively encouraged foreign investment in the forestry sector, and they have estimated that forestry needs up to \$7 billion in new investment over the next 20 years to make maximum use of the industry's growth potential. The current Minister of Forests has said that the Government is seeking to create a climate of enterprise in which productive industries could flourish unassisted, and that the Government would act as a facilitator of foreign investment in the forestry sector<sup>12</sup>. The Government feels that processing development and plant expansion has been held in check by a lack of capital, and foreign investment is therefore essential. The Government is promoting the available investment opportunities to overseas investors and is working on bringing together farmers with suitable land and people looking for attractive investments. The Minister has said that New Zealand has up to 3,000,000 hectares of land suitable for forestry, giving it a large scope to capitalise on the growing world demand for radiata pine<sup>13</sup>.

The Japanese have shown particular interest in New Zealand's radiata pine to supply their plywood manufacturing industry. Already, Japanese companies have acquired substantial forestry assets in Hawkes Bay, Wairarapa and Northland. In January this year, the Overseas Investment Commission approved the sale of the Kaitaia Triboard Mill (Northern Pulp Mill) to a Japanese consortium. Approval was given despite the fact that a Muriwhenua Consortium led by the Hon. Matiu Rata put in a late bid (\$1.2 million in excess of the Japanese bid) and lodged an objection to the Japanese purchase with the Commission. The Muriwhenua consortium were concerned that the Japanese consortium already owned the Aupouri Forest in Northland and that if it owned the mill it would end up controlling all the region's forests. In addition, the Muriwhenua consortium felt that job retention at the mill would be stronger under New Zealand ownership. However, the Japanese consortium has apparently given an assurance that it will employ local people and that it intends to increase output at the mill. Last year, the Japanese consortium purchased 45,000 hectares of state forest and it plans to build mills near Gisborne and Masterton. In addition to the interest shown by Japanese investors, a Chinese based group has recently purchased 22,000 hectares of coastal Otago forests. Foreign companies now own more than 10% of New Zealand's commercial forest resources.

However, there is a legitimate concern in the community that foreign buyers are more interested in merely logging and exporting timber rather than processing it in New Zealand. This is potentially damaging to New Zealand, because there is no investment in processing and therefore there are no downstream benefits for the New Zealand economy, i.e. employment opportunities. It is apparent that the Japanese find it more profitable to export logs to Japan for processing. One of the reasons for this may be that the Japanese Government subsidises domestic sawmilling. The Government is currently investigating this issue<sup>14</sup>.

### **Sale of Telecom**

In June 1990 the Labour Government sold the national telecommunications company to a consortium including two giant American telephone firms, Ameritech and Bell Atlantic. The Government stated that the sale was essential to meet debt-reducing goals and that foreign investment was highly desirable because it would have to accept a

considerably lower price and a spread sale over several years if all of Telecom were sold domestically<sup>15</sup>. The American companies originally purchased 100% of the shares in Telecom and agreed to sell 40.1% of the shares in an international float in at least two stages. The first stage of the float took place earlier this year. The other 10% of the shares will be purchased by the other members of the consortium, Freightways and Fay Richwhite over the next three years.

The Government has retained a single "Kiwi Share" separate from all ordinary shares and carrying no voting rights or dividends. The Kiwi Share can be used to enforce the customer service pledges written into Telecom's Articles of Association prior to the sale. The Kiwi Share can also be used to ensure that the identity of all major shareholders is known and that no shareholder owns more than 49.9% of the company. There has been criticism of the fact that the guarantees written into the Articles of Association are not legally binding. However, if the guarantees are broken, the Government can introduce regulations to enforce them.

New Zealand is not unique in selling its national telephone company. Britain sold 50.2% of the shares in British Telecom in November 1984 for £4 billion. Japan and Chile have followed suit and other countries planning sales include Mexico, Argentina and Bangladesh. However, all other countries to date have sold their companies in stages to ensure the widest possible spread of shareholding and most have kept at least a minority Government stake. New Zealand has given foreign shareholders effective control although the consortium has promised that a majority of the directors must be New Zealanders.

#### **Tourist Hotel Corporation/Wairakei Golf Course**

In June 1990, the Labour Government sold the state-owned Tourist Hotel Corporation (THC) to the Sydney-based Southern Pacific Hotel Corporation. Previously, the Government had turned THC into a limited liability company through the Tourist Hotel Corporation Act 1989. This indicated that the Government was preparing to sell the Corporation in one transaction rather than dispose piece-by-piece, and it was understood that a Japanese company, EIE Developments Limited, had shown interest. The sale made the Southern Pacific Group the biggest hotel chain in the country (the Group also manages the eight ParkRoyal and Travelodge Hotels in New Zealand).

Two Maori groups also lodged bids for THC. Maori International and the Ngai Tahu Tribe. The bids lodged by these groups were significantly less than the \$73,000,000.00 sale price. The Maori groups claimed that the ground rules for bidding were changed many times and it was impossible to keep up with what was required. The groups claimed that their bids were never taken seriously by the Government. The Royal Forest and Bird Protection Society was concerned about the sale of the hotels to an overseas company with little interest or experience in local conservation and environmental issues. The Society was specifically concerned about three hotels in national parks in the South Island and the possibility of development of land surrounding the hotels.

Following the sale of THC there was a dispute later in 1990 over the proposed sale of the Wairakei Golf Course (one of the assets of THC) to the Tokyo-based Japan Golf Systems. The Overseas Investment Commission approved the sale, but the then Minister of Lands used his power under the LSPLA Act to block the sale. The Minister said that

uncertainty about Japan Golf System's eventual plans for the course was a factor in blocking the sale. The main concern was that the Japanese company planned to use the course as a status symbol and that this could eventually lead to the course being out of reach of the New Zealand public. The Minister stressed that the Government favoured foreign investment in New Zealand but agreed that a line would have to be drawn from time to time around precious places such as Wairakei<sup>16</sup>.

The decision by the Labour Government apparently caused adverse comment in Japan, particularly since the golf course was already in foreign ownership, having been purchased by Southern Pacific Hotels Corporation. The Minister of Lands had no jurisdiction under the LSPLA Act to block the sale of the golf course to Southern Pacific Hotels Corporation, because that was a transfer of shares in a company rather than a transfer of title to the land. This is an example of one of the major anomalies in the legislation governing land sales to foreigners. I discuss proposals for reform of this legislation in the next section of this paper.

Following the 1990 General Election, Japan Golf Systems Limited made a further application to the new Minister of Lands for approval of the transaction. The sale of the golf course was approved. The Minister of Lands said that jobs, investment and an enhanced perception of New Zealand were factors in his decision to approve the sale<sup>17</sup>. The Japanese company made several voluntary commitments including: pledging to ensure that half the players using the course were New Zealanders; to attempt to attract international tournaments to the course; to provide work for New Zealanders and to spend at least \$5,000,000.00 developing the course. However, there has been criticism of the Government's decision (including Government MPs) and doubts over the effectiveness of the four voluntary promises made by Japanese Golf Systems as these are not legally enforceable contractual conditions. Critics have said that the Government should look more closely at the national interest rather than the highest price<sup>18</sup>.

#### **Hauraki Gulf Islands**

As discussed earlier in this paper, the sale of islands to foreign investors is one of the "sensitive" areas under the LSPLA Act which require the consent of the Minister of Lands in conjunction with the Minister of Finance. However, two recent transactions involving islands in the Hauraki Gulf have exposed serious deficiencies in the current legislation and raised questions about the Government's foreign investment policy and the need to maintain adequate safeguards in order to protect certain areas.

The first transaction involved Kaikoura Island; a 567 hectare uninhabited island, west of Great Barrier. This was sold to two Honolulu based investors in a series of transfers which went undetected by any official agency in New Zealand. The sale price was \$2.47 million. Overseas Investment Commission approval was not required because consents are only needed for rural zoned land and purchases which exceed \$10,000,000.00. Approval under the LSPLA Act by the Minister of Lands was unnecessary because the island was purchased as a result of a transfer of shares in a shelf company and the LSPLA Act does not cover transfer of assets by the sale of shares in a company.

The second transaction involved 24 hectare Pakatoa Island which was owned by Pacer Kerridge Tourism Limited,

part of the Pacer Kerridge Corporation. This was sold to a group of German investors (Gecco Venture Trust Ltd). The sale was approved by the Overseas Investment Commission and came before the Minister of Lands for his consent under the LSPLA Act. The Minister approved the sale on the basis of the following conditions<sup>19</sup>: that public access to the beaches of Pakatoa Island would be guaranteed; the purchasers would spend at least NZ\$10 million over the next 2 years to improve tourist facilities; the purchasers would expand staff levels from 27 to 40 within 18 months and make certain that Pakatoa remains open to New Zealanders. The purchasers also said that they would offer the island to New Zealanders first at any resale. However, subsequently it was revealed that one of the purchasers had been convicted in Germany for embezzling investment funds and was still under investigation by the German police. The Minister of Lands froze the sale pending an investigation and the matter is still unresolved. The purchaser is now facing immigration charges. It is clear that relevant information on the background of the purchasers was not before the Overseas Investment Commission or the Minister of Lands at the time the consents were given.

## Current Proposals for Legislative Reform

### Foreign Investment in New Zealand Land

The Government has recognised that although foreign investment has increased in some high-profile areas such as commercial property and state-owned enterprises/assets, there is a view in the business community that New Zealand could do more to attract a greater share of foreign investment. The Minister of Lands has stated that the Government wishes to provide a more welcoming climate for foreign investors and this includes the land sector. However, the Minister has also recognised that New Zealanders have a special association with their land and therefore safeguards should be put in place to ensure effective scrutiny and monitoring of land sales, especially areas having significant location or reserve/recreational value<sup>20</sup>. The public concern behind the enactment of Part IIA of the LSPLA Act in 1968 is still relevant today.

The Minister has expressed concern about the deficiencies that have been exposed in the legislation controlling the sale of land to foreign investors. In particular, the Minister has identified the following concerns<sup>21</sup>:

- lack of clear criteria and guidelines;
- the fact that land sales to foreign investors can require consents under three Acts (the Overseas Investment Act, the LSPLA Act and, in some cases, the Land Act 1958)—in each case, a different body is required to give consent on the basis of different criteria;
- the existing legislation does not provide for effective monitoring of the quantity or quality of land being sold and details of purchasers;
- the existing legislation contains loopholes which allow some transactions to escape any scrutiny; and
- the existing legislation does not provide for enforceable conditional consents with penalties for non-compliance.

The Minister has proposed new legislation to clarify and tighten up the rules governing land sales and to encourage

further suitable investment. The salient features of the proposals are<sup>22</sup>:

- to establish a single land holding management agency to administer the policy of foreign land sales (this would amalgamate the relevant functions under the Overseas Investment Regulations, the LSPLA Act and the Land Act);
- the agency would hold decision-making powers subject to Ministerial discretion. The Minister believes responsibility for decisions to sell "sensitive" land should rest with the Government;
- alternatively, to ensure issues are dealt with objectively, the whole matter could be removed from the political arena into a more neutral agency similar to the current Overseas Investment Commission;
- any changes should be simple and transparent to benefit both foreign investors and New Zealanders. However, the loopholes in the current legislation should be closed to ensure that all land sales (and purchasers) are subject to monitoring and scrutiny;
- the new agency should be able to impose enforceable conditions on consents and there should be penalties for non-compliance;
- criteria for sales of land to foreigners should be simplified and guidelines should be available to prospective investors. The agency should only have to ensure that there are significant benefits to New Zealand provided by the sale whether they be economic, technological or trade-related; and
- information on transactions and conditions that are imposed on consents should be readily available to the public.

The proposals put forward by the Minister are currently being debated by politicians and interest groups. It is clear that there are different opinions both in the business sector and in Government. For instance, there is a view that the existing system is discouraging foreign investment and that there should be no rules limiting foreign investment in land (even "sensitive" areas). The Secretary of the Overseas Investment Commission has stated that if the Government abolishes the current system in relation to rural land and sets up a single consent authority, the Commission would lose 20% of its work. The Secretary has said that a separate body would suggest to foreign investors that land purchases were less welcome.

In my view, the changes proposed by the Minister would speed up the consent process and make it less confusing for foreign investors. Clear guidelines and a single consent agency must be more attractive than the current system. However, the closing of existing loopholes and the imposition of enforceable conditions on consents may be a disincentive to prospective investors. More transactions would be subject to scrutiny and investors may be reluctant to agree to binding conditions which are subject to penalties for non-compliance. In addition, the continued involvement of the Government may be a disincentive to some foreign investors, particularly the Japanese.

The Minister has indicated that officials are reviewing the current legislation with a view to introducing changes this year. It is understood, at this stage, that new legislation will not be introduced until next year.

## Foreign Investment in the Oil Exploration Industry

Foreign investment has always been a feature of the New Zealand oil exploration industry because of the capital intensive/high risk nature of the industry and the inability of New Zealand-based organisations to fund the exploitation of the resource. Government policy has generally been to encourage foreign investment in this area to ensure that New Zealand has an indigenous energy base and a reasonable level of liquid fuels self sufficiency, e.g. Petroleum Act 1937 was enacted to resolve land access, negotiating problems and ownership questions which the Government considered were deterring explorationists from New Zealand<sup>23</sup>. An analysis of the participating interests held in petroleum prospecting licences as at 10 June 1991 shows that overseas investors hold significant interests in a high percentage of the current licences<sup>24</sup>.

During the last two years however, several legislative reforms have been introduced which may act as a disincentive to petroleum exploration in New Zealand.

Firstly, new petroleum mining tax regime commenced on 1 October 1990. The new regime introduced a number of significant changes in the treatment of the deductibility of costs of petroleum exploration and production. The industry (in particular members of PEANZ) have reacted against this new legislation and have criticised aspects of the regime as being penal and discriminatory. One commentator has calculated that an offshore find that was commercial under the old tax system would now have to be 30% larger to make it a realistic possibility for development<sup>25</sup>. Critics of the regime believe that it makes New Zealand a relatively unattractive proposition for exploration investment. They say that this is particularly regrettable because without a significant new hydrocarbon discovery, the next few years will see the gap between demand for oil and indigenous supply start to widen rapidly.

Secondly, the Resource Management Act and the Crown Minerals Act were enacted earlier this year and came into force on 1 October 1991. The Crown Minerals Act is particularly relevant to oil exploration as it repeals most of the Petroleum Act 1937 and introduces a new regime for the management of Crown-owned minerals. Features of the Act are: the introduction of Minerals Programmes which will define the policies, procedures and provisions to be applied in the management of specific resources; the introduction of a new permit system to replace licences; the introduction of a new system of obtaining access to land. The Resource Management Act introduces the principle of "sustainable management" of natural resources. The Government has determined that the allocation of minerals will not be determined by this principle. However, anything else to do with the extraction and use of those minerals will be covered by the principle and, therefore, the adverse effects of mining and the negative effects of minerals use will be controlled under the Resource Management Act. These reforms have also drawn widespread criticism from the industry. Commentators say that foreign investors will be deterred because the reforms destabilise the legislative regime, introduce uncertainty and transfer too much power to landowners and conservation groups.

In accordance with its general policy on foreign investment in areas requiring development, the National Government has indicated that it wishes to encourage further

investment in oil exploration in New Zealand. The Minister of Energy has stated that although the Crown (as resource owner) has a right to a fair financial return and maintenance of its options to determine its involvement in the exploitation of the resource, there must be ample opportunity for private interests to explore for oil and to secure an attractive return on their investment. In this regard, the Minister has stated that the recent changes in petroleum exploration taxation are discriminatory against further exploration for petroleum products in New Zealand and he has given a commitment that the Government will review the legislation with a view to ensuring continued exploration and development in the oil industry<sup>26</sup>. At this stage, no proposals for amendments to the legislation have been put forward by the Government.

With regard to the Resource Management Act and the Crown Minerals Act, the Government believes that these reforms are necessary to create a more holistic approach to resource management and to introduce legislation which is consistent for the allocation and use of all minerals. The aim of the Minerals Programme is to introduce more certainty and information about the processes managing mineral resources allocation and use. In relation to access to land, a distinction has been made between petroleum mining and mining of other minerals, i.e. the landowners right of veto will not apply to petroleum mining. This distinction recognises the lower impacts of petroleum mining on the environment. It remains to be seen whether these reforms will act as a disincentive to investment in oil exploration in New Zealand as envisaged by members of the industry: It is worth nothing, however, that international oil companies are used to working under similar resource law regimes in places such as Alaska and these regimes do not appear to have discouraged investment.

## Conclusions

Government recognises that New Zealand cannot generate enough investment from its own resources to finance the development which need to be undertaken in tourism, forestry, property ownership and industry generally. Therefore, the Government is pursuing a policy of actively encouraging foreign investment in relevant sectors of the New Zealand economy. Foreign investment is encouraged in a variety of ways, i.e. the purchase of company shares, the purchase of companies, purchase of real estate, joint ventures, leasing partnership and individual ownership. This policy has led to legislative reforms in a number of areas in order to reduce controls and create a more "welcoming climate" for foreign investors. In relation to land, the Government has recognised that there is still a need to maintain safeguards in order to protect "sensitive areas" and new legislation has been proposed to encourage further overseas investment and to ensure effective monitoring and scrutiny of transactions.

In relation to oil exploration, recent legislative reforms in the areas of tax and resource management have been criticised as being discriminatory and introducing a climate of uncertainty into the industry which will act as a disincentive to foreign investment. The National Government has stated that it is committed to encouraging further exploration and development of New Zealand's natural petroleum resources and it is undertaking a review of the current petroleum tax regime with a view to ensuring further exploration. The new resource management regime has been modified in several areas by the National Government and it remains to be seen whether it will affect the level of foreign investment in the industry.

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