

The Treasury

Overseas Investment Act Submissions Information Release

December 2019

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- [3] 6(b)(i) - to avoid prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the Government of any other country or any agency of such a Government
- [23] 9(2)(a) - to protect the privacy of natural persons, including deceased people
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24 May 2019

Overseas Investment Act Reform
The Treasury
PO Box 3724
Wellington 6140

SUBMISSION MADE IN RESPECT OF THE CONSULTATION DOCUMENT ('REFORM OF THE OVERSEAS INVESTMENT ACT 2005')

This submission relates to a particular client of this firm and is intended to illustrate the reality of issues that the Act and its Regulations in their current form present to New Zealand business.

In brief:

1. Our client owns underlying land interests for cell phone towers owned by Spark, Vodafone and other Telcos.
2. The underlying land interest held by our client in general comprises a freehold interest in the area leased by the Telco, typically an area of perhaps 200m² to 400m².
3. The areas owned by our client are not subdivided (in the conventional sense) but are held under a tenant in common arrangement with the landowner from whom our client acquires the interest, with encumbrance and covenant arrangements that mimic a subdivision in practical terms but not in legal terms. They equate in essence to a separate and distinct utility site.
4. This ownership structure has been tested in the Courts, right up to the Court of Appeal which determined that it is not a "subdivision" as defined in section 218 of the Resource Management Act, but in practical terms operates in that way so that our client only ever has control over the small parcel of land beneath the tower.
5. Our client is 100% New Zealand owned, principally by two private investors, and the purpose of the business is to accumulate such sites for the benefit of the rents that accrue from the Telcos over the long term. Investment in such assets is new to New Zealand, but is well-established in other countries. This particular ownership structure has the advantage of not requiring expensive and time-consuming subdivision requirements that could render the acquisition of such sites from private land owners uneconomic and thus reduce the ability to introduce new capital into these assets.
6. However, the technical effect of tenant in common ownership means that if the landowner's total land area exceeds 5ha or is otherwise "sensitive land" then the interest held by our client in, for example, 200m² of land, is deemed in itself to comprise sensitive land, and therefore any investment by an overseas person either comprising 25% or more of our client's shares or any other interest in our client or its landholdings would require OIO consent.
7. The outcome is that if an overseas person wanted to take an interest in our client or acquire any of its assets, the unfortunate fact is that not only would the cost of that application be substantial (as all OIO applications have become because of the complexities that have developed, particularly in more recent years), but the current substantial time taken for any decision to be forthcoming (and with complete uncertainty in the meantime) is a potential barrier for overseas investment.
8. In summary, the issues that provide barriers in this case in respect of potential overseas investment (which is no threat to actual "sensitive land") are:

- (a) inflexibility in the definition of sensitive land;
- (b) cost and complexity of OIO applications; and
- (c) (most importantly), the excessive amount of time taken and the uncertainty that creates, meaning unnecessary impediments to valuable overseas investment in this business and in these assets.

A simple change to the current terms of the Act that would address this issue is to exempt an interest in land such as the interest held by our client, which technically can come within the definition of "sensitive land" but in practical (and in fact legal) terms does not confer an effective interest in anything more than the small parcel of land under the tower. This would facilitate investment from overseas in an area where capital investment needs to be encouraged, including with impending intensive capital investment in telecommunications infrastructure that will be required with 5G developments.

We would be happy to provide more detail and information if requested.

Yours faithfully
BROWN PARTNERS



John Brown
Partner

ddi: [23]
email: