

## Overseas Investment Office quarterly update – solar and wind farms

### The Overseas Investment Office (OIO) recently presented its quarterly update with particular regard to renewable projects under the Overseas Investment Act 2005 (Act). Some of the key takeaways are set out below.

#### Investments in sensitive land for solar or wind

Investments in “sensitive land” for a solar or wind farm will need to meet the following criteria:

- **The investor test:** This ensures that the overseas investor is suitable to own or control sensitive New Zealand assets, by assessing whether they are likely to pose risks to New Zealand, based on factors relating to their character and capability.
- **The benefit to New Zealand test:** This test reflects the key principle of the Act, which is that it is a privilege to own or control land in New Zealand. This test ensures that the investment will benefit New Zealand across seven categories: economic benefit, environmental benefit, retained or increased public access, protection and access to historical sites, advancement of significant Government policy, participation and / or oversight by New Zealanders and other flow on benefits. All solar and wind farm investments generally result in similar benefits, such as:
  - increased capital investment during development of the land;
  - large increases in temporary jobs during the construction phase and smaller increases of permanent jobs for the ongoing operation of the project;
  - supplying energy to the national grid (powering homes), improving energy security / reliability for New Zealand; and

- advancing significant government policies relating to climate change and renewable energy.

The above benefit claims (which fall within the economic benefit and advancement of significant Government policy benefit factors) have all previously been accepted by OIO as substantial and identifiable benefits to New Zealand.

- **Modified benefit test:** In addition to the OIO's analysis under the benefit to New Zealand test, where the subject land includes farm land exceeding 5ha, the transaction will also need to meet the modified benefit test. The modified benefit test requires the participant to demonstrate that the proposed economic benefits and participation and / or oversight by New Zealanders benefits resulting from the transaction are substantial, noting that each of these factors will be given high relative importance by the OIO in assessing this additional test.
- **The farm land advertising test:** This ensures that any farm land (of which is the type of land commonly acquired for solar or wind farms) has been advertised on the open market to non-overseas persons. More on this below.
- **The national interest test:** The Act provides for an application for consent to a "transaction of national interest" to be declined if it is "contrary to the national interest". The OIO considers that an acquisition in a solar or wind farm is deemed a transaction of national interest where the development's output in energy will exceed 250MW, or will increase existing production to over 250MW. In the absence of overseas government ownership in the applicant (including the applicant's upstream investors), the acquisition of an interest in land on which a solar or wind energy development is to be undertaken is not to be considered a "transaction of national interest" unless the development is expected to involve electrical generators with a total capacity exceeding 250MW.

#### Land tenure

Investors must secure enduring rights to land in order to develop a solar or wind farm. To date, most investors the

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OIO have dealt with have relied on long term leases (30+ years), though some have also sought to proceed on the basis of easements.

### Leases

- A lease will require consent where the leased land is "sensitive land" and the interest in land is for a total term that exceeds ten years (including right to renewal periods) or three years if the land is residential.

### Easements

- Easements are exempted interests under the Act and therefore the acquisition of the benefit of an easement does not require consent under the Act. For this reason, investors often look to use easements to secure tenure for their solar or wind operations.
- The OIO has stated that an arrangement will only be considered an easement if the arrangement is not extensive or invasive enough as to remove the landowner from the enjoyment and control of the relevant land.

Where the OIO deems that an agreement is *more* than an easement, regardless of what form the agreement is in, the OIO will treat the agreement as a lease and consent under the Act will be required. The OIO will ultimately take a 'substance over form' approach.

Generally speaking, we understand the rights required by a developer of a large-scale solar farm will be considered by the OIO as more than can be validly accommodated by an easement. However, the rights required by a developer of a large-scale wind farm might be able to operate under an easement. This is due to the nature of each of these developments and how much land is required for such developments respectively.

The OIO provided the following examples:

- *Intensive solar farm on a dairy farm:*

- A 400ha dairy farm is proposing to grant an easement over 350ha of the land for solar panel use.
- This is likely not a valid easement, and OIO consent would be required as the landowner's enjoyment and control of the land is heavily impacted and the dominant use of the land would be the solar farm.
- *Rooftop solar farm on industrial land:*
  - A building owner is granting an easement for solar panels to be built on the roof of their factory, with power being sold back to the factory and the national grid.
  - This is likely a valid easement as there are minor restrictions to the owner's enjoyment and control of the land, and the factory remains as the dominant use of the land. OIO consent would not be required.
- *Windfarm on rural land:*
  - A 1,000ha farm is proposing to grant an easement for 90 large turbines, with 0.25ha of land used per turbine.
  - This is likely an easement, and therefore would not need an OIO consent, as there is minimal restriction on the landowner's enjoyment and control of the land.

### Farm land advertising exemption (FLAE)

- "Farm land" must be offered for acquisition on the open market before being sold to overseas persons. However, in respect to solar and wind farms, investors typically want to secure the right to develop the land before committing to the time and cost of due diligence. This is at odds with the advertising requirement.
- For this reason, investors commonly apply for a FLAE and seek approval from the OIO to exempt an investment from the advertising requirements under the Act based on the circumstances of the investment or the nature of the land.

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- Applications for FLAEs are best made in advance to an application for consent.

### Want to know more?

If you have any questions about any of the above updates, feel free to get in touch with our specialist [property team](#).