



BELL GULLY



Overseas Investment Act 2005

FEBRUARY 2006

CONTENTS

Introduction	2
1 Categories of investment requiring consent	3
2 Overseas investment in sensitive land	4
3 Overseas investment in significant business assets	6
4 Overseas investment in fishing quota	7
5 Who is an “overseas person”?	8
6 Applications for consent	9
7 Criteria for overseas investment in sensitive land	10
8 Criteria for overseas investment in significant business assets	12
9 Criteria for overseas investment in fishing quota	13
10 What if required consent is not obtained?	14
11 The “Regulator” – the Chief Executive of LINZ and the Overseas Investment Office	15
12 Offences	16
13 Overseas Investment Regulations 2005	17
14 Further information/assistance	18
15 Appendix	20

Disclaimer

This publication has been prepared for clients and professional associates of Bell Gully. While every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions. The information contained in this guide should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in specific cases. If advice concerning individual problems or other expert assistance is required, the service of a professional advisor should be sought.

Copyright

Copyright in this guide is owned by Bell Gully. This guide may not be copied in whole or in part without prior written approval.
© January 2006

INTRODUCTION

Legislation relating to overseas investment in New Zealand balances “privilege for overseas persons to own and control sensitive New Zealand assets” against desire to encourage positive foreign contribution to the New Zealand economy.

The **Overseas Investment Act 2005** came into force on 25 August 2005. It replaces the Overseas Investment Act 1973 and the associated regulations.

The Act re-enacts a number of the requirements of the previous regime governing investment by overseas persons in New Zealand assets, but also introduces a number of amendments.

This booklet comprises a simple outline of the key aspects of the Act – a base checklist for determining if consent may be required for any proposed investment. The Appendix sets out a flow chart providing an overview of the tests for determining if consent may be required. Once a preliminary assessment has been made that consent may be required, reference should be made to the specific terms of the Act and associated regulations.

1 CATEGORIES OF INVESTMENT REQUIRING CONSENT

The Overseas Investment Act 2005 (the Act) applies to three categories of investment transactions by overseas persons:

- sensitive land;
- significant business assets; and
- fishing quotas.

It requires consent to be obtained for a transaction before the overseas investment is given effect under the transaction. A transaction may be entered into conditional on consent being given under the Act, as long as it does not become unconditional without such consent having been obtained.¹

¹ It is possible to apply for retrospective consent subject to payment of an administrative penalty.

2 OVERSEAS INVESTMENT IN SENSITIVE LAND

An *overseas investment in sensitive land* is the acquisition by an overseas person (or an associate of an overseas person) of either of the following:

- A direct interest in certain land

An interest in land if:

- (a) the land is *sensitive* under Part 1 of Schedule 1 of the Act, namely:

- (i) the land is or includes:

- non-urban land (being farm land; or any land other than land in an urban area that is used for commercial, industrial, or residential purposes) exceeding² five hectares in area;
- land on certain specified islands exceeding² 0.4 hectares in area;
- any land on other non-specified islands;
- foreshore and/or seabed;
- bed of a lake exceeding² 0.4 hectares in area;
- land held for conservation purposes or to be used as a reserve, public park, open space or for recreation purposes, land subject to a heritage order or any historic place or wahi tapu area; in any case exceeding² 0.4 hectares in area; or

- (ii) the land adjoins any:

- foreshore and the land exceeds² 0.2 hectares in area;
- other sensitive land such as the bed of a lake, certain land held for conservation purposes, reserve land, regional or public park land, certain land adjoining the sea or a lake, land subject to a heritage order or including an historic place or wahi tapu area; where the land exceeds² 0.4 hectares in area;

and

- (b) the interest acquired is a freehold estate, or a lease or any other interest for a term of three years or more (including rights of renewal) but not including easements or profits á prendre.

- Securities giving indirect interest in sensitive land

Rights or interests in securities of a person (A) if A owns or controls (directly or indirectly) an interest in sensitive land as described above and as a result of the acquisition:

- (a) the acquirer has a 25% or more ownership or control interest in A; or

² Either alone or together with any associated land (defined term) of that type.

- (b) the acquirer has an increase in an existing 25% or more ownership or control interest in A; or
- (c) A becomes an overseas person itself.

3 OVERSEAS INVESTMENT IN SIGNIFICANT BUSINESS ASSETS

An *overseas investment in significant business assets* is any of the following by an overseas person (or an associate of an overseas person):

- The acquisition of rights or interests in securities of a person (A) if:
 - (a) as a result of the acquisition, the overseas person (or associate) has a 25% or more ownership or control interest in A or an increase in an existing 25% or more ownership or control interest in A; and
 - (b) the value of the securities or consideration provided, or the value of the assets of A (or A and its 25% or more subsidiaries), exceeds NZ\$100 million.
- The establishment of a business in New Zealand if:
 - (a) the business is carried on for more than 90 days in any year (consecutively or in the aggregate); and
 - (b) the total expenditure expected to be incurred, before commencing the in business, establishing that business exceeds NZ\$100 million.
- The acquisition of property (including goodwill and other intangible assets) in New Zealand used in carrying on business in New Zealand if the total value of the consideration provided exceeds NZ\$100 million.

4 OVERSEAS INVESTMENT IN FISHING QUOTA

An *overseas investment in fishing quota* is the acquisition by an overseas person (or an associate of an overseas person) of either of the following:

- An interest in fishing quota.
- Rights or interests in securities of a person (A) if A owns or controls (directly or indirectly) an interest in fishing quota and as a result of the acquisition:
 - (a) the acquirer has a 25% or more ownership or control interest in A; or
 - (b) the acquirer has an increase in an existing 25% or more ownership or control interest in A; or
 - (c) A becomes an overseas person.

An interest in fishing quota is:

- provisional catch history, quota, or annual catch entitlement; or
- an interest in that provisional catch history, quota, or annual catch entitlement.

5 WHO IS AN “OVERSEAS PERSON”?

Persons are overseas persons if they themselves fall within the definition or if they are 25% (or more) owned or controlled by an overseas person or persons.

Overseas persons are, principally:

- individuals who are neither New Zealand citizens nor ordinarily resident in New Zealand;
- a body corporate that is incorporated outside New Zealand or is a 25% or more subsidiary of a body corporate incorporated outside of New Zealand; and
- a body corporate, partnership, unincorporated joint venture or other body of persons, trust or unit trust where:
 - (a) 25% or more of any class of shares, the partners or members, or the beneficial interest in or entitlement to the profits or assets of the unincorporated body's or trust's property, is held by an overseas person; or
 - (b) the composition of 25% or more of the governing body, or the right to exercise or control the exercise of 25% or more of the voting power at a meeting, is comprised of or held or controlled by overseas persons.

The Act applies to investment by associates of overseas persons. Associates of overseas persons in relation to an overseas investment include persons controlled or subject to direction by an overseas person, agents or trustees of an overseas person, or persons acting jointly or in concert with an overseas person in connection with an overseas investment.

6 APPLICATIONS FOR CONSENT

Each overseas person or associate making an overseas investment must apply to the regulator³ for consent to the overseas investment transaction.

If the transaction requires consent because of the issue, buyback or cancellation of securities, and consent has not been obtained by the person making the overseas investment, the issuer of the securities must apply for consent.

The regulator may require any other party to the transaction, or any associate of any overseas person making the investment, to be a party to the application.

An application is decided by:

- in the case of a sensitive land decision, the Minister of Finance and the Minister for Land Information (although some decisions are delegated to the regulator);
- in the case of a significant business assets decision (non-land), by the regulator (or the regulator's delegate) (under delegation from the Minister of Finance);
- in the case of a fishing quota decision, the Minister of Finance and the Minister of Fisheries; and
- in the case of a decision that is in more than one of the relevant categories, by all of the Ministers (or delegates) that are relevant to those categories.

Information required for an application

A considerable amount of information is required to be included in any application for consent, for example:

- information about the applicant;
- details of the investment;
- the rationale for the investment; and
- evidence that the investment meets the relevant criteria in the Act.

Additional information is required for applications for an investment in sensitive land.

Timeframe for an application to be processed

The regulator is likely to take between two and three months to process a simple application and significantly longer for a more complex application. The time taken will depend on a number of factors, including the complexity of the application, whether the application involves sensitive land (and, if so, the type of sensitive land) and whether the regulator requires further information from the applicant.

³ See section 11 (The "regulator")

7 CRITERIA FOR OVERSEAS INVESTMENT IN SENSITIVE LAND

The criteria for an overseas investment in sensitive land (either a direct interest or securities giving an indirect interest in sensitive land) are all of the following:

- The overseas person has, or (if that person is not an individual) the individuals with control of the overseas persons collectively have, business experience and acumen relevant to that overseas investment.
- The overseas person has demonstrated financial commitment to the overseas investment.
- The overseas person is, or (if that person is not an individual) all the individuals with control of the overseas person are, of good character.
- The overseas person is not, or (if that person is not an individual) each individual with control of the overseas person is not, an individual of the kind referred to in section 7(i) of the Immigration Act 1987 (which lists certain persons not eligible for exemptions or permits under that Act).
- Either:
 - (a) the overseas person is, or (if that person is not an individual) all the individuals with control over the overseas person are, New Zealand citizens, ordinarily resident in New Zealand or intending to reside in New Zealand indefinitely; or
 - (b) the overseas investment will, or is likely to, *benefit New Zealand* (or any part of it or group of New Zealanders) (*see below*) and, if the relevant land includes non-urban land that in area (either alone or together with any associated land) exceeds 5 hectares, that benefit will be, or is likely to be, substantial and identifiable.
- If the relevant land is or includes farm land, (subject to limited exceptions) either that farm land or the securities to which the overseas investment relates have been offered for acquisition on the open market to persons who are not overseas persons in accordance with the procedures set out in the associated regulations.

Benefit to New Zealand

In assessing benefit to New Zealand, consideration must be had to all the following factors⁴:

- Whether the overseas investment will, or is likely to, result in:
 - (a) the creation of new, or the retention of existing, jobs in New Zealand;
 - (b) the introduction into New Zealand of new technology or business skills;
 - (d) added market competition, greater efficiency or productivity, or enhanced domestic services, in New Zealand; and
 - (e) introduction into New Zealand of additional investment for development purposes.

⁴ The Overseas Investment Office requires an “investment plan” that addresses these benefit factors, at a minimum, including:

- (a) a business plan relating to any business to be undertaken on the land (including major proposed developments, proposed level of Capex and likely business income and expenditure in each of the first five years); and
- (b) reports identifying whether each of the specified factors are likely to be addressed including (if applicable) detail on and conservation plans for indigenous vegetation/fauna, wildlife, historic heritage and walking access; and
- (c) a report identifying the nature of any current business undertaken on the land (including current productivity and gross annual income, operating expenses and net surplus).

- Whether the overseas investment will, or is likely to, result in increased processing in New Zealand of New Zealand's primary products.
- Whether there are or will be adequate mechanisms in place for protecting or enhancing/providing (as applicable):
 - (a) existing areas of significant indigenous vegetation and significant habitats of indigenous fauna;
 - (b) existing areas of significant habitats of certain protective wildlife and providing walking access to those habitats by the public;
 - (c) historic heritage; and
 - (d) walking access over the relevant land by the public.
- If the relevant land is or includes foreshore, seabed or a bed of a river or lake, whether that foreshore, seabed, riverbed or lakebed has been offered to the Crown in accordance with the associated regulations.
- Any other factors set out in the associated regulations, which currently include any consequential benefits to New Zealand, the relevant investor's current or future New Zealand investment position, and matters relevant to New Zealand's trade or international relations and compliance with its international obligations, or to the advancement of significant Government policy or strategy.

When assessing the benefit to New Zealand, the regulator may consult with external organisations, including the Department of Conservation and The New Zealand Historic Places Trust.

8 CRITERIA FOR OVERSEAS INVESTMENT IN SIGNIFICANT BUSINESS ASSETS

The criteria for an overseas investment in significant business assets are all of the following:

- The relevant overseas person has, or (if that person is not an individual) the individuals with control of the relevant overseas persons collectively have, business experience and acumen relevant to that overseas investment.
- The relevant overseas person has demonstrated financial commitment to the overseas investment.
- The relevant overseas person is, or (if that person is not an individual) all the individuals with control of the relevant overseas person are, of good character.
- The relevant overseas person is not, or (if that person is not an individual) each individual with control of the relevant overseas person is not, an individual of the kind referred to in section 7(1) of the Immigration Act 1987.

9 CRITERIA FOR OVERSEAS INVESTMENT IN FISHING QUOTA

The criteria for an overseas investment in fishing quota are all of the following:

- The relevant overseas person is a body corporate.
- The individuals with control of the relevant overseas person collectively have business experience and acumen relevant to that overseas investment.
- The relevant overseas person has demonstrated financial commitment to the overseas investment.
- All the individuals with control of the relevant overseas person are of good character.
- None of the individuals with control of the relevant overseas person are individuals of the kind referred to in section 7(1) of the Immigration Act 1987.
- The interest in the fishing quota is capable of being registered in the Quota Register or the Annual Catch Entitlement Register.
- The granting of consent is in the *national interest* (see below).

National interest

In assessing whether or not an overseas investment in fishing quota is in the national interest, consideration must be had to all the factors listed in section 7 above, and also the following factors:

- Whether the overseas investment will, or is likely to, result in:
 - (a) the creation of new, or the retention of existing, jobs in New Zealand;
 - (b) the introduction into New Zealand of new technology or business skills;
 - (c) increased export receipts for New Zealand or exporters;
 - (d) added market competition, greater efficiency or productivity, or enhanced domestic services, in New Zealand; and
 - (e) the introduction into New Zealand of additional investment for development purposes.
- Whether the overseas investment will, or is likely to result in increased processing of New Zealand fish, aquatic life or seaweed.
- Any other factors set out in the regulations or that the Minister of Finance and the Minister of Fisheries, having regard to the circumstances and nature of the application, think fit.

10 WHAT IF REQUIRED CONSENT IS NOT OBTAINED?

A transaction for which consent is required under the Act and under which the overseas investment has been given effect without that consent does not constitute an illegal contract for the purposes of the Illegal Contracts Act 1970 of New Zealand and is not void only because the overseas investment has been given effect to without the requisite consent. However, the transaction *may be cancelled* by a party to the transaction who was not required to obtain consent, by giving notice in writing to all the other parties; or by the court, on application of the regulator.

On cancellation, the court may order the transfer of property to another person, payment of any monetary amount or specific performance or injunctive relief. If the court orders cancellation on the regulator's application, the court may also make any other order necessary to give effect to the cancellation.

Additional forfeiture and other remedies relating to fishing quota

In addition to the above, an overseas person that does not obtain consent when required in respect of fishing quota has no entitlement to be allocated provisional catch history, and any provisional catch history allocated must be cancelled by the Chief Executive of the Ministry of Fisheries.

Further, if the Chief Executive believes on reasonable grounds that a person (A) has been registered as the owner of an interest in fishing quota without obtaining consent when required, the Chief Executive may direct that a caveat be registered over that interest in the fishing quota and give written notice to that person of forfeiture of the interest in the fishing quota unless application is made to the High Court of New Zealand within a specified period for a declaration whether A is an overseas person. If no such application is made, the fishing quota is forfeited to the Crown, without compensation. If an application for a declaration that A is an overseas person is made, and the court declares them to be an overseas person, the court may order that the relevant interest in the fishing quota be forfeited to the Crown without compensation or alternatively order disposal by A of the relevant interest within a specified time period.

⁵ See also section 12 (Offences)

11 THE “REGULATOR” – THE CHIEF EXECUTIVE OF LINZ AND THE OVERSEAS INVESTMENT OFFICE

Pursuant to the Act, the Overseas Investment Commission has been replaced by the Overseas Investment Office, a dedicated unit within Land Information New Zealand (**LINZ**). The Overseas Investment Office’s functions (under delegation from the Chief Executive of LINZ, as the regulator) are:

- to consider each application and advise the relevant Minister or Ministers on how the application should be determined (or itself determine application under delegation); and
- to exercise any other powers or functions that have been delegated under the Act or any associated regulations.

The Overseas Investment Office also monitors on an ongoing basis compliance with conditions of any consent⁶, issues guidelines when necessary, provides general information for the benefit of applicants for consent, and does anything else necessary for the efficient operation of the rules relating to overseas investment in sensitive New Zealand assets.

⁶ This can include requiring a consent holder to provide (regularly) information relevant to, and/or a statutory declaration verifying, compliance with the conditions of consent. Note also, generally, any plans and representations submitted with an application for consent will become conditions to the consent, requiring compliance with such plans/representations.

12 OFFENCES

A person who is required to apply for consent to an overseas investment transaction commits an offence if that person gives effect to the overseas investment without the consent required by the Act.

Any person who knowingly or recklessly enters into a transaction or takes any other step for the purpose of, or having the effect of, in any way, directly or indirectly, defeating, evading or circumventing the operation of the Act also commits an offence.

It is also an offence to resist, obstruct or deceive any person who is exercising or attempting to exercise any power or function under the Act or any associated regulations.

A person who commits an offence as described above is liable on conviction on indictment:

- in the case of an individual, to imprisonment for a term not exceeding 12 months or to a fine not exceeding NZ\$300,000;
- in the case of a body corporate, to a fine not exceeding NZ\$300,000.

There are also penalties for failing to comply with any notice, requirement or condition given or imposed under the Act or any associated regulations, or for knowingly or recklessly making any false or misleading statement or any material omission in any offer, representation information or document or any communication made for the purposes of the Act or any associated regulations or provided to the regulator.

Civil Remedies

The court may also order the disposal of property and/or payment of civil penalties to the Crown or any other person not exceeding the higher of:

- NZ\$300,000; or
- any quantifiable gain in relation to the applicable property; or
- the cost of remedying any breach; or
- any loss suffered by a person in relation to any breach.

Any civil penalty will be in substitution for any fine specified above.

(For additional penalties relating to fishing quota, see also section 10: What if required consent is not obtained)

13 OVERSEAS INVESTMENT REGULATIONS 2005

The Overseas Investment Regulations 2005 (the **Regulations**) have been made pursuant to the provisions of the Act.

The Regulations set out the required procedures for offering farm land or farm land securities for acquisition on the open market to persons who are not overseas persons; and for offering foreshore, seabed, riverbed, or lakebed to the Crown.

They also provide certain additional factors for assessing benefit of overseas investment in sensitive land.

The Regulations set out a schedule of fees, charges and certain administrative penalties payable in respect of matters governed by the Act.

Certain transactions are exempted pursuant to the Regulations from the requirement to obtain consent for overseas investment. These have been substantially carried over from the previous legislation, including exemptions for some corporate (internal) restructurings, for some security arrangements, for certain persons connected to portfolio investors and for certain specified essentially New Zealand controlled persons who were previously granted specific exemptions.

14 FURTHER INFORMATION/ASSISTANCE

The above overview outlines the key aspects of the Act and the associated regulations and is current as at 13 September 2005. Careful analysis needs to be undertaken in respect of any proposed investment to ascertain exactly how it is to be dealt with under the Act and to ensure all relevant provisions are accurately applied, and all required information to support any application is drawn together for submission with an application. For more detailed assistance and advice in respect of the full implications of the Act, please contact your legal advisor.

Bell Gully contacts in this regard are as follows:

Auckland

David Boswell

Partner
Corporate/Commercial
Telephone: 64 9 916 8941
Mobile: 021 764 292
david.boswell@bellgully.com

Garry Downs

Partner
Corporate/Commercial
Telephone: 64 9 916 8932
Mobile: 021 761 601
garry.downs@bellgully.com

Jayne Kirton

Partner
Corporate/Commercial
Telephone: 64 9 916 8936
Mobile: 021 960 755
jayne.kirton@bellgully.com

Wellington

Andrew Brown

Partner
Corporate/Commercial
Telephone: 64 4 915 6848
Mobile: 021 778 236
andrew.brown@bellgully.com

Mark Freeman

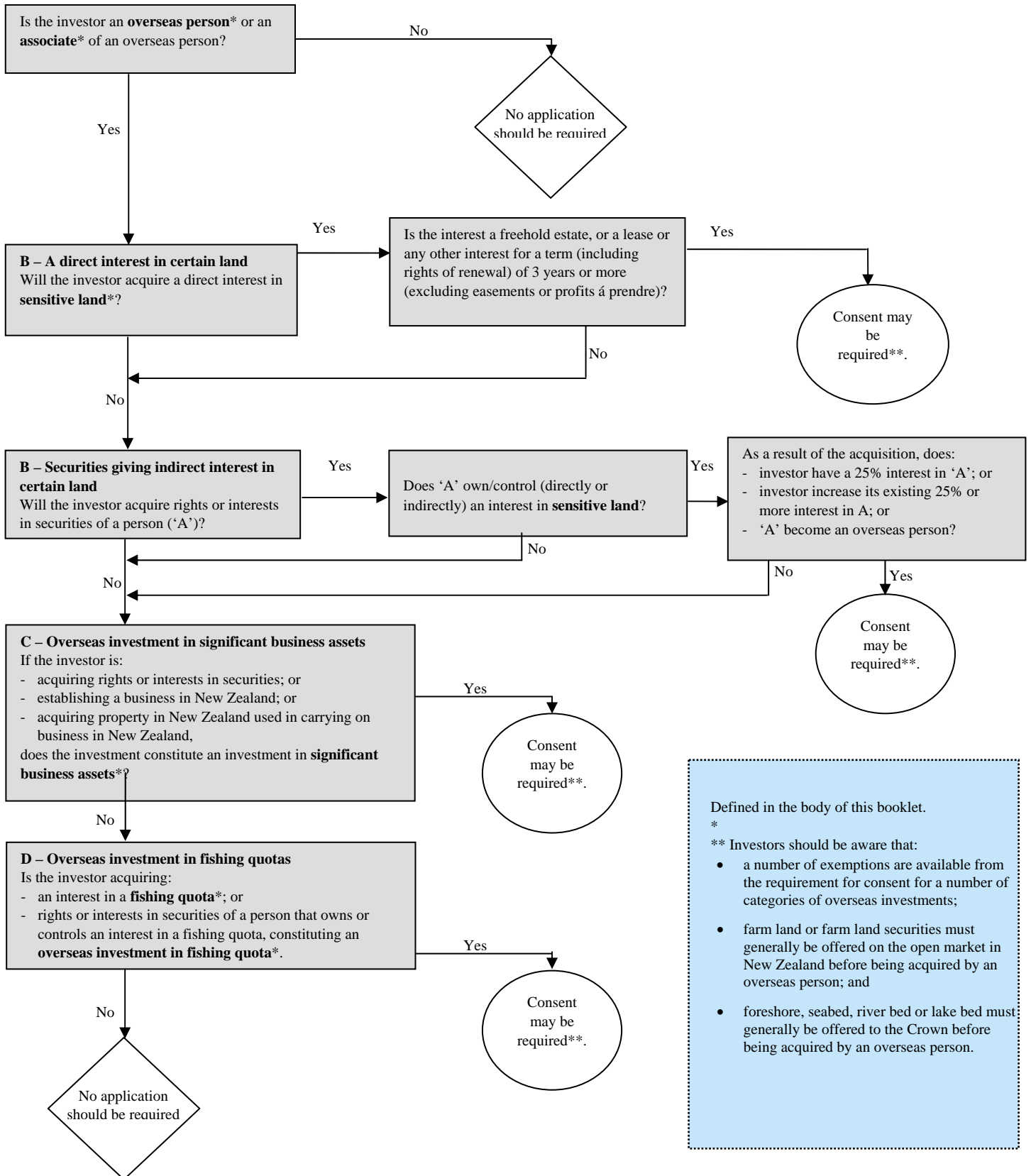
Partner
Corporate/Commercial
Telephone: 64 4 915 6963
Mobile: 021 632 917
mark.freeman@bellgully.com

Chris Gordon

Partner
Corporate/Commercial
Telephone: 64 4 915 6836
Mobile: 021 614 522
chris.gordon@bellgully.com

15 APPENDIX

Overview of the tests for investments requiring approval



AUCKLAND VERO CENTRE, 48 SHORTLAND STREET
PO BOX 4199, AUCKLAND 1140, NEW ZEALAND, DX CP20509
TEL 64 9 916 8800 FAX 64 9 916 8801

WELLINGTON HP TOWER, 171 FEATHERSTON STREET
PO BOX 1291, WELLINGTON 6140, NEW ZEALAND, DX SX11164
TEL 64 4 473 7777 FAX 64 4 473 3845

BELL GULLY