

Solar and wind farms under the Overseas Investment Act 2005

Overview



- Solar and wind farms are becoming more common in New Zealand. Since 2022 several solar farms have been consented under the Overseas Investment Act 2005.
- Unlike other types of investment, solar farms have unique characteristics, with differences found in relation to land tenure, complementary land use, and complex commercial arrangements.
- All solar investments generally result in similar benefits, and these have previously been sufficient to secure consent under the benefit to New Zealand test.
- Generally speaking, the rights required by the developer of a large-scale solar farm will be more than can be accommodated by an easement. However, the rights required by the developer of a large-scale wind farm might well be a suitable use of an easement.
- An exemption from the farm land advertising requirement may be appropriate for solar farms where it conflicts with the commercial need for due diligence.
- A national interest assessment may be required if a non-New Zealand government investor is involved.
- A national interest assessment may also be required for investments over 250MW and for investors whose installed capacity will exceed 250MW as a result of the investment.

Scope of this guidance

This guidance outlines the unique characteristics of solar farms and highlights the differences in treatment between solar and wind farms under the Overseas Investment Act 2005 (the **Act**). In particular, this guidance deals with the farmland advertising requirement, the criteria for consent including common benefit claims, land tenure issues including the use of easements, and when a mandatory (section 20A) or discretionary (section 20B) national interest assessment will be undertaken.

This guidance is technical in nature and intended mainly for investors who already have a general understanding of the Act and its requirements, and for their legal advisors.

Solar and wind energy farms under the Overseas Investment Act 2005

Solar farms are becoming more common in New Zealand and Toitū Te Whenua Land Information New Zealand (**LINZ**) has considered a number of applications for consent under the Act since late 2022.

Solar and wind farms typically need consent due to the investor buying or leasing “sensitive land” on which to build the solar farm. Larger farms, where the total cost of development or the consideration exceeds \$100m may also require consent (whether sensitive land is involved or not). There will also come a point where investors will need consent to establish a business.

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

- **The investor test:** This ensures that the investor and the people who own and control it are 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 ensures that the investment will benefit New Zealand, having regard to prescribed factors including economic benefits, benefits to the natural environment, and public access benefits, oversight or participation of New Zealanders or advancing a significant Government policy. If the land being used for the investment is farm land the benefits will need to substantially meet the economic factor and/or the oversight or participation factors.
- **The farm land advertising requirement:** This ensures that any farm land has been advertised on the open market to non-overseas persons.
- **The national interest test:** This ensures that the investment is not contrary to the national interest.

However solar farms have a range of unique characteristics not seen by other types of investment, and not seen with wind farms, despite both generally being undertaken on similar types of land.

Differences can relate to:

- **land tenure**, including developers relying on long-term leases and easements,
- **complementary land use**, especially the possibility of some farming activity taking place after the development is complete, and
- **complex commercial arrangements**, including a long due diligence phase which is an uncomfortable fit with the farm land advertising requirement.

While these differences can add complexity to these applications, several applications for consent for solar farms have been granted (and none have yet been declined).

Wind farms, for reasons that will be explained below, are less likely to need consent under the Act.

Land tenure

Investors must secure enduring rights to land in order to develop a solar or wind farm. To date, most investors we have dealt with have relied on long-term leases (30+ years), though some have also sought to proceed on the basis of easements.

The most appropriate form of land tenure is primarily a commercial decision for the investor. However, while the Act can be applied to a range of tenures, leases may have advantages for investors under the Act.

Leases

A lease needs consent when the land is sensitive land and the duration of the lease exceeds ten years. To date, most solar developments consented under the Act have used leases.

Leases have two main advantages for solar investors:

- The benefit to New Zealand test requires the decision-maker to consider whether the overall benefit of the investment is proportionate to the sensitivity of the land and the nature of the transaction. Freehold interests generally require greater benefits than leasehold interests.
- A lease may also have advantages if an advertising exemption is required as the temporary nature of a leasehold interest will be relevant to a decision to grant an exemption.

Easements

An easement is a form of land tenure which gives either positive or negative rights to a person to derive some limited advantage from the land of another.¹ Easements typically provide for rights of way or the right to convey water, or electricity, but can be used for other purposes as well.

One feature of a valid easement is that it is not so extensive or invasive that it deprives the owner from the enjoyment and control of the land.²

¹ Kevin Gray and Susan Francis Gray *Elements of Land Law* (5th ed, Oxford University Press, Oxford, 2009) at 596 cited in *Opua Coastal Preservation Inc v Far North District Council* [2018] NZCA 262 at [53].

² *Schmuck v Opua Coastal Preservation Inc* [2019] NZSC 118 at [56].

Under section 12 of the Overseas Investment Act, an overseas person does not require consent to acquire an easement because it is an “exempted interest.”³ This reflects the limited rights arising from an easement.

Some solar farm developments acquire interests in land that they describe as easements. Despite this description, if the interests being acquired are more extensive than an easement in practice then consent will be required.

LINZ will consider whether the rights being granted to the developer prevent the land owner from the enjoyment and control of the land. If the arrangement requires the landowner to substantially change their use of the land, or imposes significant restrictions on their use of the land, then the interest being acquired is unlikely to be an easement.

All solar farm developments LINZ has seen to date have provided more extensive interests in land than an easement, so consent has been required.

Example one – intensive solar farm on dairy land

A plans to develop a solar farm on 400 hectares of dairy land. Of the 400 hectares, approximately 350 ha will be developed with solar panels and site infrastructure, with the remaining 50 hectares comprising roads, native bush, and land that is too steep to install solar panels on.

The landowner will be able to graze small farm animals (such as sheep) under and around the panels, albeit at significantly lower stocking rates than would be the case without the solar panels.

A proposes to develop the solar farm in reliance on an easement.

Not an easement

The dominant use of the land will be the solar farm, not the landowner’s farming operation. The restrictions on the landowner’s enjoyment and control of the land will be so extensive that even if the arrangement were described by the developer as an easement it would not be treated as such for the purposes of screening under the Act.

Example two – rooftop solar farm on industrial land

B plans to install solar panels on the roof of a very large factory site. Some electricity will be sold to the landowner to operate the factory, and some will be delivered to the grid.

The landowner will continue to operate its factory as it did before the panels were installed. There will be some limits on the landowner: in particular, there will be small areas that they are excluded from for safety reasons, and they will be prevented from installing equipment on the factory roof.

B proposes to undertake the development in reliance on an easement.

An easement

The dominant use of the land will continue to be the factory, not the solar farm.

While restrictions on the landowner’s enjoyment and control of the land will be present, they will not be extensive and will not prevent the landowner from continuing to use the land as it did before. Accordingly, the arrangement is likely to be treated as an easement for the purposes of screening under the Act.

Example three – wind farm on rural land

C plans to install 90 large wind turbines across a 1,000 hectare farm.

The landowner will continue to operate its farm as it did before the panels were installed. There will be some limits on the landowner: in particular, there will be small areas set aside for the use of the wind farm operator (electrical equipment, a small workshop, and staff facilities) comprising about 1 hectare in total. Each turbine will occupy approximately ¼ of a hectare including the footprint of the turbine itself and areas immediately surrounding the turbine, and these areas will be unproductive for farming purposes.

C proposes to undertake the development in reliance on an easement.

An easement

³ Overseas Investment Act, s 6.

Example three – wind farm on rural land

While restrictions on the landowner's enjoyment and control of the land will be present, they will not be extensive and will not prevent the landowner from continuing to use the land as it did before. Accordingly, this arrangement may well be treated as an easement for the purpose of screening under the Act.

The unproductive areas associated with each turbine, and the small area for the exclusive use of the wind farm operator are small in comparison to the total size of the farm.

Due diligence and farm-land advertising

Solar farm developments typically follow a period of due diligence during which the investor verifies the suitability of the land for development. Investors typically want to secure the right to develop the land (through a sale and purchase agreement, agreement to lease, option, or other similar arrangement) before committing to the time and cost of due diligence.

This arrangement is an uncomfortable fit with the requirement that farm land be advertised on the open market before a transaction is entered into. Investors typically approach the owners of suitable land directly instead of responding to advertisements. Advertising following due diligence comes with commercial risks for the investor.

A number of solar investors have been granted exemptions from the farm land advertising requirement. The reasons for each exemption can be found in the register of exemptions on our [website](#).

The "benefit to New Zealand" test

Common benefit claims include:

- increased capital investment into New Zealand 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 renewable energy project
- supplying energy to the national grid (powering homes)
- advancing significant government policies relating to climate change and renewable energy

Benefit claims may also include the economic and other benefits that may result from complementary land use, such as grazing or other similar uses.

The level of benefit arising from an investment will depend on the existing use of the land. Converting highly productive land may result in fewer benefits than converting low quality land.

A summary of all consent decisions under the Act are on the [decisions page](#) of our website. These decision summaries include a brief summary of the benefits expected to result from each investment.

Likely conditions of consent

Consent will generally be subject to conditions requiring the investor to:

- applying for and obtaining any resource consent(s) required within a specified timeframe
- completing the development within a specified timeframe
- spending a certain amount of capital on the development,
- building and operating the solar farm, and
- continuing to meet the investor test.

Changing the ownership of an existing solar or wind farm

The ownership of a solar or wind farm may change across the life of the development. Consent under the Act may be required if the change in ownership/control is large enough. While the same tests will apply to the change in ownership as applied to the original investment, the benefit claims are likely to be very different, as the economic benefits of "building" the farm will already have been realised.

A likely benefit, especially for larger investments, will be a reduced risk of illiquid assets. This means that the overseas person acquiring the solar or wind farm would benefit New Zealand by ensuring there is a purchaser for assets that might otherwise be stranded.

In some cases, an intensively developed solar farm may cease to be farm land by the time the development is complete. This may mean changes in ownership would not need to meet the farm land advertising requirement. However, each case will turn on its facts, and we recommend you contact us to discuss situations like this.

We may be able to account for anticipated changes in ownership in the original consent (for example, a passive investor who will invest upon the farm beginning to generate electricity). However, the investor, and the scale and nature of the investment must be known for this to be possible.

The national interest test

Section 20C gives the Minister of Finance the power to decline consent to a “transaction of national interest” if that transaction is “contrary to the national interest”.

There are two ways in which a transaction can be a transaction of national interest:

- if it meets the criteria in section 20A (non-NZ government investors and/or strategically important businesses), or
- if the Minister of Finance considers that the transaction is a transaction of national interest.

In the absence of overseas government ownership, the acquisition of bare land on which a solar or wind energy development will be undertaken is unlikely to meet the criteria in section 20A.

However one of those criteria refers to electricity generators with a total capacity (as defined in section 73 of the Electricity Industry Act 2010) exceeding 250MW. Therefore LINZ considers that the size of the solar or wind farm and the size of the capacity of the investor’s existing generating assets will be relevant to the Minister of Finance’s decision to deem the acquisition to be a transaction of national interest under section 20B.

An acquisition is more likely to be deemed a transaction of national interest if the development will exceed 250MW, or if the development will take the investor’s total generating capacity over 250MW for the first time.

More information

The information contained in this document is intended for general guidance only, and the examples provided are for illustrative purposes only.

For more information, we recommend that you seek legal advice from a lawyer who has experience in dealing with the Act.

We also encourage investors to consider meeting with us before submitting an application for consent. A [‘pre-application meeting’](#) will help you prepare a clearly reasoned application that contains all the information we will need to assess your application.

You will be able to:

- Explain (at a high level) your overall application for consent and your investment proposal
- Ask any questions you have about presenting specific aspects of your application
- Get our feedback on how you may be able to improve the quality of your application
- Ask any questions you have about the application process.

For more information:

Phone: 0800 665 463 (New Zealand only)

Phone: +64 7 974 5595 (international callers)

Email: oio@linz.govt.nz

About the LINZ’s overseas investment regulatory function

LINZ regulates access to New Zealand’s land, residential properties and significant business assets by overseas investors, and makes decisions on overseas investment applications. It administers and applies the Overseas Investment Act. Its work contributes to more homes and jobs for New Zealanders, thriving companies and industries, protection of the places Kiwis treasure, and greater access to them.

