

Overseas Investment Amendment Act 2005 – stage 2 reforms

On 22 August 2018, as part of its overhaul of overseas investment in New Zealand, the new Government enacted the Overseas Investment Amendment Bill. This amended the Overseas Investment Act 2005 ("Act"). On 17 April 2019 the Treasury released its consultation paper on stage 2 reforms of the Act.

Why is reform being considered?

Overseas investment contributes necessary capital into the New Zealand economy, brings technological and process innovations into New Zealand, and provides access to global markets and value chains.

The Act regulates overseas investment in New Zealand, but the Act is complex and screens a broad range of investors and investments. This stage 2 reform intends to prevent unnecessary screening of overseas investment, and balance investors' need for certainty with the need to prevent undesirable overseas investment in New Zealand. It also aims to address concerns that often:

- (a) the consenting process under the Act is overly expensive; and
- (b) the timeframes for completion of the consenting process are longer than in other countries.

The current consenting process

Broadly, consent under the Act (**OIA Consent**) is required for investment in "sensitive assets" by citizens of foreign countries who are not New Zealand residents, or bodies corporate which have 25% or greater shareholding or control held by such persons (**Overseas Investors**).

"Sensitive assets" include:

- (a) residential and lifestyle land;
- (b) non-urban land with an area exceeding 5 hectares;
- (c) land which exceeds a certain area threshold and contains culturally or environmentally important features (such as foreshore or lakebed);

- (d) land which exceeds a certain area threshold and adjoins land containing culturally or environmentally important features (such as foreshore or lakebed);
- (e) certain leases or other interests in any of the above;
- (f) business assets exceeding \$100 million in value; and
- (g) a 25% ownership or control interest in an entity which owns any of the above.

Depending on the type of asset being acquired, different tests must be satisfied by an Overseas Investor. These tests include:

- (a) **The "investor test"**: which considers whether the Overseas Investor have relevant experience and are of good character.
- (b) **The "benefit to New Zealand test"**: which compares the benefits to New Zealand resulting from the proposed investment against the benefits to New Zealand if the investment did not proceed. This comparison is carried out by reference to a list of specific "benefit factors" contained the Act and associated regulations. For example, if the investment will result in new jobs, technology or skills being introduced to New Zealand.

What is being reformed?

The below is a high level summary of the possible consequences of the proposed reforms:

- (a) **Assets no longer sensitive**: assets that were previously "sensitive" may no longer be sensitive, so OIA Consent may no longer be required for overseas investment in such assets. Under some variations of the proposed reform, certain business assets and land types will no longer be "sensitive", so Overseas Investors would be able to purchase them without OIA Consent. For example, one proposal is to amend the Act so that land cannot be "sensitive" because it adjoins land with particular "sensitive" qualities. This would be a substantial change.
- (b) **Entities no longer Overseas Investors**: entities that were previously Overseas Investors may no longer be Overseas Investors, so are able to invest in "sensitive assets" without obtaining OIA Consent.
- (c) **Criteria for OIA Consent changed**: the tests which Overseas Investors must satisfy to obtain OIA

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Consent to purchase sensitive assets may become more stringent, or more permissive, depending on the type of asset. For example, investments with potentially adverse effects on national security may be subject to increased scrutiny, while other investments may be subject to less or different scrutiny than under the current regime.

- (d) **Increased discretion for decision makers:** there may be increased discretion granted to the decision maker to accept or decline an application for OIA Consent.
- (e) **Statutory timeframes:** a statutory timeframe during which a decision must be made may be introduced.

Do you want to know more?

If you have any questions about the proposed reforms or want to make any submissions on them, please contact our specialist [overseas investment team](#).

A copy of the consultation document and summary documents can be found [here](#).

Annexure – proposed options for reform

| Aspect of Act being reformed | Options for reform (note, in some circumstances more than one option could be adopted) | |
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| 1 | Which assets are "sensitive" | Remove all categories of land from Table 2 of Schedule 1 of the Act except foreshore, lakebed, and some land that is significant to Maori. This would mean land cannot be sensitive due to the characteristics of adjoining land, unless the adjoining land contains foreshore, lakebed, or land that is significant to Maori. |
| | | Only remove from Table 2 of Schedule 1 of the Act, land listed, or in a class listed as reserve, a public park or other sensitive area under section 37 of the Act. |
| 2 | Which leases of sensitive land require OIA Consent | Provide an exemption for "short term leases" from the requirement for OIA Consent. For example, leases for less than 10 years (including rights of renewal). |
| | | Provide a split pathway depending on the type of land leased, for example: <ul style="list-style-type: none"> (a) leases of non-urban land to Overseas Investors for 10 years or more (including rights of renewal) require OIA Consent; and (b) leases of all other classes of land to Overseas Investors for 35 years or more require OIA Consent. |
| | | Explicitly state that periodic leases to Overseas Investors do not require OIA Consent, regardless of the type of land. |
| 3 | Who is an Overseas Investor (requiring OIA Consent to purchase sensitive assets) | Provide that an entity is not an "overseas person" (OP) under the Act unless it is 49% owned by OPs. |
| | | Provide that domestically incorporated listed entities are OPs only if "substantial holdings" (being 5% or more) by OPs in classes of securities that confer control rights cumulatively total 25%. |
| | | Provide that: <ul style="list-style-type: none"> (a) more than 49% of the economic returns flow to OPs; and/or (b) OPs collectively hold "substantial holdings" in a securities class that confers control rights at a level of 25% or more. |
| | | Provide an exemption for domestically incorporated entities with a strong connection to New Zealand and a strong record of compliance with the Act. The definition of "strong connection to New Zealand" has not been finalised. |

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| 4 | Exemptions for portfolio investors | Provide a class exemption for portfolio investors in sensitive New Zealand assets whose policy is to limit their interest to minority interests, and does not seek control or board representation. |
| | | Provide a class exemption for portfolio investors in sensitive assets where: <ul style="list-style-type: none"> (a) at least 51% of the investor's funds are invested on behalf of New Zealanders; and (b) the investor is at least 76% controlled by New Zealanders, referred to as the 51/76 Rule. |
| | | Provide a class exemption for portfolio investors meeting the 51/76 Rule, but only if the investor is a domestically regulated superannuation funds. |
| | | Allow individual exemptions for portfolio investors and entities meeting the 51/76 Rule. Ministers would determine if an exemption is granted and any conditions of the exemption. |
| 5 | "Tipping point issues" (where the acquisition by an OP of a minority interest in an entity results in that entity becoming an OP) | Remove the requirement for OIA Consent to an OP's acquisition of securities in an entity that has an interest in sensitive land. Replace this provision with a new anti-avoidance provision to prohibit the delay of transactions which would result in an entity becoming an OP, in order to allow it to buy sensitive land without OIA Consent. |
| | | Require OIA Consent to: <ul style="list-style-type: none"> (a) an OP acquiring at least 5% of securities in a class if this causes the entity to become an OP (or the acquisition is the first transaction after the entity becomes an OP); and (b) the entity has an interest in sensitive land. |
| | | As immediately above, but only in respect of publicly listed entities. |
| 6 | Existing exemption for existing OIA Consent holders to incrementally increase shareholding | Allow an OP to increase their existing shareholding provided it does go beyond the next applicable control threshold (25%, 50%, 75%, or 90%) |
| | | Extend the existing exemption for incremental shareholding increases to apply to not only to the original OIA Consent holder, but also shareholders and subsidiaries of the original OIA Consent holder. This would be also be subject to not passing the next applicable control threshold. |
| | | Provide an exemption for shareholders if: <ul style="list-style-type: none"> (a) OIA Consent was not required at the time of the initial share acquisition; and (b) OIA Consent was not actually obtained at that time. |

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| | | Remove the 5-year time limit from the existing exemption. |
| 7 | The "investor test" – which must be satisfied by all OPs applying for OIA Consent | Remove the requirements that an OP (or individuals with control) must: <ul style="list-style-type: none"> (a) Demonstrate financial commitment to the investment. (b) Be eligible for a visa or entry permission into New Zealand. |
| | | Remove the requirements that an OP (or individuals with control) must: <ul style="list-style-type: none"> (a) Have relevant business experience and acumen. (b) Demonstrate financial commitment to the investment. Simplify the "good character" criterion by: <ul style="list-style-type: none"> (a) Narrowing the "whether convicted or not" aspect of the requirement to consider offences, so that unproven allegations are only considered for certain types of crimes (e.g. fraud and dishonesty crimes). (b) Remove the requirement for the decision maker to consider "any other matter" that reflects adversely on the applicant's character. |
| | | Shift to a bright-line/checklist assessment of character. Provided certain criteria are met, the test is satisfied. |
| | | Remove the requirement for New Zealand individuals involved in an OP to satisfy the investor test. |
| | | Amend the test to allow it to apply to a corporate applicant, rather than all relevant individuals involved in the corporate applicant. |
| | | Introduce a "standing consent", exempting OPs who have previously satisfied the test, and have not undergone any changes in ownership or management from the requirement to satisfy the test in further applications. |
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| 8 | "Benefit to New Zealand test" (must be satisfied by various investors in land or business assets) | Expand the benefit to New Zealand test to allow decision makers to consider the negative effects of an investment, and the national security effects of an investment. |
| | | Simplify the benefit to New Zealand test by reducing the number of benefit factors be considered, but introduce a "substantial harm" test, which allows an investment to be prevented if it would cause "substantial harm" (such as threats to public order, health and safety, or essential security interests). The substantial harm test would be applied solely by Ministers, who would have a discretion to determine what constitutes "substantial harm". |
| | | Simplify the benefit to New Zealand test, but introduce a "national interest test" for some transactions. The national interest test would allow holistic consideration of the benefits and issues with a particular investment. Reasons for a decision under the national interest test would likely be published, and the decisions would likely be reviewable. The test would be applied by Ministers if |

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| | | <p>this option were adopted.</p> <p>Remove the existing benefit to New Zealand test and replace it with the above national interest test. This would substantially increase decision makers' discretion.</p> <p>Provide Ministers with the power to "call up" certain transactions that raise national security concerns. Mandatory or voluntary notification of transaction, or a hybrid notification model, would be necessary.</p> |
| 9 | The "counterfactual analysis" (currently applied under the benefit to New Zealand test) | <p>Provide that when assessing the benefit to New Zealand, the use and state of the land at the time of the application is the relevant counterfactual.</p> <p>Provide that when assessing the benefit to New Zealand, the vendor retaining the land is the relevant counterfactual.</p> <p>When assessing the benefit to New Zealand, where genuine market testing has shown there is no market interest, the vendor's continued ownership will be the relevant counterfactual. Otherwise, the existing law applies.</p> |
| 10 | Water extraction | <p>Amend the benefit to New Zealand test to include consideration of existing or proposed specific water bottling and bulk water export resource consents.</p> <p>Amend the benefit to New Zealand test to include consideration of existing or proposed generic water extraction resource consents for any purpose.</p> |
| 11 | Tax | <p>Include an analysis of the historic tax compliance of an OP as part of the investor test.</p> <p>Include as a requirement for satisfying the investor test, that the relevant individuals certify that they:</p> <ul style="list-style-type: none"> (a) Are not involved in tax avoidance. (b) Have not breached any tax legislation. (c) Are not in a dispute with a tax authority. <p>Require OPs to get a binding ruling from the IRD on treatment of transactions under New Zealand tax rules.</p> |
| 12 | Maori cultural values | <p>Broaden the benefit to New Zealand test to allow the decision maker to account for the OP's plans to allow existing lawful arrangements (such as public access) to continue.</p> <p>Broaden/clarify the benefit to New Zealand test to allow the decision maker to account for the OP's intention to protect or enhance wāhi tūpuna or promote/enhance any Māori reservation.</p> <p>Expand the benefit to New Zealand test to allow decision makers to consider Māori cultural values as they relate to sensitive land.</p> |

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| 13 | Special land offer provisions | Clarify that the requirement to offer "special land" (such as land bordering on significant streams/rivers) to the Crown only applies when an OP is purchasing the freehold title to sensitive land. |
| | | Make the requirement for special land to be offered to the Crown a requirement for OIA Consent under the Act. Currently it is contained the associated regulations. |
| | | Establish a way to provide access (via adjoining land) to special land that is acquired by the Crown or put into the common marine and coastal area. |
| | | Improve the special land offer process by: <ul style="list-style-type: none"> (a) Allowing land to be offered for free. (b) Making the OP responsible for the offer back, rather than the vendor. (c) Only requiring special land to be valued if the Crown rejects the offer. |
| 14 | Farm land advertising | Require that: <ul style="list-style-type: none"> (a) Advertising must be carried out before the contract is entered into. (b) At least 2 types of advertising must be carried out. Provide for: <ul style="list-style-type: none"> (a) An application for an exemption to the farm land advertising requirement may be submitted before the application for OIA Consent. (b) Guidance on what qualifies for an exemption from the farm land advertising requirement. |
| | | Remove the requirement for farm land advertising to be carried out. |
| 15 | Timeframes for decisions | Impose a universal statutory timeframe during which all decisions to grant/decline OIA Consent must be made. |
| | | Impose statutory timeframes for the making of decisions whether to grant/decline OIA Consent must be made, but the timeframes differ depending on the tests which must be satisfied by the applicant. |