

Overseas Investment Regulation in NZ

Foreign investment in New Zealand is generally encouraged. However, there are certain rules in place to protect sensitive New Zealand assets. This guide summarises which investments will trigger New Zealand's overseas investment regulations and how to navigate those regulations.



The Overseas Investment Act 2005 (**Act**) regulates investments by “overseas persons” in “sensitive land” and/or “significant business assets”. It does this through a body called the Overseas Investment Office (**OIO**). If consent is required under the Act, then an application must be made to the OIO and consent must be granted before the investment can proceed. There are four main investment pathways: significant business assets, sensitive land, residential land, and forestry. In certain limited circumstances, the relevant government ministers can “call-in” and prohibit a transaction even where the investment is not an investment in “sensitive land” or “significant business assets”.

When is OIO consent required?

What is an “overseas person”?

The definition of “overseas person” is central to the consent regime. An “overseas person” includes:

- a natural person who is not a New Zealand citizen or “ordinarily resident in New Zealand”;
- a body corporate incorporated outside New Zealand;
- a body corporate (including a New Zealand company) which is a “more than 25% subsidiary” of a body corporate incorporated outside New Zealand;
- a body corporate that is not a New Zealand listed issuer and an “overseas person” has (or “overseas persons” have):
 - more than 25% of a class of securities;
 - the power to control the composition of more than 25% of the governing body; or
 - the right to exercise or control the exercise of more than 25% of the voting power at a meeting;
- a New Zealand listed issuer where:
 - an “overseas person” (or “overseas persons” have) a beneficial interest in 50% or more of the issuer’s securities; or
 - at least one “overseas person” has a beneficial entitlement to 10% or more of any class of the issuer’s securities which confer control rights and all such persons together have more than 25% of the voting power at a meeting of the issuer or the right to appoint 50% or more of the board; and
- partnerships, unincorporated joint ventures, other unincorporated bodies, trusts, unit trusts managed investment schemes or limited partnerships, where relevant overseas ownership or control thresholds are exceeded.

What is “sensitive land”?

“Sensitive land” includes a freehold interest or a leasehold interest of three years or more in residential land, or a freehold interest, profit à prendre or a leasehold interest of ten years or more in land of the following types:



non-urban land areas greater than five hectares (eg farms);



land which is “sensitive” because it includes or adjoins marine and coastal areas or lakes, national or regional parks, conservation areas, areas of historic significance or land of significance to Māori; or



land on certain specified islands.

Generally, an “overseas persons” who is not “ordinarily resident” in New Zealand but holds a residence class visa will require consent before they can acquire residential land. There are some exemptions, including the following:

- Investors or developers who are “overseas persons” may be able to obtain consent to purchase residential land where they will increase the housing supply (ie by building houses) and commit to sell the properties once the investment is complete.
- Australian and Singaporean investors who are not “ordinarily resident in New Zealand” will not need consent to acquire residential land that is not otherwise “sensitive”.

An investment in a business which owns or leases “sensitive land” will usually be an acquisition of “sensitive land” under the Act. An acquisition of “sensitive land” includes acquiring a more than 25% interest (or increasing an existing more than 25% interest where that increase passes a “control interest limit”) in a person or entity that owns or leases “sensitive land”.

What is an acquisition of “significant business assets”?

An acquisition of “significant business assets” includes:

- acquiring a more than 25% interest (or increasing an existing more than 25% interest where that increase passes a “control interest limit”) in a business where the consideration paid for the New Zealand part of the investment exceeds NZ\$100 million;
- acquiring a more than 25% interest (or increasing an existing more than 25% interest where that increase passes a “control interest limit”) in a business where the value of the New Zealand assets of the business exceed NZ\$100 million;
- acquiring any property in New Zealand (including goodwill and other intangible assets) for more than NZ\$100 million; or
- establishing a business in New Zealand where the expenditure incurred exceeds NZ\$100 million.

The NZ\$100 million threshold is increased to NZ\$676 million under certain circumstances for Australian non-government investors, NZ\$142 million for Australian government investors, and NZ\$200 million for investors in certain countries that have trade agreements with New Zealand (including countries which are party to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership).

Associates

Investments by an “associate” of an “overseas person” are also captured by the Act. The concept of association includes situations of control, agency, acting jointly or in concert and participation in an overseas investment as a consequence of “any arrangement or understanding”.

Exemptions

Certain transactions do not require consent, including transactions that are part of a restructure within a group and the transfer of certain debt obligations.

The application of the exemptions is narrow, fact-specific, and you should always seek legal advice before relying on an exemption.

Control Interest Limit

A stakeholder will pass a “control interest limit” – and therefore will need consent – if they move from an interest of:

Between 25.01% and 49.99% → 50% or more

Between 50% and 74.99% → 75% or more

Between 75% and 99.99% → 100%

Call-in power

Even where a transaction does not require consent, if it is an “overseas investment in Strategically Important Business (SIB) assets” the relevant government minister can review that transaction, apply conditions and even prohibit or require the transaction be unwound.

An “overseas investment in SIB assets” is the acquisition, by an “overseas person”, of:



any securities in a person who is directly or indirectly carrying on a SIB (noting that there are specific rules for media businesses and listed issuers); or



property in New Zealand used in carrying on a SIB.

The term “SIB” is closely defined in the Overseas Investment Act and associated regulations and includes producers of military or “dual use” technology, key utilities, and businesses which hold sensitive information on significant numbers of people.

In most circumstances, an “overseas investment in SIB assets” may be notified to the relevant government minister in advance, to seek a pre-approval. Where the acquisition relates to military or “dual use” technology or is of an entity which has been named as a “critical direct supplier”, the transaction must be notified.

Notifications of “overseas investment in SIB assets” are submitted through the OIO’s online webforms. After becoming aware of a transaction, the OIO makes an initial assessment, usually within 15 working days.

If the initial assessment shows that an investment could pose a significant risk, a full assessment will be completed and referred to the Minister of Finance for decision. Decisions must be made within 55 days, with a possible extension of a further 30 days.

How do you obtain OIO consent?

Application

The process starts with the investor submitting an application to the OIO (in the prescribed form). The investor pays an application fee once the OIO has received all information it requires and has accepted the application for assessment.

These application fees range depending on the nature of the application. To give an indication, a fee of NZ\$38,800 is payable in respect of “significant business assets” applications and NZ\$68,200 – \$146,200 for “sensitive land” applications (which includes significant business assets applications with a land element). The level of fee for sensitive land applications depends on whether the decision is delegated to the OIO or decided by the relevant Ministers and whether the application is classed as simple or complex.

Applications are now filed using the OIO’s online application webforms. A list of the information required for each of the investment pathways is available from the OIO but, because every investment is different, the OIO recommends investors seek legal advice for an application at an early stage.

Investment Pathways

Broadly, there are the four categories of investment pathways, each with different requirements:



Significant business assets

Application only.



Sensitive land

Applicants must meet the benefit to New Zealand test.



Residential land

Applicants must meet the benefit to New Zealand test, increased housing test, non-residential use test, or demonstrate a commitment to reside in New Zealand.



Forestry

Applicants must meet the special forestry test (for existing plantation forests) or the benefit to New Zealand test (for farm to forest conversions).

Standing consents are available for forestry and residential land developments. If granted, this allows investors to apply for consent before identifying the property they want to buy. A standing consent covers a predetermined number of transactions and has a use-by date.

Timing

The OIO must assess applications within a prescribed time frame, which is different for each investment pathway. The time frames for the following investment pathways are:

- Significant business assets – 35 working days
- National interest test – 55 working days
- Benefit test (general and forestry) – 70 working days
- Benefit test (farm land) – 100 working days

If an application involves more than one pathway, the longest time frame will apply. The clock stops if an applicant is asked to provide further information.

National Interest Test

The OIO will not give consent to a transaction where it considers the transaction is contrary to the national interest. The test is largely discretionary, with a number of factors considered by the Minister of Finance in determining whether a transaction is contrary to New Zealand's national interest including:

- National security, public order, and international relations.
- Competition, market influence, and the economy.
- Economic and social impact.
- Alignment with New Zealand's values and interests (including giving better effect to Te Tiriti o Waitangi).
- The character of the investors.

Matters in an OIO consent application

Benefit to New Zealand Test

Generally, if the investment involves an interest in "sensitive land", the applicant must demonstrate that the purchase will bring a net benefit to New Zealand. There are exceptions or modifications to this test for some investment pathways, including forestry. The OIO looks at seven factors when assessing an application to acquire sensitive land:

- Will there be an economic benefit to New Zealand?
- Will there be a benefit to New Zealand's natural environment?
- Will New Zealanders gain or retain access?
- Will historical sites be protected and accessible?
- Will the investment assist government policy?
- Will New Zealanders oversee or participate in the investment?
- Will there be further benefits as a direct result of the investment?

When assessing these factors to determine the benefit of an investment, the OIO applies a test known as the "counterfactual test". This test assesses the difference between the benefits to New Zealand with the proposed investment and the status quo.

There is also a farm land benefit test which applies a higher benefit threshold to farm land applications and places greater emphasis on economic benefits and oversight or participation by New Zealanders.

The applicant must provide an investment plan and supporting statements detailing how it will manage any "sensitive land" going forward. This document is an important touchstone, as compliance with the plans set out is almost always a condition of consent.

Investor Test

The investor test sets out the types of behaviour and history the OIO considers show that the overseas investor is likely to pose a risk to New Zealand. It is made up of two groups of factors: character and capability.

Character factors include:



Convictions resulting in imprisonment or significant fines.



Corporate fines both in New Zealand and overseas.



Being ineligible to come to New Zealand.

Capability factors include:



Prohibitions on being a director, promotor, or manager of a company.



Penalties for tax avoidance or evasion.



Unpaid tax of NZ\$5 million or more.

The relevant "overseas person" and all individuals with control of the relevant "overseas person" must meet the investor test. New Zealanders do not need to meet the investor test.

Repeat investors who have met the new investor test will not need to satisfy the investor test each time they apply for consent (provided there are no substantial changes since the last time they obtained consent).

An investor can utilise a "standalone investor test", which does not apply to a specific transaction, but screens the investor with the view to speeding up future consents and giving the investor greater certainty.

Inland Revenue Information

Investors applying for consent to invest in a "significant business asset" must provide tax information as part of their application. This information will be passed directly to Inland Revenue (New Zealand's tax department).

Special Rules for Farm Land and Fresh or Seawater Areas

If an "overseas person" wishes to acquire farm land, or shares in a company owning farm land, that land must be marketed for sale in New Zealand for 30 working days (to persons who are not "overseas persons") before the parties enter into a sale and purchase agreement.

Investors must notify the Crown if they are acquiring an interest in land that includes marine or coastal areas or the beds of lakes or rivers. The Crown can acquire those interests, but may decide not to.

Ongoing Monitoring of Compliance

The OIO monitors the activities of the “overseas person” post acquisition to ensure that the investor is complying with the law, any representations made in its application for consent, and any conditions of consent imposed by the OIO.

A common condition of consent is that the applicant (or the individuals exercising control over the applicant) continue to meet the investor test. There are ongoing reporting requirements around this and other conditions of consent (for example, those directly relating to the benefits of the investment for New Zealand, such as increased employment and further development).

The Act sets out various penalties for non-compliance with its provisions. These include fines of up to NZ\$500,000 for an individual or NZ\$10 million for a body corporate for proceeding with an overseas investment without obtaining the required consent and fines of up to NZ\$100,000 for failing to comply with consent conditions. In cases of serious non-compliance, the OIO can seek court orders for disposition of property.

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Exclusive New Zealand member of Lex Mundi

Auckland

Level 27, 88 Shortland Street,
Private Bag 92518, Auckland 1141, New Zealand

Wellington

Level 5, 40 Bowen Street,
PO Box 2402, Wellington 6140, New Zealand

Christchurch

Level 1, 151 Cambridge Terrace, West End,
PO Box 874, Christchurch 8140, New Zealand
