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# Overseas Investment Regime

A brief guide

July 2017

## Introduction

Investments by overseas investors in New Zealand are regulated by the Overseas Investment Act 2005 ("**Act**") and the Overseas Investment Regulations 2005 ("**Regulations**"). The Overseas Investment Office ("**OIO**") oversees the regime and is responsible for assessing applications from overseas investors who intend on making substantial investments in New Zealand.

This document is intended to be a basic guide to this regime.

This guide does not cover:

- **Exemptions:** The Regulations exempt specific classes of transactions or persons from the requirement for consent. These exemptions cover a range of instances where consent is not required (for example, mortgages granted in the ordinary course of business, custodian shareholding and internal/group restructures).
- **Fishing Quotas:** Commercial fishing in New Zealand is controlled by the Fisheries Act 1996, which establishes a quota management system. No commercial fishing can be undertaken within New Zealand's territorial waters without a fishing quota. The Act and Regulations, in conjunction with the Fisheries Act 1996, prohibit overseas persons from having an interest in a fishing quota or an interest through a business that, directly or indirectly, holds an interest in fishing quota, unless consent is obtained.

This publication is intended only to provide a summary of the subject covered. It does not purport to be comprehensive or to provide legal advice. No person should act in reliance on any statement contained in this publication without first obtaining specific professional advice. If you require any advice or further information on the subject matter of this newsletter, please contact Russell McVeagh or the partner/solicitor in the firm who normally advises you.

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# Executive Summary

## Overview

Unless exempted by the Regulations, an investment by an **Overseas Person** in **Significant Business Assets** or **Sensitive Land** requires an application for consent to be lodged with the OIO, and the consent of the OIO obtained, before the proposed transaction can be completed. (The proposed transaction can be conditional upon receipt of OIO consent).

## Overseas Person

An **Overseas Person** is broadly defined in the Act. It includes any person who is not a New Zealand citizen, any company incorporated outside New Zealand, and any entity where 25% or more of any class of its securities is owned or controlled by such persons.

## Significant Business Assets

An investment by an **Overseas Person** in **Significant Business Assets** is:

- a) The acquisition of a 25% or more ownership or control interest of a New Zealand company (or an increase in an existing 25% interest) where the consideration paid, or the assets of the New Zealand company, exceeds NZ\$100 million.
- b) The acquisition of assets in New Zealand (that are used in carrying on business in New Zealand) where the total consideration exceeds NZ\$100 million.
- c) The establishment of a business in New Zealand where the expenditure incurred before commencing the business exceeds NZ\$100 million.

## Sensitive Land

An investment by an **Overseas Person** in **Sensitive Land** is:

- a) The purchase or lease (for a term of three years or more, including renewals) of non-urban land over five hectares and other areas of, or adjoining, significant land such as the foreshore and seabed.
- b) The acquisition of a 25% ownership or control interest (or an increase in an existing 25% interest) in an entity that owns or controls an interest in sensitive land.

## Requirements for Consent

- **Significant Business Assets:** The "Investor Test" must be met.
- **Sensitive Land:** The "Investor Test" and the "Benefit to New Zealand Test" must be met. (In certain cases, the benefit must be "substantial and identifiable").

## Filing Fee

The OIO has a filing fee for all applications. The fee depends on the type of application and the consideration payable. Generally, the following filing fees apply:

- **Significant Business Assets:** \$32,000
- **Sensitive Land:** \$35,500 – \$49,000

## Timing

The average time taken for the OIO to assess applications (which includes requests for further information from applicants, and time spent consulting with third parties) is currently approximately:

- **Significant Business Assets:** 3 months
- **Sensitive Land:** 5 – 6 months

## When is Consent Required?

Consent is required before an **Overseas Person** acquires **Significant Business Assets** and/or **Sensitive Land**.

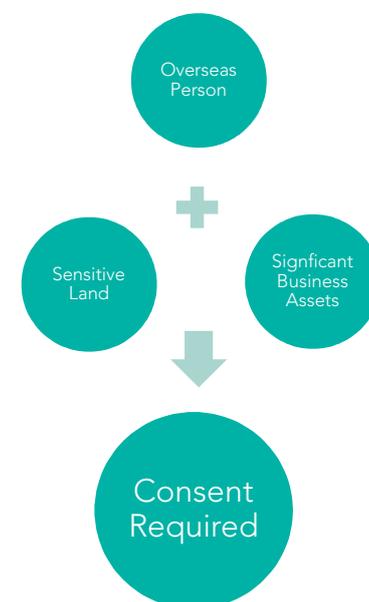
### Significant Business Assets

**Purchase of 25% or more of a business** If an **Overseas Person** acquires a 25% or more ownership or control interest in a New Zealand company (or has an increase in an existing 25% interest) and the consideration provided, or the value of the company's assets in New Zealand, exceeds NZ\$100 million.

Importantly, this includes indirect acquisitions (eg acquisitions of overseas entities that have a New Zealand subsidiary).

**Purchase of assets** If an **Overseas Person** acquires assets (including property and other intangible assets) in New Zealand that are used on carrying on business in New Zealand and the total consideration exceeds NZ\$100 million.

**Set-up of business** If an **Overseas Person** sets up a business in New Zealand that is carried on for more than 90 days in any year (consecutively or in aggregate) and the expenditure incurred before commencement of the business is expected to be more than NZ\$100 million.



### What is Sensitive Land?

**Non-urban land** Non-urban land (being farm land or any land not in an urban area that is used for commercial, industrial or residential purposes) that exceeds five hectares.

**Significant land** Other areas of land of certain sizes either comprising, or adjoining, land of particular significance (such as foreshore, seabed, lakebed, Maori reservation land, land listed as a reserve, land of historic significance and land held for conservation purposes).

### When is Consent Required for Sensitive Land?

**Lease or Purchase** If an **Overseas Person** purchases or leases (for a term of three years or more, including any renewals) **Sensitive Land**.

**Acquisition of securities** If an **Overseas Person** acquires securities in an entity that owns or controls an interest in **Sensitive Land** and, as a result:

- the overseas person acquires a 25% or more ownership or control interest in that entity;
- the overseas person increases an existing 25% or more ownership or control interest in that entity; or that entity becomes an **Overseas Person**.

#### Overseas Person

##### Natural persons

Any person who is not a New Zealand citizen and is not ordinarily resident in New Zealand.

##### Entities

A company, a partnership, a joint venture or a trust that is incorporated overseas or is 25% or more owned or controlled by an overseas person.

## Significant Business Assets

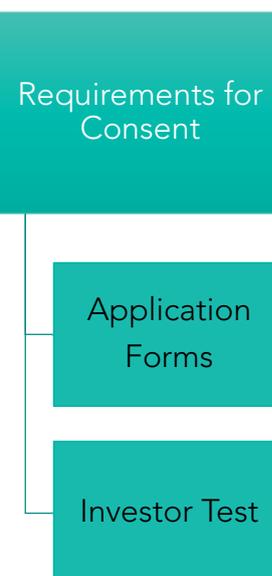
### Application Forms

**Application Form** The OIO's template "Application Form" (which can be found [here](#)) must be prepared and submitted to the OIO.

In addition to submissions on the **Investor Test**, the Application Form requires an applicant to provide an overview of the proposed investment, the business activities of the applicant, ownership information of the applicant (tracing back to ultimate owners/controllers) and how decisions in respect of the proposed investment will be made.

**Vendor Form** The OIO's template "Vendor Information Form" (which can be found [here](#)) must be prepared and submitted to the OIO (at the same time as the **Application Form**).

The **Vendor Form** requires the vendor to provide ownership and control information, business information, and its reasons for selling.



### Investor Test

To satisfy this test, the "relevant overseas person" (generally the applicant) and/or the "individuals with control" (generally the directors of the applicant, but in certain cases senior management) must:

**Business Experience** Have business experience and acumen relevant to the overseas investment being made.

**Financial Commitment** Show actions that demonstrate financial commitment to the investment have been undertaken (intentions are not sufficient). Examples include incurring due diligence costs, entering into an agreement for the investment and engaging professional advisers.

**Good Character** Show that the people who will control the investment are of "good character". Matters which go to the "good character" of an individual are broad, and include any contravention of law, prosecution or other enforcement action and any circumstance of inappropriate behaviour. It does not include parking, speeding or other traffic offences that did not result in a conviction by a court.

**Not certain individuals** Not be individual(s) of the kind referred to in section 15 or 16 of the Immigration Act 2009 (generally speaking, people who have been imprisoned for offences or deported from a country).

## Sensitive Land

### Application Forms

<b>Application Form</b>	The OIO's template "Application Form" (which can be found <a href="#">here</a> ) must be prepared and submitted to the OIO (this form is substantially the same as that for <b>Significant Business Assets</b> ).
<b>Investment Plan</b>	<p>The OIO's template "Investment Plan" (which can be found <a href="#">here</a>) must be prepared and submitted to the OIO (at the same time as the <b>Application Form</b>).</p> <p>The Investment Plan sets out the proposed investment and the applicant's <b>Benefit to New Zealand</b> claims.</p>
<b>Vendor Form</b>	<p>The OIO's template "Vendor Information Form" (which can be found <a href="#">here</a>) must be prepared and submitted to the OIO (at the same time as the <b>Application Form</b>).</p> <p>This requires the vendor to provide information on the <b>Sensitive Land</b>, reasons for entering into the transaction, as well as ownership, business and control information.</p>

### Benefit to New Zealand

<b>Benefit Test</b>	<p>It must be shown that the investment is likely to result in <b>Benefit to New Zealand</b>.</p> <p>If the relevant land includes <b>non-urban land</b> over five hectares, then the benefit must be <b>substantial and identifiable</b> (ie a more stringent test than <b>likely to benefit</b>).</p>
<b>Benefit Factors</b>	<p>The <b>Benefit Test</b> involves assessing the investment against 21 factors, which are set out section <a href="#">17(2)</a> of the Act and regulation <a href="#">28</a> of the Regulations.</p> <p>Briefly, these factors include economic benefits (jobs, exports, investment), environmental benefits and other benefits (such as enhancing viability of existing investments).</p>
<b>Assessment of Benefits Claims</b>	The relevance and importance of each factor is determined by the OIO. Considerations include the nature of the investment, the benefit claim made and the type of land acquired. If the <b>Sensitive Land</b> involves large areas of <b>Farm Land</b> , certain benefit factors are given higher importance.
<b>Counterfactual</b>	A <b>Counterfactual Test</b> is used when assessing whether the investment will result in <b>Benefit to New Zealand</b> . This requires a comparison between what is likely to happen with the investment, and what is likely to happen without the investment. The <b>Benefit to New Zealand</b> flowing from the investment must be greater than those that would flow from the counterfactual.

#### Requirements for Consent

Application Forms

Investor Test

Benefits to New Zealand

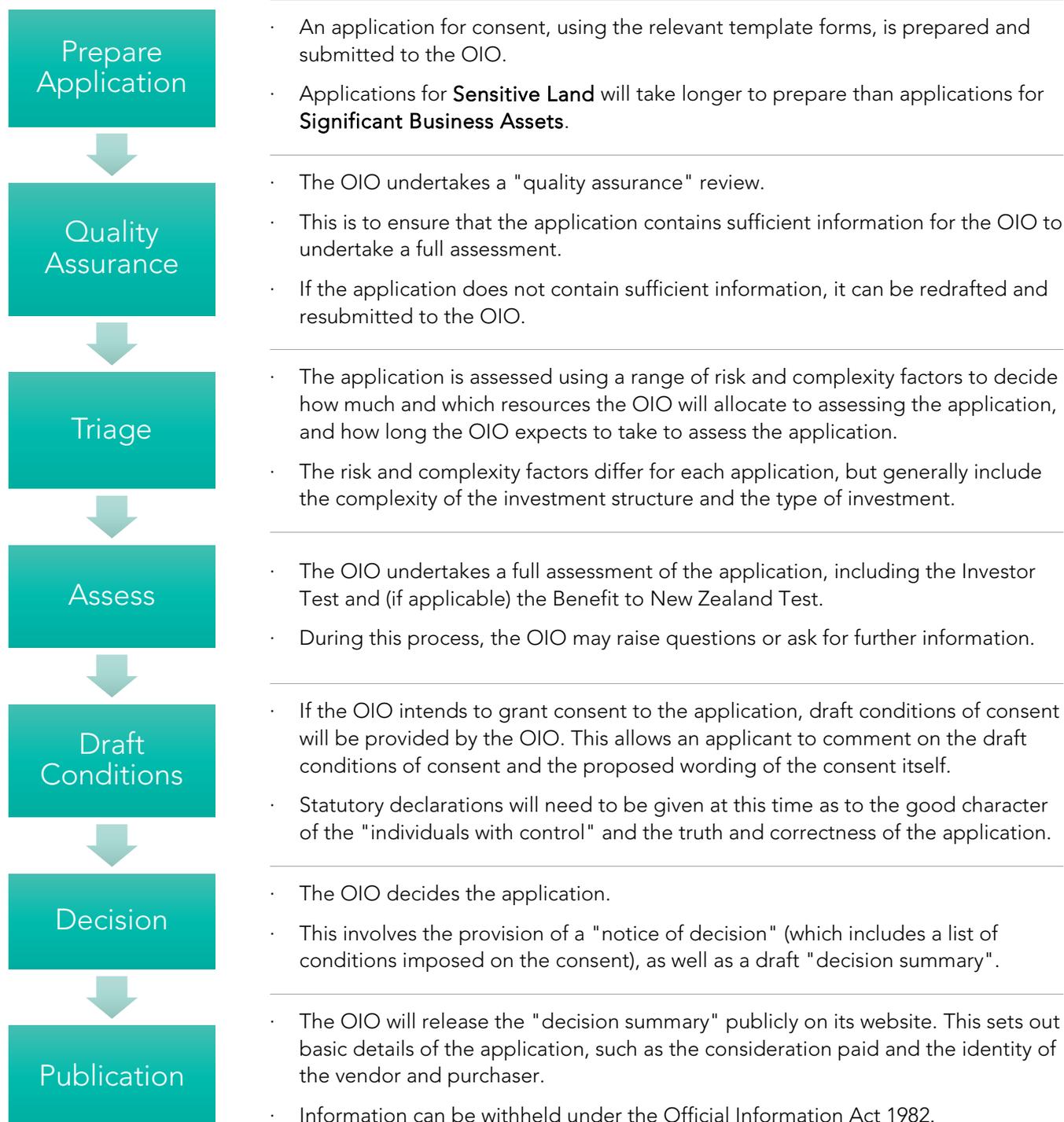
#### Investor Test

The **Investor Test** must be satisfied (which is the same test as for **Significant Business Assets**).

#### Advertise

If the **Sensitive Land** involves **Farm Land** it must be advertised on the open market for a minimum of 20 working days. Exemptions are available in limited circumstances.

## Process for Obtaining Consent



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