Foreign Investment Review 2020

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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the ninth edition of Foreign Investment Review, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Armenia, Cambodia, Laos, Mexico, Myanmar, New Zealand, Thailand and Vietnam.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Oliver Borgers of McCarthy Tétrault LLP, for his continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

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New Zealand

Ben Paterson and Lance Jones
Russell McVeagh

LAW AND POLICY

Policies and practices

1 What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

The New Zealand government's policy is to welcome and encourage high-quality inbound foreign investment that will be beneficial to New Zealand. The government's stated overall policy approach is to achieve an appropriate balance between the need for highly beneficial investment and the need for New Zealand to maintain ownership and control of sensitive New Zealand assets. At the core of this policy is the underlying principle that it is a privilege and not a right for overseas persons to own or control sensitive New Zealand assets.

Inbound foreign investment is currently regulated under the Overseas Investment Act 2005 (the Act) and the Overseas Investment Regulations 2005 (the Regulations). The Act and Regulations are administered by the Overseas Investment Office (OIO), which is a regulatory unit within Land Information New Zealand, a government ministry.

The Act requires an overseas person to obtain approval (consent) before acquiring a qualifying ownership or control interest in 'sensitive land', 'significant business assets' or 'fishing quota'. It states that it is a privilege for an overseas person to own or control such assets, and therefore requires such investors to be screened prior to acquiring them – a process in which the overseas person making the investment must demonstrate that they have appropriate levels of business experience and acumen that are relevant to the investment, that they are financially committed to the investment, and that they are of 'good character'. Where proposed investments involve 'sensitive land', overseas persons must also show that their investments will likely benefit New Zealand.

Consent decisions are made by government ministers, with advice from the OIO, or by the OIO itself under delegation from ministers.

The scope of the screening process under the Act is not limited by industry segment but by the nature of the assets acquired, and it applies to all overseas investors regardless of their nationality or nature.

The New Zealand government is currently undertaking a two-stage reform of the Act aimed at both encouraging overseas investment by reducing complexity and uncertainty while, at the same time, strengthening the regime to ensure it operates efficiently and effectively and appropriately protects New Zealand's national interest.

The first phase of these reforms concluded with the passage of the Overseas Investment Amendment Act 2018, which came into force on 22 October 2018. These amendments aimed to deliver on the current government's 2017 election promises by effectively banning overseas persons from investing in 'residential' land, stream-lining the process for acquisitions of interests in forestry assets to encourage forestry investment, and raising the bar for overseas investors to acquire interests in rural land and farmland.

The second phase was initiated in April 2019 and is considering wide-ranging reforms to the Act, including a narrowing of the scope of the Act in a number of areas and introducing a new national interest test. On 19 November 2019, the government announced the changes that it proposes to include in draft amending legislation that it plans to introduce to parliament in early 2020 for passage in mid to late 2020. These proposed changes are discussed throughout this chapter.

New Zealand does not exercise currency controls.

Main laws

2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals and investors on the basis of the national interest?

The Act does not currently regulate foreign investment in terms of the national interest; however, the government announced in November 2019 that it will introduce a national interest test in 2020.

The national interest test will apply to three categories of investment: (i) where a foreign government or its associates would hold a 10 per cent or greater interest; (ii) investments that are found to present national security risks; and (iii) investments that involve certain specified categories of strategically important industries and high-risk critical national infrastructure (see question 3). It is proposed that the new national interest test will also be able to be applied not only to the listed industries and infrastructure, but to any other investments 'that pose material risks'. It is currently unclear how this will be defined, but the stated intention is that this catch-all limb of the test will only be applied in rare cases. If a transaction is determined to be contrary to the national interest, consent may be declined, or conditions imposed or undertakings required to mitigate any risks.

In addition, the government has announced that it will also introduce a 'call-in' power that will apply to transactions not otherwise covered by the Act. The government has stated that it is intended that this power will rarely be used and only where necessary to control those investments that pose a significant risk to New Zealand's national security or public order.

Scope of application

3 Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

The Act applies to all transactions in which an 'overseas person' directly or indirectly acquires an interest in 'sensitive land' or 'significant business assets'.

Sensitive land

Consent is required if an overseas person proposes to directly or indirectly acquires an interest in sensitive land.

Qualifying interests include (but are not limited to) freehold title, leases with a term of three years or more (to be extended to 10 years in 2020) and profits à prendre.

Indirect acquisitions are caught where there is an acquisition of or increase in an ownership or control interest in an entity that itself has a qualifying interest in 'sensitive land'.

'Sensitive land' includes residential land, non-urban land of more than five hectares (eg, farming or other agricultural, horticultural or similar blocks) and land adjoining a variety of other types of land of a certain size (eg, parks, historic places, foreshore or land subject to heritage orders). Residential land is land that is categorised as residential or lifestyle in the relevant district valuation roll and residential flats.

Significant business assets

Consent is required if an overseas person proposes to:

- acquire a 25 per cent or more ownership or control interest in a New Zealand entity (or an increase in an existing 25 per cent interest) and either: (i) the consideration provided exceeds NZ$100 million; or (ii) the gross value of the entity's assets in New Zealand exceeds NZ$100 million;
- incur more than NZ$100 million in capital expenditure to establish a new business in New Zealand; or
- acquire assets in New Zealand that are used to carry on business in New Zealand for consideration greater than NZ$100 million.

Assets of any nature (tangible and intangible) are included.

Higher thresholds than the NZ$100 million threshold above apply to investments in significant business assets (not sensitive land) by non-government-related investors from certain countries with trade agreements with New Zealand. A higher threshold of NZ$530 million (indexed to CPI) applies to Australian non-government investors, while the threshold is NZ$200 million for non-government investors from the other trade agreement countries.

Difficulties can arise applying the NZ$100 million consideration test referred to in (i) above in the case of international transactions occurring entirely offshore New Zealand but where the target has a business and assets in New Zealand. In these cases, market practice is to apply the same mechanism (eg, a multiple of EBITDA) used to determine the price for the global target business to calculate the consideration attributable to the New Zealand business to determine whether the transaction is caught.

Forestry rights

Overseas investments in 'forestry rights' also require consent under the Act. Overseas investment in forestry rights is encouraged by the current government, and has its own simplified consent pathways (see question 16).

Fishing quota

Overseas investments in fishing quota also require consent under the Fisheries Act 1996.

Acquisition of minority interests

In the case of transactions involving indirect acquisitions of interests in sensitive land or significant business assets – for example, through a direct or indirect acquisition of securities – consent will be required if a 25 per cent or more minority interest is acquired. Acquisitions of ownership or economic interests of less than 25 per cent will still be caught if they come with disproportionate (25 per cent or more) voting rights or director appointment rights. Associated interests are aggregated for the purposes of the tests.

Sector-specific targeting

New Zealand's foreign investment regime is currently sector-neutral.

However, the government has announced that it will introduce in 2020 a new national interest test modelled on the Australian 'Foreign Investment Review Board (FIRB)' test. This new national interest test will be additional to the existing tests under the Act and will apply to the following categories of 'strategically important industries and high-risk critical national infrastructure':

- significant ports and airports;
- electricity generation and distribution businesses;
- water infrastructure (broadly: drinking, waste, storm water networks and irrigation schemes);
- telecommunications infrastructure;
- media entities that have an impact on New Zealand's media plurality;
- entities with access to, or control over, dual-use or military technology;
- critical direct suppliers to the New Zealand Defence Force, the Government Communications Security Bureau and the New Zealand Security Intelligence Service; and
- systemically important financial institutions and market infrastructure (for example, payments systems).

The government has stated that the new test will be framed as a 'non-contrary to' test, with the onus of proof on the relevant minister(s) to show that the investment is contrary to the national interest.

If a transaction is determined to be contrary to the national interest, consent may be declined, or conditions imposed to mitigate any risks.

In addition, the government plans to introduce a new 'national security and public order call in power' to allow it to exercise control over investments not already subject to the Act but which pose risks to national security or public order. Mandatory and voluntary notification requirements will also be introduced alongside this new power. If a material risk to the national interest is identified then the investment may be blocked, have conditions imposed, or where relevant, be unwound.

Definitions

4 | How is a foreign investor or foreign investment defined in the applicable law?

An 'overseas person' is broadly defined in the Act and includes all natural and unnatural persons, body corporates, unincorporated bodies of persons, trusts, units trusts, partnerships, limited partnerships, funds, among others, that are either non-New Zealand citizens or are incorporated, registered or established outside of New Zealand and/or 25 per cent or more owned or controlled by overseas persons. The test looks at both economic interests (eg, via equity ownership) and decision-making power (eg, via membership of, or control of the membership of, a governing body, such as a board of directors). An entity will be an 'overseas person' if the 25 per cent threshold is met under either test.

Interests of 'associates' are aggregated under the Act for the purposes of determining both whether an entity is an overseas person and whether an overseas person has acquired a qualifying interest in the relevant assets. The 'associate' definition is broad, and, as well as usual control, influence and direction tests, any kind of direct or indirect arrangement or understanding to act in concert in relation to the entity or the investment will be caught.

Special rules for SOEs and SWFs

5 Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

New Zealand's foreign investment regime does not currently distinguish between government-related and non-government-related investors, except that the higher significant business assets test thresholds for investors from New Zealand's trade agreement partners (see question 3) only apply to non-government-related investors from those trade-partner countries.

However, it is proposed that the 2020 reforms of the Act will include applying the national interest test to all transactions that are otherwise caught by the Act and where a foreign government or its associates would hold a 10 per cent or greater direct or indirect interest in the relevant asset. It is currently unclear how an associate of a foreign government will be defined – but it is likely that it will include SOEs and SWFs.

Relevant authorities

6 Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

New Zealand's foreign investment regime does not currently provide for the review of investments on national interest grounds. However, a new national interest test will be introduced in 2020.

The Minister of Finance is responsible for administration of the Act and has designated the OIO as the regulator. It is expected that the Minister of Finance will be responsible for administering the national interest test and 'call in' power.

National interest

7 Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

The current regime does not allow any such discretion, which is the primary concern of the government that motivated the proposed introduction of a new national interest test in 2020. The precise terms of the government's discretion under the new test have not yet been decided; however, the government publicly stated when it announced the proposed reforms that the test will 'serve as a "backstop" tool to manage significant risks associated with transactions already screened under the Act' and 'will be used rarely and only where necessary to protect New Zealand's core national interests'.

The government will also be able to exercise a degree of discretion when exercising its proposed new national security and public order call in power. Again, it has been stated that this power will be rarely used, and only where there is an identified risk to national security or public order.

It is likely that the government will align these tests (and associated guidance) closely to the Australian FIRB test, to give investors in the region confidence as to how it will be applied.

PROCEDURE

Jurisdictional thresholds

8 What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

Filing is mandatory and consent must be received before the relevant investment is 'given effect to'. The OIO considers that an investment is given effect to on signing of a binding agreement, which means that any such agreement must be expressly conditional on receipt of OIO consent to avoid breaching the Act.

As noted in question 3:

- there is no jurisdictional threshold for 'sensitive land' investments – the test is whether a qualifying 'interest' in 'sensitive land' will be acquired; and
- the threshold for investments in 'significant business assets' is NZ$100 million consideration or gross assets, unless a higher threshold applies by virtue of the investor's jurisdiction being a New Zealand trade agreement counterparty country (currently NZ$530 million for Australia and NZ$200 million for other trade agreement countries).

National interest clearance

9 What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees? Is filing mandatory?

OIO consent is mandatorily required for all transactions that are included in the Act, and must be obtained before the transaction is given effect. If a binding agreement in respect of a transaction covered by the Act is entered into before OIO consent is obtained, it must be expressly conditional on obtaining that consent and the transaction cannot proceed unless and until consent is obtained.

OIO consent is obtained by making an application using the OIO's prescribed form application templates (available on the OIO website), which differ depending on the type of investment (sensitive land, business assets, residential land, forestry rights, etc). For all investments, the investor is required to complete an application form. The vendor is also required to prepare and submit a vendor information form.

The application forms themselves contain guidance as to the information required to be included in the submission.

For all types of application, detailed information is required to be provided in the application form in relation to (among other things):

- the applicant;
- the transaction, including copies of all relevant agreements giving effect to the transaction;
- the applicant's business and financial position (and in each case that of its wider corporate group, if applicable);
- the applicant's ultimate ownership and control, including all relevant entities up to the top of the corporate chain, all ultimate beneficial owners of 5 per cent or more of the applicant, corporate structure charts, etc;
- the directors (or equivalent) of all entities in the ownership and control structure;
- details as to how material decisions are made in relation to the applicant or investment and who makes those decisions, including copies of any relevant contracts (such as shareholder or limited partnership agreements), constitutional documents and any delegation of authority documents;
- the business experience and acumen (including summary curricula vitae information) of the 'individuals with control' (key decision-makers) (IWC) in relation to the applicant or investment;
- the 'good character' of each IWC; and
- copies of passports of each IWC.

In addition to the application form, an investment plan is required to be prepared and submitted for sensitive land investments. This is effectively a business plan relating to the investment, the purpose of which is to set out the 'benefit to New Zealand' that will arise as a result of the investment by reference to 21 'benefit factors' that are set out in the Act and Regulations. These benefit factors include matters such as introduction of new investment for development purposes, creation of

jobs, increases in business productivity or efficiency, introduction of new domestic services or technology and protection of indigenous flora and fauna. Benefit claims are measured against a 'counterfactual' (see question 16) and are required to be detailed and backed up by quantitative evidence and analysis that is set out in the investment plan.

The 'vendor information form' required to be submitted by the vendor is required to contain details about the vendor, the current state of the land or assets and the vendor's future plans in respect of the land or assets. This form is submitted to the OIO by the vendor separately to, but concurrently with, the investor's submission of its application.

Fees are required to be paid to the OIO for all application types. The quantum of fees differs between application type, but currently include fees of NZ$32,000 for significant business assets applications; NZ$34,100 for residential land and forestry rights applications; NZ$41,500 for sensitive land decisions made under delegation by the OIO; NZ$49,000 for sensitive land decisions made by the ministers; and NZ$54,000 for combination sensitive land and business assets applications where ministerial approval is required.

Securing approval

10 | Which party is responsible for securing approval?

The purchaser or investor is the party responsible for making the application and obtaining consent. The counterparty's involvement in the application process is relatively limited although, for sensitive land applications, the vendor is required to complete a 'vendor information form' (see question 9).

Review process

11 | How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

How long the OIO consent process takes depends on a range of factors and can range from one to two months to a year or more. There is currently no legislated review period with which the OIO must comply.

Typically, a significant business assets application process takes between one and four months from the time of submission to the OIO to consent being received, with the risk being to the longer end of that range. Sensitive land application processes typically take between two and eight months to obtain consent, again with the risk being to the longer end of that range.

The majority of sensitive land applications require separate review and approval by the Minister of Finance and the Minister of Land Information, following a recommendation by the OIO. The ministerial review and approval process is unpredictable, and may be impacted by parliamentary recesses, ministerial workloads and political influences. The OIO and ministers may also consult with interested stakeholders and experts in relation to heritage, environmental, cultural and walking access issues arising in relation to sensitive land applications, and these processes add further unpredictability to the review timeline.

In all cases, application preparation time is additional to the OIO's review period, and requires significant expertise and dedication of resources to provide and assimilate the required information. It typically takes between two weeks and a month to prepare and obtain the required information and draft an application.

The government has announced that the proposed reform of the Act in 2020 will include the introduction of review time frames that are tailored to each type of application and reflective of the different levels of complexity that apply to the purchase of different asset types (eg, an investment in significant business assets will have a different time frame to investments in sensitive land). The particular time frames have not yet been determined.

Clearance penalties

12 | Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

Yes, OIO consent must be obtained before the parties can close the transaction. Owing to the length of the OIO review process, this often results in a material period between signing and closing of a transaction that is subject to the Act.

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, and will be liable on conviction to, in the case of an individual, imprisonment for a term not exceeding 12 months or to a fine not exceeding NZ$300,000, or, in the case of a body corporate, to a fine not exceeding NZ$300,000. The OIO can also apply to a court to order disposal of interests in property or assets (including securities) acquired in contravention of the Act. The OIO has a large, dedicated enforcement team, and regularly brings enforcement proceedings and imposes fines for breaches.

The government has announced that the proposed reform of the Act in 2020 will include increasing the financial penalties above to NZ$500,000 for individuals and NZ$10 million for corporates. The reforms will also introduce powers for the OIO to apply for urgent injunctive relief and obtain court enforceable undertakings to deal with breaches (including prospective breaches).

Involvement of authorities

13 | Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

The OIO tends to shy away from giving formal guidance, particularly in relation to issues of legal interpretation, and generally directs applicants to rely on their own New Zealand legal advisers to navigate both the legislation and the application process. However, informal pre-application meetings with the OIO are both encouraged by the OIO and can be beneficial, particularly to introduce a new investor to the OIO and discuss with the OIO any matters of particular complexity or novelty regarding the applicant's ownership and control structure, the transaction and/or the applicant's future plans in relation to the target assets.

Pre-application meetings normally last for about an hour, and can be in person at the OIO's offices in Wellington, or can be conducted by teleconference or videoconference.

There is no expectation on the part of the OIO of pre-application dialogue or meetings.

Facilitating clearance

14 | When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

Applications are prepared and primarily supported (including liaising with the OIO before and during the application process) by the applicant's New Zealand legal advisers. However, specialist government relations experts can assist (informally) in cases where additional advocacy is required.

Post-closing powers

15 What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to pre-merger review?

Neither the OIO nor the government currently has any power to review, challenge or unwind a transaction that does not require OIO consent under the Act.

The government has announced that the proposed reform of the Act in 2020 will include introducing a new 'national security and public order call in power' to allow the government to exercise control over investments not already subject to the Act but which pose risks to national security or public order. Mandatory and voluntary notification requirements will also be introduced. If a material risk to the national interest is identified then the investment could be blocked, have conditions imposed or, where relevant, be unwound. The OIO will also have the power to apply for urgent injunctive relief from the courts and obtain court enforceable undertakings from investors who have breached the Act.

SUBSTANTIVE ASSESSMENT

Substantive test

16 What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

The test that must be met for OIO consent to be granted differs depending on whether the investment involves significant business assets or sensitive land.

The 'investor test'

The 'investor test' must be met for both sensitive land and significant business assets applications. The investor test criteria are fundamentally the same for all consent applications. The four core investor test criteria are the following:

- Relevant business experience and acumen: the IWC must collectively have business experience and acumen relevant to the overseas investment being made. To meet this test, the applicant provides a description of current and former material roles, business experience and qualifications of each IWC, with a particular focus on experience and qualifications relevant to the same type of industry and investment that is the subject of the application.
- Demonstrated financial commitment to the investment: the applicant must have committed financially to the investment, for example, by engaging advisers, conducting due diligence, negotiating and entering into transaction documents, paying a deposit, and/or having engaged debt financiers to secure, or having entered into, funding commitments.
- 'Good character': the IWC must each be of 'good character'. This involves disclosure of any and all information potentially relevant to the character of the IWC, including offences or contraventions of the law (whether convicted or not), allegations of the same and any investigations, prosecutions or other enforcement action by regulatory or professional bodies. Where any such disclosure is made, an explanation must be provided as to why such matter(s) do not impugn the good character of the relevant individual. Each IWC must give a statutory declaration addressed to the OIO confirming that they are of 'good character'.
- Absence of ineligible individual(s): the IWCs must not be individual(s) of the kind referred to in section 15 or 16 of the Immigration Act 2009, being a person who, broadly:
  - has been sentenced to imprisonment for more than five years or more than 12 months in the previous 10 years;
  - has been the subject of a removal order;
  - has been removed, deported or excluded from New Zealand or any other country;
  - is likely to commit an offence that is punishable by imprisonment;
  - is, or is likely to be a threat or risk to security, public order or the public interest; or
  - is a member of a terrorist entity designated under the Terrorism Suppression Act 2002 (NZ).

The 'benefit test'

In the case of investments involving sensitive land, the applicant is additionally required to satisfy a 'benefit test'.

This test requires that the investment will result in a 'benefit to New Zealand'. Where the investment involves an interest in non-urban or farm land of more than five hectares, the applicant must show that the benefits to New Zealand will be, or is likely to be, 'substantial and identifiable'.

The Act and Regulations contain 21 specific 'benefit factors' against which the outcomes of the investment are measured, including matters such as introduction of new investment for development purposes, creation of jobs, increases in business productivity or efficiency, introduction of new domestic services or technology, and protection of indigenous flora and fauna.

Benefit claims are required to be measured against a 'counterfactual' in respect of which the OIO applies a rebuttable presumption that the relevant assets will be acquired by a hypothetical 'competent and adequately funded alternative New Zealand purchaser' (ANZP). The benefit to New Zealand under each factor is therefore required to be measured against the benefit to New Zealand that would arise if an ANZP acquired and owned the relevant assets. For example, if one of the benefits claimed by an applicant is that it will introduce to New Zealand investment for development purposes of NZ$5 million and create 10 jobs over the five-year period following the transaction, the counterfactual may be that an ANZP would invest NZ$3 million and create five jobs over that period, and so the net benefit to New Zealand under these benefit factors would be NZ$2 million and five jobs. This is a notoriously difficult test to apply given its hypothetical nature, and the government has announced that the test will be amended in 2020 (see 'Reform' below).

Separate pathways for investments in residential land and forestry rights

Amendments to the Act that were introduced in 2018 brought acquisitions of residential land and forestry rights within the scope of the Act.

Forestry rights were previously not captured by the Act owing to general exclusion for profits à prendre (rights to take), but this exclusion was removed by the amendments. The new rules provide the following:

- The acquisition of forestry rights will not require OIO consent where the total area covered by forestry rights acquired in any calendar year (including acquisitions by related parties) is less than 1,000 hectares.
- Forestry investors can take advantage of two new (and simplified) consent pathways where the land 'will be or is likely to be used exclusively or nearly exclusively, for forestry activities' (maintaining, harvesting or establishing a crop of trees) and there is a commitment to replant following harvest, namely:
  - a simplified benefit to New Zealand test that can be met by committing to maintain existing arrangements for supply of logs to New Zealand processors and existing environmental protections – the applicant is not required to show any additional benefit resulting directly from the investment; and
  - a new counterfactual test that only requires the OIO to compare the proposed forestry use against the current use of

the land (and not against what a hypothetical alternate New Zealand purchaser might do).

These tests can be used regardless of the nature of the forestry investment (eg, bare land purchase, purchase of existing forest, lease, forestry right, or investment in a forestry business). If the relevant land includes any existing homes on residential titles, those homes can either be retained for staff accommodation or removed for the purposes of the forestry business.

Residential land was also not previously within the scope of the Act; however, the current government made election promises when it came to power in 2016 to 'ban' foreign investment in residential property and has implemented that policy through amendments to the Act rather than by introducing new legislation.

As a result of the changes, any overseas person who wishes to buy residential or lifestyle land (of any size), or lease it for three years or more, will in almost all cases need to apply to the OIO for consent.

To obtain OIO consent to acquire residential land, the overseas person will generally need to show that:

- they will be developing the land and adding to New Zealand's housing supply (eg, new apartments);
- they will convert the land to another use (eg, a business) and are able to demonstrate this would have wider benefits to New Zealand;
- they have an appropriate visa status and intend to reside in the property being purchased (the 'commitment to reside' test); and/or
- the residential land is being used for a purpose associated with or incidental to a business (eg, worker accommodation) (the 'incidental use' test).

Applicants for OIO consent can apply using a combination of the available tests, depending on their intentions for various parts of the land. Generally, an overseas person will not be able to purchase residential land for the purpose of holding it as an investment property.

Onus of proof

The onus is on the applicant to establish that the relevant tests are satisfied so that consent should be granted. Benefit claims are required to be evidentially substantiated and quantified, and require a level of analysis on the part of the applicant that is sufficient to convince the OIO both as to the likelihood that the benefit will occur and the quantum of that benefit as against the counterfactual. Sometimes these are backed up by third-party reports or opinions.

Guidance

There is a significant amount of technical guidance on how to make benefit claims and counterfactual arguments on the OIO's website, www.linz.govt.nz/overseas-investment.

Engaging a New Zealand legal practitioner with specific expertise in preparing OIO applications is critical to both a smooth process and a successful outcome.

Reform

Various aspects of the substantive tests will be reformed by amendments to the Act in 2020. These changes include:

- replacing the 21 'benefit factors' with fewer, broader factors that encompass the range of benefits that can currently be recognised – it is unclear what impact this change will have other than streamlining the application form;
- removing the narrow requirement for benefits in non-urban land over five hectares to be 'substantial and identifiable', and replacing it with a proportionate approach where the benefits to obtain an interest in any sensitive land must be proportional to the land's sensitivity and the interest being acquired in it – this is a welcome change and will introduce into the legislation a proportionality requirement that the government has directed the OIO to apply but which some would argue has not always been consistently or appropriately applied;
- removing the theoretical counterfactual test, by requiring that benefits claimed be measured against the current state of the sensitive land and any business carried on from it – this is also a welcome change that will significantly simplify the analysis required in relation to the benefits test, and should eliminate some anomalies that arise under the current hypothetical ANZP counterfactual approach; and
- replacing the 'good character' test with a bright line test under which the decision maker may only take into account criminal convictions with prison terms, civil contraventions punished by pecuniary penalties and allegations of the same level of offending or contravention where formal proceedings have commenced – this change should significantly ameliorate the delays, financial cost and uncertainty associated with the current test and approach (which has been highly problematic for both the applicants and the OIO to deal with).

Consulting other countries

17 To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

The OIO will use all avenues that it considers necessary or appropriate in the circumstances of the particular application to address any issues it identifies, and this may include consulting with regulators and officials in other countries (although this is rare).

Other relevant parties

18 What other parties may become involved in the review process? What rights and standing do complainants have?

Because application processes (and the underlying transactions) are often confidential prior to consent being obtained, third parties are unlikely to have an opportunity to intervene in the process prior to consent being granted. No other agencies or regulators have a right to intervene, or any formal role, in OIO review processes.

However, the OIO and ministers may consult with interested stakeholders and experts in relation to heritage, environmental, cultural and walking access issues arising from 'sensitive land' applications. These stakeholders include Heritage New Zealand, the Department of Conservation, the Walking Access Commission, local councils, local iwi (Maori tribes) and others. This engagement may lead to requests from these stakeholders for undertakings from applicants – for example, undertakings to protect or preserve heritage, cultural or significant environmental aspects of the land, and negotiation of these undertakings with both the OIO and stakeholder(s) can add unpredictability and delay to the review process.

The OIO and ministers may also choose to engage experts (eg, economists or industry specialists) to advise in relation to particularly difficult counterfactual or benefits analyses. Again, where such engagement does occur, this can add unpredictability and delay to the process.

Prohibition and objections to transaction

19 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If OIO consent is not obtained, the transaction cannot (legally) proceed. It is a criminal offence to give effect to a transaction requiring consent without having first obtained such consent.

Mitigating arrangements

20 | Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings or agreeing to other mitigation arrangements?

Notwithstanding the lack of a formal review or appeal process within the regime, in practice, the application process operates such that if the OIO has concerns with an application (for example with the level of benefits offered, good character issues, transparency of the ownership and control structure, etc) then it will raise these concerns during the review process and give the applicant an opportunity to rectify them by providing additional information in the form of an updated application. Where these issues prove to be insurmountable, practice has been for the applicant to withdraw the application and not proceed with the transaction, rather than receive a decision to decline.

Undertakings by way of conditions of consent are an ingrained part of the current regime. In particular, the OIO's practice is to impose conditions of consent relating to the benefits promised by an applicant to ensure that the benefits are delivered. These conditions are then monitored by the OIO, by requiring the applicant to report against them to the OIO annually until they have been satisfied. For example, if the applicant promised in its application to introduce NZ$10 million of new investment for development purposes in relation to particular proposed projects over the five-year period following the transaction, this expenditure would be included as a condition of the OIO's consent to the transaction, and the applicant would be required to write to the OIO annually disclosing the capital invested over the previous 12 months and in aggregate since consent was granted, and the projects it has invested in, until the NZ$10 million has been invested. The OIO has increasingly taken action against investors who have materially and consistently failed to deliver on promises made in their applications.

Challenge and appeal

21 | Can a negative decision be challenged or appealed?

There is no specific process within the regime to appeal or challenge a negative consent decision. Decisions can, however, be judicially reviewed through the courts, and there was an example in 2019 of a ministerial decision to decline an application being reversed under threat of such a review (see case study 1, question 23).

Confidential information

22 | What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

Applications submitted to the OIO are not announced, published or made generally available but they are a matter of public record and, as such, are subject to requests for disclosure from members of the public under the Official Information Act 1982.

If, for reasons provided for in the Official Information Act, there is good reason to withhold the existence of an application from the public, the OIO will not disclose the existence of the application while it is being considered. The fact that a transaction remains confidential and has not been announced will be sufficient grounds for this.

In relation to requests for disclosure of the application itself, the OIO's usual practice is also to consult with applicants before releasing an application or any information contained within it, and will withhold or redact sensitive information if grounds for doing so have been made out by the applicant in accordance with the Official Information Act. The ground for withholding official information under the Official Information Act that is frequently argued by applicants to resist disclosure of an application or information contained in it is that the release of such information will result in 'prejudice to a person's commercial position'.

Once an application is determined, the OIO's standard practice is to issue a public decision summary at the end of the month following the month in which the decision is made, containing basic details of the parties, transaction and the benefit factors that were satisfied by the investment. The applicant can seek to withhold sensitive information from this publication, typically including the purchase price (if it has not already been announced).

RECENT CASES

Relevant recent case law

23 | Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

Case study 1 – Judicial Review of Ministerial decision

In April 2018, Oceana Gold Ltd, a New Zealand gold miner with an existing active mine, applied to the OIO to purchase 178 hectares of rural land for a new tailings reservoir required to extend the operating life of the mine. The OIO assessed the application and, in November 2018, issued its report to the ministers recommending that the application be approved. However, the Minister for Land Information Eugenie Sage and Associate Finance Minister David Clark reached different conclusions as to whether the benefits test had been met, with Sage choosing to decline consent and Clark choosing to grant consent, resulting in consent being declined. This was despite the applicant arguing that the new tailings dam was required to extend the life of the mine, and that without it 340 jobs and NZ$2 billion in exports would be lost over nine years. In declining to give consent, Sage, a Green Party MP, appeared to take into account potential negative environmental impacts of mining in reaching her decision, including concerns about soil contamination, increased carbon emissions and the general safety of tailings dams, and stated that the project itself was inconsistent with New Zealand's values in relation to sustainability. Oceana Gold then applied to judicially review that decision, alleging that Sage took into account factors that were not relevant to the test under the Act. Rather than risk an adverse ruling in this proceeding, the government allowed Oceana Gold to submit new applications, which were reconsidered and approved by the Minister of Finance Grant Robertson and Associate Minister of Finance David Parker on the basis that the investment would benefit New Zealand by the retention of about 340 full-time jobs over nine years and exports valued at NZ$2 billion over nine years.

Case study 2 – Decline of application to acquire interest in farmland

In 2018, an investment vehicle for a fund established by Fiera Comox Partners Inc to invest in agricultural land and rural producing assets in New Zealand, Australia, Canada and the US, applied to the OIO for consent to acquire up to a 68.3 per cent interest in Rangitata Dairies Limited Partnership, which owns eight dairy farms on the south island of New Zealand, by way of a subscription for new shares. Rangitata intended to use the subscription price for the investment to convert 111 hectares of farmland into an orchard planting permanent crops and installing irrigation and in-shed feeding on some of the dairy farms. The ministers chose to decline consent in this case, stating that the benefits to New Zealand resulting from the investment were not sufficiently substantial and identifiable relative to the interests in land being acquired in the investment. This is a rare example of a decline decision by the OIO and ministers, and is an example of the higher standard applied to investments in large tracts of productive farmland.

Case study 3 – Exercise of the OIO's enforcement powers

In July 2014, the OIO granted consent to Kingstown Blue Spring Resort (KBSR) to purchase the Okoroire Hot Springs Hotel near Tirau in July 2014. KBSR needed consent under the Act to purchase the property because of the size and location of the land, and its historic value – the hotel is one of New Zealand's oldest hotels and includes hot springs and several historic buildings. As part of the OIO consent, KBSR agreed to undertake work to improve the facility, including constructing eight new hot pools, 22 new guest rooms, protecting important heritage features and improving public access to the property, and these promises were made conditions of the OIO's consent. KBSR was given four years to complete the promised work. KBSR undertook some minor work; however, the OIO became concerned about the company's ability to complete the developments in time and comply with its consent conditions. Ultimately, the OIO decided that KBSR had breached the conditions of its OIO consent and obtained a court order directing KBSR to dispose of the hotel.

UPDATE AND TRENDS

Key developments of the past year

24 Are there any developments, emerging trends or hot topics in foreign investment review regulation in your jurisdiction? Are there any current proposed changes in the law or policy that will have an impact on foreign investment and national interest review?

As noted throughout this chapter, a wide-ranging reform of the Act was announced by the government in November 2019, with legislation due to be introduced in early 2020 and enactment of the amending legislation scheduled for mid to late 2020.

These reforms constitute a material overhaul of the Act and were designed through the consultation process with two key principles in mind, being, first, to give the government discretion that does not currently exist under the Act to block transactions that are contrary to New Zealand's national security or other core national interests and, second, to simplify the regime and improve certainty for investors by addressing various issues with the scope and interpretation of the Act. The key reforms proposed for implementation in 2020 include the following:

- A new 'national interest' test which will apply to transactions for which consent is already required.
- A new national security and public order call in power that will apply to transactions not currently covered by the Act, together with a new notification process.
- A higher benefits standard for investments in farmland.
- Enhancing the OIO's enforcement powers by introducing court enforceable undertakings and urgent injunctive powers.
- Increasing maximum civil penalties for breach of the Act to NZ$500,000 for individuals and NZ$10 million for corporates.
- Simplifying the benefits test for sensitive land applications by reducing the number of benefit factors, removing the requirement that benefits associated with investments in non-urban land over five hectares be 'substantial and identifiable' and replacing it with a proportionate approach based on the land's sensitivity and the nature of the interest being acquired (eg, freehold versus leasehold), and introducing a new counterfactual test that refers simply to the current state of the land or assets.
- Removing screening requirements for transactions that pose little to no risk; for example, leases of less than 10 years, transactions involving companies that are majority owned and controlled by New Zealanders, transactions involving land adjoining other sensitive land, and incremental shareholding increases where a new control threshold is not crossed.
- Introducing statutory review time frames tailored to each type of application, reflecting the different levels of complexity that apply to the purchase of different asset types (eg, an investment in a significant business asset will have a different time frame to investments in sensitive land).

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