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FOREIGN INVESTMENT REVIEW

New Zealand

LEXOLOGY

Foreign Investment Review

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LAW AND POLICY

Policies and practices

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. The New Zealand government also seeks to manage risks to New Zealand's national interest and national security through a national interest test, which may be applied to any transaction that requires consent under the foreign investment regime, and a national security and public order call-in regime that may apply to a narrow range of transactions that otherwise do not require consent.

Recently, the New Zealand government announced a plan to reform the overseas investment regime as part of its policy objective to encourage overseas investment in New Zealand. This includes reversing the presumption that investing in New Zealand is a privilege and that investors must justify their transaction to the government. New legislation is being prepared and is expected in 2025.

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 these investors to be screened before acquiring them.

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. However, the national security and public order call-in regime has certain sector-specific elements.

New Zealand does not exercise currency controls.

Law stated - 21 November 2024

Main laws

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 contains a national interest test, which allows the government to assess overseas investment transactions that require consent under the Act for significant risks to New Zealand's national interest.

The national interest test has mandatory application to overseas investment transactions for which consent is already required under the Act where: a foreign government or its associates would acquire sensitive land or hold a more than 25 per cent interest in the target New Zealand business; or the transaction involves certain specified categories of strategically important business.

The national interest test may also be applied at the minister's discretion to any other transaction that requires consent if the minister determines that the proposed investment poses a risk to New Zealand's national interest. Factors (set out in guidance and referred to in the current Ministerial Directive Letter) that could trigger the escalation of a transaction for review under the national interest test include if the proposed investment:

- could pose risks to New Zealand's national security or public order;
- would grant an investor significant market power within an industry or result in vertical integration of a supply chain;
- has foreign government or associated involvement that is below the more than 25 per cent ownership or control interest threshold for automatic application of the national interest test, but granted that government (or its associates) disproportionate levels of access to or control of sensitive New Zealand assets;
- would have outcomes that were significantly inconsistent with or would hinder the delivery of other government objectives;
- raises significant Treaty of Waitangi issues; or
- relates to a site of national significance (eg, significant historic heritage).

If a transaction is determined to be contrary to the national interest, consent may be declined, conditions imposed or undertakings required to mitigate any risks. The national interest test will be used to block or restrict an overseas investment transaction rarely and 'only where necessary to protect New Zealand's core national interests'. The rebuttable presumption is that overseas investment is in New Zealand's national interest, and hence the test is similar to Australia's 'not contrary to the national interest' test under the Foreign Investment Review Board regime.

The Act also contains a national security and public order call-in regime, which applies to investments that do not otherwise require consent under the Act but involve the acquisition of interests in strategically important business assets and infrastructure, such as military or dual-use technology, critical direct suppliers to an intelligence or security agency, systemically important financial institutions and financial market infrastructure, key electricity generators, telecommunications services, ports and airports, and significant media businesses. Notification to the minister is mandatory for certain categories of strategically important business, and discretionary for other categories.

Law stated - 21 November 2024

Scope of application

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 requirement to obtain consent from the OIO applies to all transactions in which an 'overseas person' directly or indirectly acquires an interest in 'sensitive land' or 'significant business assets'.

In addition, the national interest test can be applied to any application for consent.

The national security and public order call-in regime applies to overseas investments in strategically important businesses and infrastructure, such as key electricity generators, registered banks, operators of financial market infrastructure, telecommunications services providers, ports, airports and media businesses, as well as businesses that hold certain categories of 'sensitive information' (such as financial, health, genetic or biometric information) in respect of 30,000 or more New Zealand individuals.

Sensitive land

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

Qualifying interests include (but are not limited to) freehold title, leases with a term of 10 years or more (including rights of renewal) 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, national 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:

- through acquisition of securities, acquire a more than 25 per cent ownership or control interest in an entity, or increase an existing more than 25 per cent interest through the 50 per cent or 75 per cent control thresholds, or to 100 per cent, and either:
    - if the target is a New Zealand entity, the consideration provided for or value of the securities exceeds NZ$100 million;
    - if the target is not a New Zealand entity, the value attributable to the New Zealand business exceeds NZ$100 million;
    - the gross value of the entity's assets in New Zealand, and the New Zealand assets of the target entity's more than 25 per cent direct and indirect owned

and controlled entities (regardless of where they are established), exceeds NZ$100 million;

- the target entity has a more than 25 per cent direct or indirect ownership or control interest in one or more New Zealand entities, which, directly or indirectly through their more than 25 per cent owned or controlled entities (regardless of where they are established) have assets anywhere in the world the value of which 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.

Alternative monetary thresholds 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$560 million (applicable until 31 December 2022 or, if later, publication of the 2023 threshold) applies to Australian non-government investors, while the threshold is NZ$200 million for non-government investors from the other trade agreement countries. The Australian non-government investor threshold is inflation adjusted annually.

Difficulties can arise when applying the NZ$100 million consideration test referred to 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 and existing forest land have their own simplified consent pathways, and there is an ability to acquire up to 1,000 hectares of forestry rights without OIO consent in a calendar year. However, investments in farmland for forestry conversion are difficult under current policy settings and there have been several recent decisions where such investments have been declined consent by the OIO on the grounds of failure to establish sufficient benefits to New Zealand arising from the investment. The more productive the farmland to be acquired is, the more difficult it will be to satisfy the benefit to New Zealand test.

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 (eg, through direct or indirect acquisition of securities), consent will be required if more than 25 per cent minority ownership or control interest is acquired. The consent regime will still catch acquisitions of ownership or economic interests of 25 per cent or less if they come with disproportionate (more than 25 per cent) voting rights or director appointment rights. Associated interests are aggregated for the purposes of the tests.

In addition, investments at levels lower than 25 per cent may be voluntarily or compulsorily notifiable to the OIO under the national security and public order call-in regime where they relate to strategically important businesses. For example, an acquisition of a 10 per cent or more ownership or control interest in a listed issuer that carries out a strategically important business, or of any ownership or control interest at all in other categories of strategically important business, may be notifiable under this regime.

Sector-specific targeting

New Zealand's foreign investment regime requires certain sectors to be subject to an increased level of scrutiny, in the form of the national interest and national security and public order call-in regimes.

These regimes apply to investments in 'strategically important businesses', which include:

- New Zealand's major port and airport operators;
- major electricity generators (with more than 250MW capacity) and electricity lines services providers;
- major drinking water, wastewater, sewerage or stormwater service providers (in each case servicing more than 5,000 people);
- telecommunications infrastructure or services providers;
- media entities that have an impact on New Zealand's media plurality;
- entities that research, develop, produce or maintain military or dual-use technology;
- critical direct suppliers to the New Zealand Defence Force, Government Communications Security Bureau and the New Zealand Security Intelligence Service;
- systemically important financial institutions and market infrastructure (eg, payments systems);
- in the case of the national interest regime only, major irrigation schemes (with more than 25mm3pa of water); and
- in the case of the national security and public order call-in regime only, entities that develop, produce, maintain or otherwise have access to sensitive information in connection with services provided to certain government agencies or in respect of 30,000 or more New Zealand individuals.

In the case of the national interest regime, which only applies where the transaction already requires OIO consent for another reason (for example because it activates the 'significant business assets' or 'sensitive land' consent pathways), if a transaction is determined by the minister to be contrary to the national interest, consent may be declined or conditions imposed to mitigate any risks.

In the case of the national security and public order call-in regime, investments that do not otherwise require OIO consent but relate to a strategically important business may be mandatorily or voluntarily notifiable to the OIO, and, in rare cases where a material risk to national security or public order is identified, the minister may call the transaction in for review and ultimately block, impose conditions on, or, where relevant, unwind the transaction.

In addition, farmland, forestry rights, fishing quotas and water extraction rights are subject to targeted provisions under the sensitive land consent pathway.

Law stated - 21 November 2024

Definitions

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 and managed investment schemes, among others, that are either non-New Zealand citizens or are incorporated, registered or established outside of New Zealand and/or are more than 25 per cent owned or controlled by overseas persons (or in the case of a managed investment scheme, where the manager is an overseas person). The test looks at both economic interests (eg, via equity ownership) and decision-making powers (eg, via the 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 more than 25 per cent threshold is met under either test.

Different tests apply to New Zealand-listed issuers and certain managed investment schemes.

A New Zealand-listed issuer, being a company incorporated in New Zealand and listed on New Zealand's Exchange (NZX), will only be an 'overseas person' if:

- it is more than 50 per cent owned by overseas persons; or
- one or more overseas persons who each own 10 per cent or more of its securities together control the composition of more than 50 per cent of its board (or equivalent governing body) or exercise or control the exercise of more than 25 per cent of the voting power at its shareholder meetings (or equivalent ownership body).

A New Zealand-managed investment scheme will not be an 'overseas person' if:

- it is established under New Zealand law and listed on the NZX;
- 50 per cent or less of the value of its managed investment products is invested on behalf of overseas persons; and
- no more than 25 per cent of the products in the scheme that entitle holders to vote are beneficially owned by or on behalf of overseas persons who own 10 per cent or more of those products (alone or together with their associates).

Interests of 'associates' are aggregated under the Act to determine both whether an entity is an overseas person and whether an overseas person has acquired a qualifying interest

in the relevant assets. The definition of 'associate' is intentionally broad so as to act as an effective anti-avoidance mechanism, 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.

Law stated - 21 November 2024

Special rules for SOEs and SWFs

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 national interest test mandatorily applies to all transactions that require consent under the Act and where, as a result of the transaction, a 'non-New Zealand government investor' would hold a more than 25 per cent or greater direct or indirect interest in the relevant asset. Foreign government or associated involvement that is below the 25 per cent threshold, but grants that government (or its associates, or both) disproportionate levels of access or control to sensitive New Zealand assets (such as access to non-public information, membership or observer rights on the board, the power to control board composition and any involvement other than through the exercise of ordinary voting rights in the target entity's decision-making) may also be considered by the minister under the national interest test.

Guidance issued by the government states that transactions involving foreign government investors and their associates may be subject to more rigorous scrutiny because these investors may be pursuing broader policy or strategic (as opposed to purely commercial) objectives through their investments, and those objectives may not align with New Zealand's national interest. There is precedent in the New Zealand market for the government blocking transactions in sensitive sectors, proposed to be undertaken by entities that have majority upstream ownership by a single foreign government that the New Zealand government views unfavourably.

A 'non-New Zealand government investor' is defined broadly and includes any foreign government (including regional or local government), as well as 'relevant government enterprises'. An entity will be a 'relevant government enterprise' if one or more government-related investors from a single country (either alone or together with their associates) have, directly and indirectly, in aggregate, a more than 25 per cent ownership or control interest in the investor. This assessment requires an aggregation of all holdings of government-related investors from a single country, regardless of the size of the holding. An investor will be considered to be government-related if it is, acts on behalf of or is related to any national, state or municipal government, and includes any national, state or municipal pension funds, state-owned enterprises, sovereign wealth funds and any similar government-related or controlled (or both) entities.

Law stated - 21 November 2024

Relevant authorities

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

The Minister of Finance has formal decision-making responsibility under the national interest test and national security and public order call-in regime; however, the OIO is responsible for administering the regime and making recommendations to the minister, on which the minister relies heavily. The investor's engagement is with the OIO.

Law stated - 21 November 2024

Relevant authorities

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

The term 'national interest', and what would be contrary to it, is not defined; instead, the government is granted discretion to decide on a case-by-case basis whether a prospective investment would be contrary to New Zealand's national interest in cases where the national interest test does not automatically apply to the investment.

The government has specifically stated that the test is intended to operate as a 'backstop tool' that should be applied rarely and only where necessary to protect New Zealand's core national interests – the starting point is that investment is in New Zealand's national interest.

The current Ministerial Directive Letter, which directs the OIO on how to exercise its powers under the Act, states that the OIO should only exercise its discretion to recommend to the minister that a transaction should be escalated to a national interest assessment if the proposed investment:

- could pose risks to New Zealand's national security or public order;
- would grant an investor significant market power within an industry or result in the vertical integration of a supply chain;
- has foreign government or associated involvement that was below the more than 25 per cent ownership or control interest threshold for automatic application of the national interest test, but granted that government (and/or its associates) disproportionate levels of access to or control of sensitive New Zealand assets;
- would have outcomes that were significantly inconsistent with or would hinder the delivery of other government objectives;
- raises significant Treaty of Waitangi issues; or
- relates to a site of national significance (eg, significant historic heritage).

However, in practice, the OIO tends to behave conservatively when considering what may be of interest to the minister from a national interest perspective in cases where the national interest test does not mandatorily apply, and is likely to ask the applicant questions regarding areas of perceived potential interest to allow the OIO to address them in its advice to the minister.

The government also has a degree of discretion when exercising the national security and public order call-in power once notified of a proposed investment. Again, it has been stated that this power will rarely be used and only where there is an identified risk to national security or public order. This is informed by advice from the New Zealand Security Intelligence Service, Government Communications Security Bureau, with public order advice coming from a range of agencies where relevant. Advice on international relations is provided by the Ministry of Foreign Affairs and Trade.

Law stated - 21 November 2024

PROCEDURE

Jurisdictional thresholds

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

If an investment is caught under the Act's consent pathways, filing is mandatory, and consent must be received before the relevant investment is 'given effect to'. The Overseas Investment Office (OIO) considers that an investment is given effect on signing a binding agreement, which means that any such agreement must be expressly conditional on receipt of OIO consent or, in the case of a notification under the national security and public order call-in regime, receipt of a direction order, to avoid breaching the Overseas Investment Act 2005 (the Act).

For consent:

- 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$618 million for Australia (increasing to NZ$650 million from 1 January 2025 to 31 December 2025) and NZ$200 million for other trade agreement countries).

The national interest test will mandatorily apply to a transaction that already requires OIO consent under one of the usual pathways above where the investment relates to a strategically important business or is undertaken by a non-New Zealand government investor. The minister can also exercise residual discretion to review any other transaction that requires OIO consent if he or she considers the investment may be contrary to the national interest.

The national security and public order call-in regime only applies to investments that do not require consent or approval under the usual pathways. There is no monetary threshold that investments must meet to be caught under the national security and public order call-in regime, although there is a high bar in terms of when the regime is triggered – limited to investments in strategically important businesses and critical national infrastructure, with no residual discretion available to the minister. Notification of a transaction under the national security and public order call-in regime is voluntary in most cases (but recommended, to avoid risks associated with the transaction being called in for review after it has been

implemented); however, notification is mandatory where the relevant strategically important business to which the investment relates is a business that researches, develops, produces or maintains military or dual-use technology, or is a critical direct supplier to either New Zealand's intelligence or security agencies, or both.

Law stated - 21 November 2024

National interest clearance

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 caught under 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 webforms on the OIO website, which differ depending on the type of investment (sensitive land, business assets, residential land, forestry rights, etc). For all investments that require consent under the Act, the investor is required to complete an application form. The vendor is also required to prepare and submit a vendor information form.

Mandatory and voluntary notifications under the national security and public order call-in regime are also made via a webform on the OIO's website.

The application forms themselves contain guidance as to the information required to be included in the submission, and there are significant guidance and resources available on the OIO website to assist investors.

For all types of consent 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 and corporate structure charts;
- details of any foreign-government-related investors in the ownership structure and their holdings;
- 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;

- in respect of each 'individual with control' (key decision-maker) in relation to the applicant and investment, certain personal details, summary curricula vitae information, passport copies and 'investor test' character and capability confirmations;
- whether the transaction is a transaction of national interest due to: the investment relating to a strategically important business; or the investor being a foreign government investor; and
- whether the transaction may otherwise be considered to be a transaction of national interest (ie, there is a risk that the transaction is contrary to New Zealand's national interest).

In addition to the application form, an investment plan is required to be prepared and submitted for investments in sensitive land. This is effectively a business plan relating to the investment, the purpose of which is to set out the net benefit to New Zealand that will arise as a result of the investment by reference to certain 'benefit factors' that are set out in the Act and Overseas Investment Regulations 2005. These benefit factors include economic benefits (such as the creation of jobs, increasing export receipts, increases in business productivity and the introduction of new technology or business skills), environmental factors (such as the protection of native wildlife and plants, erosion control and improvements to water quality) and other factors such as the protection of heritage sites, the advancement of government policy and increased participation by New Zealanders. However, any net benefits to New Zealand arising directly from the investment can be claimed. Benefit claims are measured against a counterfactual of the current state of the business, assets and/or land (as applicable), and are required to be detailed and backed up by quantitative evidence and analysis that is set out in the investment plan. In practice, the key benefits to New Zealand on which the application relies in order to meet the benefits test must be expressed in the investment plan as firm commitments, and the OIO will make those commitments conditions of the grant of consent.

The vendor information form required to be submitted by the vendor must contain details about the vendor, and the current state of the business, assets and/or land (as applicable), in order to establish the counterfactual. This form is submitted to the OIO by the vendor separately to, but concurrently with, the investor's submission of its application.

Fees must be paid to the OIO for all consent application types. The quantum of fees differs between application types but currently includes fees of NZ$38,800 for significant business assets applications; NZ$2,040 to NZ$35,000 for residential (but not otherwise sensitive) land; NZ$33,600 to NZ$59,000 for forestry rights applications; NZ$68,200 to NZ$141,900 for sensitive land decisions made under delegation by the OIO; and NZ$74,000 to NZ$146,200 for sensitive land decisions made by the ministers. An additional fee of NZ$83,700 is payable where a consent transaction also requires a national interest assessment.

No fees are required to be paid in respect of a notification under the national security and public order call-in regime, including when the transaction is called in for review by the minister.

Law stated - 21 November 2024

National interest clearance

Which party is responsible for securing approval?

The purchaser or investor is the party responsible for making the application or notification and obtaining consent or clearance (as applicable).

The counterparty's involvement in the application or notification process is relatively limited; although, for consent applications, the vendor is required to complete and provide to the OIO separately a vendor information form, which contains basic details regarding the vendor, the vendor's ownership and control structure, a description of the business, and the reasons for the sale.

Law stated - 21 November 2024

Review process

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?

Consent regime

Assessment timeframes differ depending on the OIO consent pathway that is triggered by the investment. These timeframes reflect the relative complexities of the assessment processes and the amount of information gathering, analysis and consultation required. The statutory timeframes are non-binding and there is no right of recourse or deemed consent for the investor if the timeframes are not met. Further, the timeframes can be extended by the OIO for a number of reasons, including while it waits for additional information that it has requested from the applicant during an initial 15 working day review period. The new assessment timeframes range from 35 working days for significant business assets consents, to 55 working days for national interest assessment and one-off forestry consents, to 70 working days (not farmland) or 100 working days (farmland) for sensitive land consents. Where the national interest test applies in addition to the standard consent pathway or more than one consent pathway applies to the transaction, the applicable timeframe will be the longer timeframe (eg, for a significant business assets consent with national interest assessment the timeframe will be 55 working days; for a standard sensitive land consent with national interest assessment the timeframe will be 70 working days; and for significant business assets and sensitive farmland application the timeframe will be 100 working days).

The most recent Ministerial Directive letter published by the government on 6 June 2024 directed the OIO to decide at least 80 per cent of all consent applications within half of the relevant statutory timeframe. Since this letter was published, there has been a significant reduction in the average assessment times for consent applications.

In all cases, application preparation time is additional to the OIO's review period and requires significant expertise and dedication of resources to obtain and analyse the required information, and produce the application and required appendices. It typically takes between two weeks and one month to obtain the required information and prepare a high-quality

and fulsome application that meets the OIO's disclosure standards. Where insufficient information is provided in the application on submission, the application will be rejected by the OIO after the initial 15-working-day review period and returned to the applicant.

National security and public order call-in regime

A transaction notified under the national security and public order call-in regime will either be cleared to proceed or called in by the minister for review within 15 working days from notification. Where the transaction has been escalated, the minister will generally decide the matter within a further 40 working days but can extend this for an additional 30-working-day period in particularly complex or sensitive cases.

In practice, the vast majority of notified transactions will be given clearance to proceed within the 15-working-day time frame, ensuring that transactions are not unduly delayed.

Law stated - 21 November 2024

Review process

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 or clearance must be obtained before the parties can close the transaction. Owing to the length of the OIO review consent process, this often results in a material period between signing and closing a transaction that requires consent under 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$500,000, or, in the case of a body corporate, to a fine not exceeding the greater of NZ$10 million and three times any quantifiable gain made by the investor in respect of the investment that required consent. The OIO can also apply to a court to order the 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.

Law stated - 21 November 2024

Involvement of authorities

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?

Applicants are generally required to rely on their own New Zealand legal advisers to interpret the legislation and navigate the application process. However, it is possible to request guidance from the OIO in difficult or marginal cases, and the OIO may be willing (but is not obliged) to provide this.

Additionally, pre-application meetings with the OIO are encouraged by the OIO in the context of an imminent application for consent, for the purpose of introducing a new investor to the OIO and discussing any matters of particular complexity or novelty regarding the pending application.

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.

Law stated - 21 November 2024

Involvement of authorities

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.

Informally, the OIO will seek to expedite the consent process to meet statutory timelines for other regulatory processes, particularly on offshore transactions involving overseas regulated or statutorily imposed takeover or scheme timetables.

Law stated - 21 November 2024

Involvement of authorities

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?

Under the national security and public order call-in regime, the government has the power to exercise control over investments not subject to the consent regime under the Act but that pose risks to national security or public order.

All overseas investment transactions that do not require consent under the Act but that relate to a business that researches, develops, produces or maintains military or dual-use technology, or is a direct supplier of integral and not readily replaceable goods or services to an intelligence or security agency, are mandatorily notifiable under the call-in regime. In this case, where notification is mandatory, the notifiable transaction cannot be 'given effect to' unless a clearance to proceed has been received.

Overseas investment transactions that do not require consent under the Act but involve acquisitions of interests in a strategically important business, either indirectly through the acquisition of securities or through direct acquisitions of assets, will be voluntarily notifiable. In the case of acquisitions of securities, notification will be triggered as follows:

- in relation to overseas investment in media business, a significant part of the business of which is the generation or aggregation of content, which has a significant impact on media plurality, only where a more than 25 per cent ownership or control interest is acquired (directly or indirectly);
- in relation to overseas investment in a strategically important business that is listed on the New Zealand Stock Exchange, only where the overseas person or their associates acquire a 10 per cent or more ownership interest, control of 10 per cent or more of the voting rights or disproportionate access or control with a lesser ownership or control interest; and
- in relation to overseas investment in any other strategically important business, where the overseas person or their associates acquire any ownership or control interest in that business.

In this case, where notification is voluntary, the notified transaction can be completed before a decision having been received, but this runs a risk that the transaction would subsequently be unwound if an adverse decision is rendered. Market practice is generally to notify the relevant transaction in both clear and marginal cases on the basis that in most cases a clearance to proceed will be received within a 15-working-day review period.

If a material risk to New Zealand's national security or public order is identified in respect of any transaction that is subject to the call-in regime, whether notified or not, the investment could be blocked, have conditions imposed or, where it has been implemented, be unwound. The OIO may also apply for urgent injunctive relief from the courts and obtain court-enforceable undertakings from investors who have breached the Act; and place entities into statutory management to enforce an order to unwind a transaction undertaken in breach of the Act.

Law stated - 21 November 2024

SUBSTANTIVE ASSESSMENT

Substantive test

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 Overseas Investment Office (OIO) consent to be granted differs depending on whether the investment involves significant business assets or sensitive land. There are also different tests applicable to investments in certain types of sensitive land, such as forestry rights and residential property. In addition, the national interest test may apply to any transaction requiring OIO consent, although it does not apply to investments in (only) residential land.

The 'investor test'

If consent is required for an investment in significant business assets or sensitive land (or both), the investor must meet the 'investor test'. The test is structured as a negative 'bright line' test, which is met if none of a list of 'investor test factors' are met.

The OIO will grant consent if it is satisfied the 'relevant overseas person(s)' (the controlling persons and entities in respect of the investment – usually the direct acquiring entity and any upstream entities that will make key decisions in respect of the investment) and the 'individuals with control' (the individuals who control the 'relevant overseas person(s)' in respect of an investment – usually the board of directors of each 'relevant overseas person', and may also include members of executive management with the power to make material decisions in respect of the investment) satisfy certain 'character' and 'capability' criteria, which are aimed at determining whether the relevant entities and persons are suitable to own or control sensitive New Zealand assets. This test will be met if each relevant overseas person and each individual with control:

- character factors:
    - has not been sentenced to imprisonment for a term of five years or more (at any time);
    - has not been sentenced to imprisonment for a term of 12 months or more (within the last 10 years);
    - if not an individual, has not been convicted of an offence for which the person has been sentenced to pay a fine;
    - has not been ordered by a court to pay a civil pecuniary penalty in respect of a contravention of any enactment;
    - has not had a penalty imposed for a contravention of the Overseas Investment Act 2005 (the Act) or the Overseas Investment Regulations 2005 (the Regulations);
    - has not been the subject of any other proceedings commenced against the person for any offence, or contravention of an enactment, that carries a penalty corresponding to those listed above; and
    - has not entered into an enforceable undertaking or an equivalent agreement with any regulator in respect of any contravention or alleged contravention of any enactment.
- capability factors:
    - is not prohibited from being a director, promotor or manager of a company;
    - has not been liable to pay a penalty for tax avoidance or evasion; and
    - does not have an outstanding unpaid tax of NZ$5 million or more.

In relation to all but the most serious matters, the above factors are limited to events within the last 10 years. The factors apply to events occurring in New Zealand or overseas.

If any of the above factors apply, the investor test may still be met if the OIO is otherwise satisfied that the relevant matter or matters do not make the investor unsuitable to own or control sensitive New Zealand assets.

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 farmland that in an area exceeds five hectares, the applicant must show that the benefit to New Zealand will be, or is likely to be, 'substantial'.

The benefit to New Zealand of the investment is required to be proportionate to the sensitivity of the underlying sensitive land (for example, the importance to New Zealand of the purpose for which the land is used, the size and value of the land, any sensitive features associated with the land and the level of interest that the public have in the land) and the nature of the interest in the land being acquired (for example, the estate or interest being acquired, whether the estate or interest is temporary or permanent, and the degree of overseas ownership or control of the land or the estate or interest in land), so that the more sensitive the underlying land and interest acquired therein the greater the benefit to New Zealand that will need to arise from the investment to satisfy the benefit test.

The benefit to New Zealand test assesses the likely benefits of a proposed overseas investment against seven broad categories or 'factors', compared to the current state of affairs at the time the investment is given effect. The seven categories of benefit factors are:

1. Economic benefits – for example:

    - the creation or retention of jobs;
    - the introduction of technology or business skills;
    - increased productivity;
    - increased export receipts;
    - increased processing of primary products; and
    - a reduced risk of illiquid assets.

2. Environmental benefits – for example:

    - protection of indigenous flora and fauna;
    - improved water quality; and
    - erosion control.

3. Public access to the sensitive land, or the features giving rise to the sensitivity.

4. Protection of historic heritage in or on the relevant land.

5. Advancing one or more government policies.

6. An increase in the oversight or participation by New Zealanders in the investment.

7. Other benefits that are likely to arise from the investment but which do not fit within one of the other factors.

If the sensitive land that is a part of the overseas investment transaction is or includes farmland exceeding five hectares, then the economic benefits (in particular, the creation or retention of jobs, introduction of technology or business skills, increased export receipts and increased processing of primary products' benefit factors) and the oversight or participation by New Zealanders benefit factor are required to be given high relative importance.

Separate pathways for investments in residential land and forestry rights

Separate rules apply to the acquisition of forestry rights, as follows:

- 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; and
- forestry investors can take advantage of a streamlined consent pathway when acquiring existing forestry land where the land 'will be continued 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. Under the special forestry test, the applicant is not required to show any benefit resulting directly from the investment, instead, it will meet the benefit test criteria where it commits to maintaining existing arrangements for the supply of logs to New Zealand processors and existing environmental protections; and
- forestry investors who have a proven track record of compliance with the OIO may apply for standing consent to acquire existing forest. This allows consent to be obtained for a predetermined number of transactions within a specified timeframe.

The special forestry test cannot be used for the acquisition of farmland for conversion to forestry in these circumstances, the substantial benefit to the New Zealand test will apply (and may be difficult to satisfy, particularly if the land proposed to be acquired for conversion to forestry is highly productive farmland).

There is also a separate pathway for overseas investments in residential land, which operates as an effective ban on overseas investment in residential property for residential purposes. 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 can 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); or
- the residential land is being used for a purpose associated with or incidental to a business (eg, worker accommodation) (the 'incidental use' test).

Australian citizens and permanent residents, and Singaporean nationals and permanent residents continue to be able to buy residential property in New Zealand if they live in that property.

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.

The 'national interest test'

A national interest test may apply in addition to the substantive assessments described above. The national interest test mandatorily applies to all transactions that require consent under the Act and where, as a result of the transaction, a 'non-New Zealand government investor' would hold a more than 25 per cent direct or indirect interest in the relevant asset or the transaction involves certain specified categories of strategically important business. A foreign government or associated involvement below the 25 per cent threshold but that granted that government (or its associates, or both) disproportionate levels of access or control to sensitive New Zealand assets could also be considered by the minister under the national interest test.

The government-issued guidance on the application of the national interest test provides that the following factors will be relevant to the minister's assessment of whether an investment is contrary to New Zealand's national interest:

- the extent to which the investment poses risks to New Zealand's national security, public order or international relations, as informed by advice from the New Zealand Security Intelligence Service, Government Communications Security Bureau and various relevant ministries;
- whether the investment may grant the investor market power either within New Zealand (eg, a significant market share in one business segment or ownership of a vertical supply chain) or globally (if, for example, an investment may allow an investor to control the global supply of a product or service);
- the investment's likely impact on New Zealand's economy and society, and the extent to which any benefits to New Zealand are commensurate with the sensitivity of the asset being acquired;
- the extent to which an investment supports broader government priorities and policy settings, and New Zealand's values; and
- whether the investor is likely to comply with New Zealand's laws, or whether they have any characteristics otherwise rendering them unsuitable to invest in New Zealand (eg, whether the investor or its associates are or have been subject to international sanctions).

In addition to the factors above, the current ministerial directive letter issued by the government states in relation to the national interest test that the OIO should only recommend to the minister that a transaction is a transaction of national interest if the proposed investment:

- could pose risks to New Zealand's national security or public order;
- would grant an investor significant market power within an industry or result in the vertical integration of a supply chain;
- has foreign government or associated involvement that is below the more than 25 per cent ownership or control interest threshold for automatic application of the national interest test, but granted that government (or its associates) disproportionate levels of access to or control of sensitive New Zealand assets;
- would have outcomes that were significantly inconsistent with or would hinder the delivery of other government objectives;
- raises significant Treaty of Waitangi issues; or

- relates to a site of national significance (eg, significant historic heritage).

In assessing whether a foreign government investor poses risks to New Zealand's national interest, the minister will generally consider the following factors, as set out in government-issued guidance:

- the extent to which the investor operates on an arm's-length and commercial basis from the relevant government;
- the investor's governance arrangements and prospective governance arrangements for the relevant investment;
- the existence of any other shareholders or partners in the investment;
- whether the target entity will be or will remain, listed on a New Zealand financial market;
- the extent to which the investment would grant the relevant government control over, or access to, the underlying asset; and
- the degree of control retained by non-associated investors.

Onus of proof

In relation to the investor test and benefit test, 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 of the likelihood that the benefit will occur and the quantum of that benefit against the current state counterfactual.

In relation to the national interest test, the government has stated that 'the starting point is that investment is in New Zealand's national interest', subject to the minister's discretion to determine whether the relevant transaction is contrary to the national interest. Applicants for consent to which the national interest test applies or may apply are invited to make submissions by reference to the factors set out in the government's published guidance on whether the transaction poses any risk to the national interest.

Guidance

There is a significant amount of technical guidance on the OIO's website on how to make benefit claims.

Given the many complexities of the regime, engaging a New Zealand legal practitioner with expertise and experience is critical to ensure compliance with the rules and a smooth application process and a successful outcome where consent is required.

Law stated - 21 November 2024

Substantive test

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 relatively rare).

Law stated - 21 November 2024

Other relevant parties

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

Because application and notification processes (and the underlying transactions) are often confidential before consent or clearance is obtained, third parties are unlikely to have an opportunity to intervene in the process before consent is granted. There is no requirement or practice for consultation to occur with competitors, customers or suppliers.

The OIO and responsible 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 (Māori 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 stakeholders can add unpredictability and delay to the review process.

The OIO and responsible ministers may also choose to engage experts (eg, economists or industry specialists) to advise in relation to matters relevant to the benefit test analyses (for example, to verify benefit claims made by applicants). Again, where this engagement does occur, this can add unpredictability and delay to the process.

The OIO consults with various domestic agencies and ministries with relevant expertise in preparing its report to the minister in respect of any national interest assessment or national security and public order assessment. The particular agencies that are consulted will vary depending on the nature of the considerations that arise from the particular application but include the Government Communications Security Bureau, the New Zealand Security Intelligence Service, the Ministry of Foreign Affairs and Trade, the Ministry of Culture and Heritage and the Treasury. The input provided by these agencies is not disclosed to applicants.

Law stated - 21 November 2024

Prohibition and objections to transaction

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

The OIO may decline consent and, therefore, prohibit a transaction from proceeding. Similarly, the minister can issue a prohibition order preventing a national interest transaction or national security and public order call-in transaction from proceeding. If a required OIO

consent or ministerial clearance (as applicable) is not obtained, the transaction cannot (legally) proceed.

It is a criminal offence to give effect to a transaction requiring consent or clearance without having first obtained that consent or clearance. If a transaction is implemented without required consent or clearance having been obtained, the OIO has powers to unwind the transaction through forced divestiture of property acquired in breach, among a wide range of other enforcement tools.

In granting consent, the OIO also has a wide discretion to apply conditions to its consent, particularly in the case of sensitive land applications where the investor is required to meet the benefit to New Zealand test – the OIO uses conditions of consent to effectively guarantee that the benefits claimed by the investor will, in fact, arise from the investment. Similarly, the minister can issue conditional direction orders on national interest transactions and national security and public order call-in transactions, using the conditions to address perceived risks arising from the transaction.

Breach of conditions can lead to enforcement action by the OIO, which may include divestment orders to unwind the transaction.

Law stated - 21 November 2024

Prohibition and objections to transaction

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 a consent application (eg, with the level of benefits offered, issues relating to the character of the investor or its upstream entities, or relating to the transparency of the investor's ownership and control structure) then it will raise these concerns during the review process and give the applicant an opportunity to rectify them by providing additional information. 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 an adverse consent decision. This same practice does not apply to the national interest assessment. In this case, an applicant will not receive any indication of the outcome, and therefore will not have any opportunity to make an informed decision whether to withdraw, prior to the minister's decision. This is in part because of the discretionary nature of the minister's decision-making power and the fact that the OIO does not make a recommendation to the minister as to what decision he or she should take (contrary to the OIO's role under the consent regime). In some recent forestry conversion cases, the OIO has not made a recommendation to the minister and therefore has not provided the investor with feedback or an opportunity to rectify before referring the decision to the minister, who has ultimately declined to grant consent.

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 failed to deliver on promises made in their applications.

In relation to the national interest assessment and the national security and public order call-in regime, the minister has the power to issue direction orders allowing a transaction to proceed but subject to conditions aimed at managing any risks that have been identified as arising from the transaction.

Law stated - 21 November 2024

Challenge and appeal

Can a negative decision be challenged or appealed?

There is no specific process within the regime to appeal or challenge a negative consent decision. However, decisions can be judicially reviewed through the courts, and there have been recent examples of this.

Law stated - 21 November 2024

Confidential information

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. However, all OIO decisions 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 or prior to settlement of the transaction. 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, once a decision has been made, the OIO's usual practice is 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 grounds for withholding official information under the Official Information Act that are frequently argued by applicants to resist disclosure of information contained in an application are that the release of the relevant information will result in 'prejudice to a person's commercial position' or to protect the privacy of individuals. The sorts of information that may be able to be withheld on these grounds typically include the purchase price (if it has not

already been announced), identifying personal information, confidential upstream investor information and any competitively sensitive information.

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 and transaction and the benefit factors that were satisfied by the investment. Investors can also request that sensitive information in a proposed decision summary be withheld under the Official Information Act 1982 on the same grounds.

The OIO also regularly publishes information about enforcement actions it has taken. The OIO may also publish on its website information that it has released under the Official Information Act.

The minister is required by statute to publish decisions relating to the transactions of national interest and decisions made under the national security and public order call-in regime that either prohibit a transaction or allow it to proceed but subject to conditions. The minister is required to publish a summary of the decision made and the reasons for that decision. The minister may defer or dispense with publication (in whole or in part) if he or she is satisfied on reasonable grounds that good reason for withholding the publication would exist under the Official Information Act 1982. Investors should resist publication of any adverse decision made on national interest or national security and public order grounds that has the potential to reflect negatively on the investor. To date, the minister has chosen not to publish decisions made under the national security and public order call-in regime (whether positive or adverse).

Law stated - 21 November 2024

RECENT CASES

Relevant recent case law

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 one – judicial review of ministerial decision

In April 2018, Oceana Gold Ltd, a New Zealand gold miner with an existing active mine, applied to the Overseas Investment Office (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 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 Overseas Investment Act 2005 (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 two – declining an 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 United States, 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. Ministers chose to decline consent in this case, stating that the benefits to New Zealand resulting from the investment were not sufficiently substantial relative to the interests in land being acquired in the investment. This is a rare example of the OIO and ministers declining an application 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, and 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.

Law stated - 21 November 2024

UPDATE AND TRENDS

Key developments of the past year

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?

The government published a new Ministerial Directive letter on 6 June 2024. Some key features of the new letter include:

- a clear statement that government policy is to attract overseas investment to grow prosperity for all New Zealanders, acknowledging that New Zealand's investment needs significantly outweigh our scarce domestic capital;
- a direction to the Overseas Investment Office (OIO) to administer the Overseas Investment Act in a manner that focuses on realising the benefits of overseas investment to support New Zealand's economic objectives;
- clear statements that the government assumes (and therefore the OIO should assume when administering the Overseas Investment Act) that overseas investment is both generally beneficial and in the national interest;
- a direction to the OIO that if another regulatory regime addresses a potential risk identified by the OIO then the risk should be considered to be mitigated unless there is 'compelling evidence to the contrary';
- a direction to the OIO that it take a 'risk-based approach' to administering the Act, including placing reliance on statutory declarations made by applicants rather than seeking to verify information provided, unless there is reason to suspect the information is false; and
- a direction that the OIO decide 80 per cent of all consent applications within half of the relevant statutory timeframe.

In October 2024, the New Zealand coalition government announced a plan to reform the Overseas Investment Act as part of its policy objective to encourage overseas investment in New Zealand.

The principles that the government has agreed to include:

- retaining the scope of what is currently screened (including farmland), so that the government retains the legal option of screening all investments that are currently subject to screening;
- fast-tracking the assessment process, with the starting assumption that investment can proceed unless there are risk factors identified, by consolidating the Overseas Investment Act's core tests (investor test, benefit test and national interest test); and
- providing the government with the flexibility to call in these investments for detailed scrutiny on a case-by-case basis, and impose conditions or block the investment where there are risks to New Zealand’s national interest.

These principles will guide and define the scope of the options the government will explore, with a target of passing legislation to implement the proposed reforms by the end of 2025.

Law stated - 21 November 2024