

**GUIDE TO FOREIGN INVESTMENT IN NEW ZEALAND
OVERSEAS INVESTMENT ACT & OVERSEAS INVESTMENT REGULATIONS**

22 October 2018

INTRODUCTION

New Zealand generally welcomes foreign investment. The regulation of foreign investment in New Zealand is liberal by international standards. However, the regime was tightened in October 2018, especially in relation to foreign investment in residential land.

New Zealand’s inbound investment rules regulate investments in New Zealand significant business assets, certain types of sensitive land (including residential and farm land), and fishing quota.

The main inbound investment rules are the Overseas Investment Act 2005 (**Act**) and the Overseas Investment Regulations 2005 (**Regulations**). The “overseas investment regime” established by the Act and the Regulations is a consenting regime, rather than a prohibition. The regime governs who needs to obtain consent, when consent is required, and the process for obtaining consent.

This guide provides an overview of New Zealand’s overseas investment regime.

WHO IS AN OVERSEAS PERSON?

The overseas investment regime regulates investments by *overseas persons*. An overseas person is a person who is:

- a company incorporated outside of New Zealand;
- a company or other entity that is at least 25% owned or controlled by an overseas person or persons; or
- not a New Zealand citizen and is not *ordinarily resident in New Zealand*.

A person will be *ordinarily resident in NZ* if they:

- hold a residency visa (so excludes working, student and visitor visas);
- have been residing in NZ for at least a year;
- are a tax resident in NZ; and
- have been present in NZ for at least 183 days in the past year.

Careful analysis is required where a person is in the process of becoming ordinarily resident in New Zealand to ascertain whether the Act will apply.

The Act also extends to investments by *associates* of overseas persons. *Associate* is widely defined by the Act and is included to ensure that those persons ultimately controlling or owning an investment are caught by the Act.

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WHEN IS CONSENT REQUIRED?

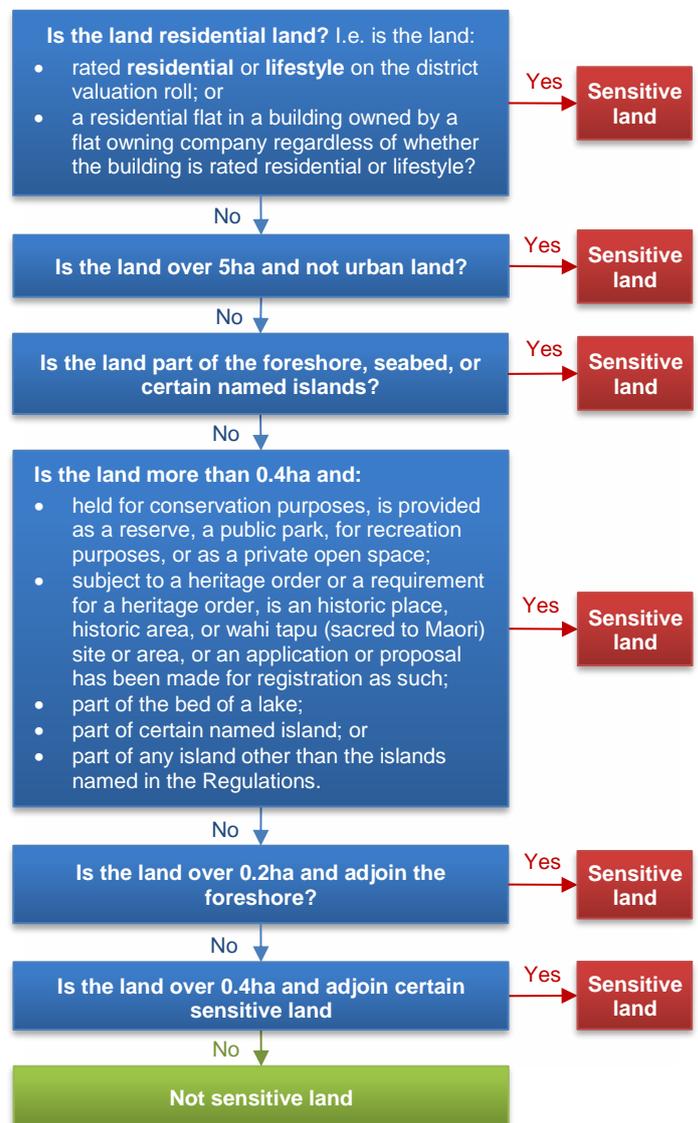
Unless an exemption applies, overseas persons require consent from the Overseas Investment Office (**OIO**) to invest (directly or indirectly) in the following:

1. sensitive land (including residential and farm land);
2. significant business assets; and/or
3. fishing quota (as regulated under the Fisheries Act 1996).

See the flow charts and summaries below to work out if your investment is caught and the relevant tests that may be applied by the OIO for consent applications.

1. SENSITIVE LAND

Is the land “sensitive land”?



Non-residential land

The OIO will consider the following criteria when reviewing applications for consent to invest in sensitive land that is not residential land:

- whether the investment is likely to **benefit New Zealand** (unless the overseas person is intending to reside in NZ);
- where the investment includes non-urban land that either alone or together with any associated land exceeds 5ha, whether the benefit to NZ is **substantial and identifiable**; and
- all of the criteria set out below that apply for investment in **significant business assets** – this is known as the **investor test**.

Residential land

For applications for residential land that is not otherwise sensitive, the criteria that apply depend on the status of the overseas person and the land being purchased. These tests may include one or more of the following:

- benefit to New Zealand test;
- commitment to reside in New Zealand test;
- increased housing test;
- non-residential use test;
- incidental residential use test; and
- investor test (see the criteria set out below that apply for investment in **significant business assets**).

Other considerations

- **Counterfactual test:** To determine whether the “*benefit to New Zealand*” criteria is satisfied, the OIO uses a counterfactual test. This involves comparing what is likely to happen with the overseas investment, with what is likely to happen without the overseas investment.

This is a complicated process. It requires assessment against the plans of others who may have been intending to purchase the land, hypothetical well-funded NZ purchasers, and the vendor’s intentions if the sale does not proceed.

- **Investment plan:** An investment plan is required for investments in sensitive land. The investment plan must include a business plan, and other requirements prescribed by the OIO.
- **Special land:** “*Special land*” is land that is or includes foreshore, seabed, river bed or lake bed. The owner of special land must offer it to the Crown in accordance with the Regulations before it is offered to an overseas person.

- **Farm land:** Any farm land must have first been offered on the open market in NZ, in accordance with the procedures set out in the Regulations. Limited exemptions apply to this requirement.

Under the Act, “*farm land*” is land exclusively or principally used for the purpose of agriculture, horticulture or pasture, or the keeping of bees, poultry or livestock.

- **Forestry rights:** Forestry rights are now captured under the Act as sensitive land. This means overseas investment in land to be used for forestry that is 1,000ha or more will require consent.

EXEMPTIONS FOR RESIDENTIAL LAND

Summarised below are the main exemptions to the requirement for OIO consent to acquire residential land.

Australia and Singapore

The following Australian and Singaporeans do not need OIO consent to acquire residential land (as long as the land is not otherwise sensitive):

- Australian citizens and Singaporean nationals;
- Australian and Singaporean permanent residents who are ordinarily resident in NZ;
- certain Australian and Singaporean enterprises or branches of overseas enterprises; and
- the Australian government.

These exemptions reflect NZ’s international obligations with Australia and Singapore.

Residential leases

OIO consent is not just required when overseas persons purchase sensitive land, it is also required when they enter leases for sensitive land with a fixed term of 3 years or more (including renewals). However overseas persons do not need OIO consent to enter into a lease of residential land if the lease is:

- a residential tenancy with a fixed term of less than 5 years (including renewals); or
- a periodic lease (i.e. they can be terminated at will and have no certainty of term of 3 years or more).

Large developments

Overseas persons do not need OIO consent to acquire residential land that is not otherwise sensitive if one of the following exceptions apply:

- **Off-plan apartments:** The overseas person buys an off-plan apartment in a large apartment development (20+ apartments) before it is complete and the developer has obtained an exemption certificate.

- **Hotel units:** The overseas person acquires an interest in a hotel unit in a large hotel (20+ units) and that unit is leased-back to the hotel company. This exemption only applies as long as:
 - the overseas person does not use their hotel unit from more than 30 days in each year; and
 - the overseas person must sell their hotel unit if the lease-back ends and is not renewed.

2. SIGNIFICANT BUSINESS ASSETS

Are the assets “significant business assets”?



When reviewing applications for consent to invest in significant business assets, the OIO will consider whether the individuals with control of the overseas person:

- have the necessary business experience and acumen;
- have demonstrated financial commitment to the investment;
- are of good character; and
- are not individuals of the kind listed in sections 15 and 16 of the Immigration Act 2009 e.g. persons who have been imprisoned for criminal convictions.

Australian threshold

Australian investors are subject to a higher threshold which is adjusted annually. The current threshold for non-government investors is **NZ\$516 million**, and **NZ\$108 million** for government investors.

CPTPP and other free trade agreement changes

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**) was signed by New Zealand on 8 March 2018. Once the CPTTP is ratified the threshold will increase from NZ\$100 million to **NZ\$200 million** for the purchase of significant business assets by non-government investors from Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, Singapore and Viet Nam.

Similarly, under the Hong Kong Closer Economic Partnership, the Korea Free Trade Agreement and the China Free Trade Agreement (all in force), the same threshold increase shall apply to non-government investors from China, South Korea and Hong Kong.

Good character threshold

The OIO's current practice is to look right up to the ultimate controlling shareholder to determine whether the “good character” threshold is met. Where a global group of companies is involved, this can involve multiple good character checks and statutory declarations.

3. FISHING QUOTA

The OIO will consider the following criteria when reviewing applications for consent to invest in fishing quota:

- whether the criteria for investment in significant business assets (see above) are met;
- whether the relevant overseas person is a body corporate;
- whether the interest in the fishing quota is capable of being registered in the Quota Register or the Annual Catch Entitlement Register; and
- whether the granting of consent is in the “national interest”.

National interest

The OIO will also consider the following additional factors to determine whether the investment is in the “national interest”:

- whether the overseas investment will, or is likely to, result in increased processing of NZ fish, aquatic life, or seaweed; and
- any other factors set out in the Regulations or that the Minister of Finance and the Minister of Fisheries think fit, having regard to the circumstances and nature of the application.

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PROCESS FOR OBTAINING CONSENT

The process for obtaining consent to an overseas investment can be complex, time consuming and costly. An overseas person will normally need the vendor to provide information and assistance.

Preparing the application

- **Timing:** Applications must be lodged, and consent granted, before a transaction is given effect to. Any purchase agreement entered before consent is given should be conditional on obtaining OIO consent.
- **Contents:** There are detailed criteria for consent applications. These are more detailed for land applications than non-land applications. An application must cover all of the criteria, including required supporting documentation, and be signed by each applicant.

All applicants must show that the individuals controlling the overseas person are of good character and collectively have the business experience and acumen relevant to the investment. An investment plan is required for investments in sensitive land, including a business plan and other details required by the OIO.

Application fees

As of October 2018, the key OIO application fees are:

- Sensitive land applications:
 - residential land: NZ\$2,040 to NZ\$49,000;
 - forestry activities and profits à prendre: NZ\$34,100 to NZ\$51,100;
 - other sensitive land: NZ\$22,500 to NZ\$49,000;
- Significant business assets applications: NZ\$32,000;
- Combined significant business assets and sensitive land applications: NZ\$34,100 to NZ\$54,000; and
- Fishing quota applications: NZ\$40,000.

Consideration of the application

- **Who decides?** Applications are decided by either the OIO or the responsible government minister.

The Act gives these decision makers a broad discretion to refuse or grant consent, and to impose conditions.

- **Decision and monitoring:** Consent may be refused, granted without conditions, or granted subject to conditions. If conditions are imposed on the consent, consent holders will generally be required to report annually to the OIO for the first five years from the date of consent as part of the OIO's monitoring programme.
- **Timing:** The OIO is not required to make a decision within a specific time period but, as at 18 October 2018, worked to the following guidelines:
 - within 10 working days for applications for a house to live in i.e. residential land (excluding non-individual applicants); and
 - within 50 working days for all other new applications.
- How long a decision may take, depends on the type and complexity of the investment. As at July 2018, the average assessment times for decisions within the past two years have ranged from 82 to 145 working days depending on the type of application.

It is common for applications (particularly complex applications) to take longer than these targets – particularly if the OIO needs to request further information from the applicant or third parties (such as the Historic Places Trust), or ministerial approval is required.

HOW WE CAN HELP

Our experienced team can guide you through the consent process, including by:

- advising whether consent is required;
- assisting with your application for consent or exemption, and to minimise any delays; and
- dealing with the OIO and assisting with requests for further information.

If you have any questions or would like us to assist you, please contact one of the contributors.

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