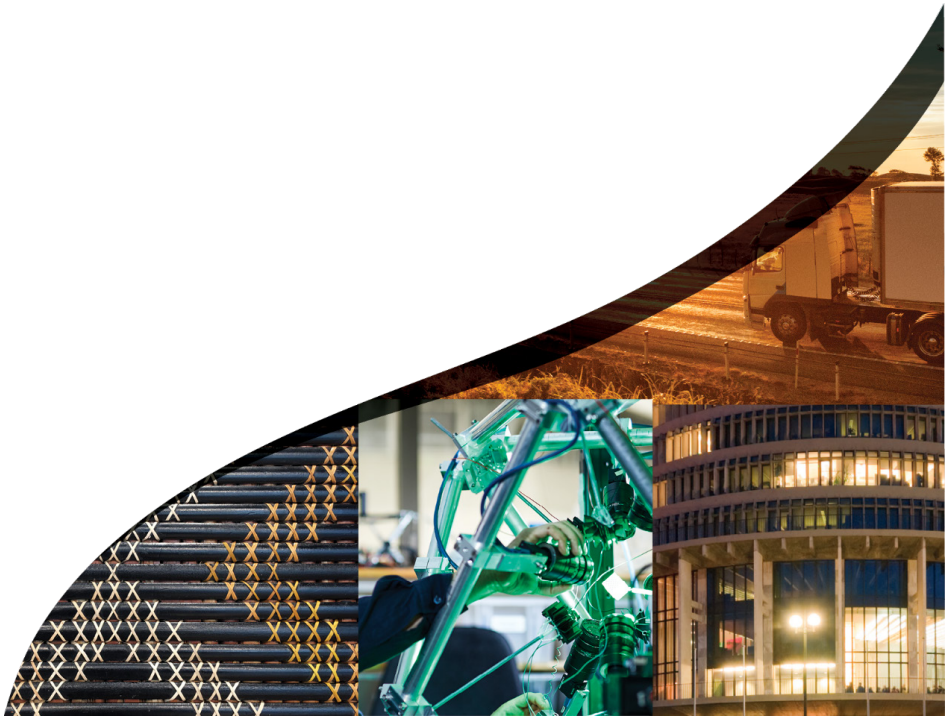
TE TAI ŌHANGA
THE TREASURY

Consultation document:

Reform of the Overseas Investment Act 2005

Facilitating productive investment that supports New Zealanders' wellbeing

April 2019



New Zealand Government

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Ministerial foreword

To grow our economy and lift productivity we need investment – both by New Zealanders and by overseas investors. This reform is one way to support this.

We have good foundations for future growth, including strong institutions, respect for contractual and property rights, and high international rankings for ease of doing business and freedom from corruption.

However, we have a prolonged current account deficit and low per-capita investment in productive businesses.

Overseas investment can help us build our productivity to support the economy and employment. The Overseas Investment Act 2005 seeks to strike a balance between:

- facilitating overseas investment, and
- protecting the government's right to both screen against undesirable investors, and to screen investments in some classes of asset that the government considers should not necessarily be sold to overseas investors.

This reform seeks to reduce unnecessary complexity and ensure that compliance costs are proportionate to risks.

It also examines ways to better ensure that overseas investment is consistent with New Zealand's national interests. Many countries with which we have strong relationships can block investments that are inconsistent with their national or security interests in ways that we cannot. Examples include investments in critical infrastructure and investments in companies with strong links to global value chains and distribution networks – infrastructure and companies that many believe it is in our interests to own. This reform tests the appropriateness of our arrangements and whether more should be done to protect New Zealand's national interests.

All the options in this consultation document maintain the protection of our most sensitive assets – so, for example, overseas persons *must* obtain consent to buy farms or residential land in New Zealand.

While some options consider removing some fundamentally New Zealand entities from the regime and simplifying processes for investments by overseas persons that have already obtained consent, the Government remains committed to a regime that recognises it is a privilege to own our most sensitive assets.

This Government has already updated the investment rules. In October 2018 we loosened screening rules for forest land to encourage foreign investment in forestry. We also tightened the requirements for investments in farm and horticultural land, and banned foreign buyers from acquiring existing homes. We also allocated the Overseas Investment Office an extra $7 million in funding to support its compliance and enforcement work.

I encourage you to provide your views on the options for reform, and help us to ensure that New Zealand remains an attractive destination for overseas investment that is consistent with our national interests.

Hon David Parker
Associate Minister of Finance

What is this consultation document about?

1. In October 2018, the Government announced that the Overseas Investment Act 2005 (the Act) would be reformed.

2. The Act requires an overseas person to get approval ('consent') before they take ownership or control of sensitive land, significant business assets or fishing quota (collectively called 'sensitive assets'). It recognises that it is a privilege for an 'overseas person' to own or control such assets.

3. The reform aims to achieve a balance between supporting high-quality investment and ensuring governments have flexibility to manage any risks arising from overseas investment.

4. This consultation document seeks your views on potential reforms that could:

   - better identify the sensitive assets and types of investor that need approval under the Act, and
   - improve the way that investments are assessed ('screened') to decide if they get approval.

5. The reform builds on changes made in 2018, in which:

   - the Overseas Investment Office's Ministerial Directive Letter was updated to clarify the treatment of farmland and forestry land (finalised in December 2017),
   - the process for acquisitions of interests in forestry assets on sensitive land was streamlined, and
   - overseas persons were restricted from buying residential land, forestry rights and other regulated 'profits à prendre' on sensitive land without consent.

6. This reform is not a 'first principles' reform. This means it does not consider the Act's purpose or substantive matters associated with the 2018 changes to the Act.

7. A glossary of terms used in this consultation document can be found at Appendix C.

8. This consultation document describes the Act and Overseas Investment Regulations 2005 to help you understand and provide your views on the reform options. The descriptions are general in nature and are not intended to be relied upon when considering any transaction that may require consent under the Act. For legal or other expert advice, you should contact a professional adviser.

How can you contribute?

9. We invite interested people and organisations to give their views on the reform options in this consultation document. You can do this by:

   - attending a public meeting or hui, and/or
   - completing a written submission and either emailing it to overseasinvestment@treasury.govt.nz or posting it to:

     Overseas Investment Act Reform
     The Treasury
     PO Box 3724
     Wellington 6140

   The closing date for submissions is **24 May 2019**.

10. The Government would like to know your views on whether this document accurately identifies the problems with the Act, options for reform and the effects of the options – and if you have any alternative ideas. There are questions to guide you on page 18 and in each section of this paper.

11. Treasury officials will analyse all submissions that are received by the closing date, and consider them in developing advice to the Government on proposals to reform the Act.

12. You can find an editable template to create your written submission and more information about meetings, hui and this reform on the Treasury's website at https://treasury.govt.nz/overseas-investment-consultation.

How your submission information can be used – and your rights

13. When you make a submission, the Treasury will take it that you have consented to us putting a PDF copy on the Treasury website. If you do not want your submission to be uploaded, please state this clearly on your submission.

14. If your submission contains confidential information or you do not want it published for any other reason, please:

    - indicate this on the front of the submission, and mark any confidential information clearly, and
    - provide a separate version that excludes the relevant information, which we can publish on the website.

15. People and organisations can ask to see your submission under the Official Information Act 1982. If you have any objection to us releasing any information in your submission, please state it clearly in the cover letter or email that goes with your submission, including the parts that you consider should be withheld and your reasons for withholding the information.

16. Under the Official Information Act, reasons for withholding information could include that the information is commercially sensitive or that you wish us to withhold personal information, such as names or contact details. The reason cannot include an automatic confidentiality disclaimer from your IT system.

17. The Treasury will take your objections into account and consult submitters when responding to requests under the Official Information Act.

18. You also have rights, under the Privacy Act 1993, in relation to the way the Treasury (and other agencies) can collect, use and disclose information about you and individuals referred to in your submission. You have the right to access personal information about you that the Treasury holds and to seek any corrections.

19. Any personal information that you supply to the Treasury in making a submission will only be used for the purpose of helping us to develop policy advice in relation to this reform. If you do not wish your name, or any other personal information, to be included in any submissions that we may publish, please clearly indicate this in the cover letter or email that goes with your submission, as well as following the steps in paragraph 14.

Overseas investment in New Zealand

This section describes the nature and impacts of overseas investment in New Zealand. It also describes the Overseas Investment Act 2005's purpose and concerns that the Act may not be operating as efficiently or effectively as it could be.

Overseas investment brings benefits

20. The Government's economic strategy aims to build a productive, sustainable and inclusive economy. Overseas investment contributes to this aim when it brings with it new jobs and increases productivity, which is the biggest determinant of people's living standards in the longer term.

21. Financial capital is required for economic growth. However, as a small nation with relatively low national savings and a range of investment needs, New Zealand faces a problem – its domestic savings do not meet its domestic investment needs. Covering the shortfall between savings and investment requires New Zealand to increase its domestic savings, use foreign savings, or accept that necessary investments must be delayed, proceed at a higher cost or, in some cases, not proceed at all. These kinds of delay can come at considerable economic cost.

22. Overseas investment therefore supports our businesses to invest by bridging the gap that currently exists between New Zealand's savings and investment needs. It enables new firms to be established and existing firms to expand and become more productive. It is also associated with wage and employment growth. Firms at least partly funded by foreign direct investment (a type of overseas investment) are among the largest employers in New Zealand. Firms acquired by overseas owners tend to increase employment and wages more quickly than similar domestic firms.[1]

23. Overseas investment can also help us to catch up with leading economies' productivity levels – that is, to produce more from the work we do. As New Zealand has a small domestic market and is far from international markets, it needs flows of people, capital, trade and ideas to support productivity. Overseas investment supports these flows. International evidence suggests that it can have the following effects (although evidence is limited and mixed about the extent to which overseas investment has produced these in New Zealand):

    - ***technology and process innovations:*** Overseas investment may help domestic firms to adopt up-to-date technologies and processes to support workers to undertake high-value work, either by buying new technology with invested funds or learning from foreign-owned firms. Foreign-owned firms generally have higher productivity levels and stronger management practices than domestic firms, but this could partly be due to foreign investors investing in relatively better-performing

[1] Fabling, R. and Sanderson, L. (2011). *Foreign Acquisition and the Performance of New Zealand Firms* (11/06). New Zealand Treasury Working Paper. The authors found that firms acquired by foreign owners raise average wages between two and eight percentage points more than similar, non-acquired firms.

firms (and there is poor evidence of these benefits in New Zealand[2]). Domestic firms may be encouraged to innovate as competition increases, which is particularly important in a small market like New Zealand,

- ***skill increases:*** Foreign direct investment can result in the transfer of new expertise and skills into the country being invested in, for example if expertise is transferred by the foreign owners or through links to parent businesses,

- ***more diverse international connections and access to global distribution networks and markets:*** In the absence of a large domestic market, international connections enable New Zealand firms to access distribution networks and markets that would otherwise be unavailable, widening their reach. Such connections can also reduce the risks associated with increased global protectionism, and

- ***participation in global value chains:*** Much of the growth in trade since 2000 has been driven by the rise of global value chains, where different manufacturing processes are happening in different countries. Many firms coordinate these chains through the control associated with direct investment. New Zealand has relatively little involvement in global value chain trade due to a number of factors, including its geographical distance from other economies, but overseas investment can help to change this.

However, overseas investment can also have risks

24. Overseas investment can also raise community concerns, impose direct costs and have potential risks. Particular concerns and risks include:

    - overseas investment could (in rare cases) lower economic activity in New Zealand, for example if:

        - an investment increased the chance that all or part of a firm would be moved offshore, and/or

        - overseas investors invested in undesirable assets (such as unproductive assets or assets in unsustainable sectors) or in assets where they did not have advantages compared to domestic owners,

    - overseas investors could underinvest in New Zealand assets during periods of global economic stress and instead prioritise their own domestic operations,

    - foreign investment could lead to profits going offshore rather than being retained and invested or spent in New Zealand. The extent to which this is a problem is not clear. An asset's sale price should reflect the value of the expected future profits, and this capital (released in the sale) may be reinvested in the New Zealand economy,

    - foreign investment could increase the prices of and reduce New Zealanders' ability to buy assets,

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[2] Fabling, R. and Sanderson, L. (2011). *Foreign Acquisition and the Performance of New Zealand Firms* (11/06). New Zealand Treasury Working Paper.

- high levels of foreign ownership or control of sensitive New Zealand assets could:
  - conflict with some people's view that sensitive assets in New Zealand, particularly land with productive, environmental, historic or cultural value (such as in te ao Māori [the Māori world]), should be owned and controlled by New Zealanders. That is, the assets have a high 'ownership value'. Some people feel a reduced sense of wellbeing simply knowing that these assets are no longer in New Zealand ownership or under New Zealanders' control, and/or
  - increase the risk of activity that is not in line with New Zealand cultural norms, which could have undesirable impacts on others or the environment, even if the behaviour is lawful. For example, this could happen if an investor restricted access to a property or the foreshore where it had traditionally been allowed,
- in some circumstances, overseas-owned businesses could pay less tax than equivalent businesses owned by New Zealanders, and
- overseas ownership or control of certain assets, such as critical infrastructure or strategically important industries, could pose risks to New Zealand's national security or public order. These risks are heightened when an investor is a foreign state or a state-linked entity that may be pursuing broader policy or strategic (as opposed to purely commercial) objectives that do not align with New Zealand's interests.

The Overseas Investment Act seeks to ensure that overseas investment is beneficial

25. Overseas persons operating in New Zealand are – like domestic investors and businesses – subject to New Zealand's laws. These laws include a range of legislation focused on land use, environmental protection and business activities, such as the Resource Management Act 1991, the Conservation Act 1987, tax laws, the Anti-Money Laundering and Countering Financing of Terrorism Act 2009, the Commerce Act 1986 and the Companies Act 1993.

26. The Overseas Investment Act (the Act) complements these pieces of legislation by offering additional protections in respect of overseas persons. It acknowledges that it is a privilege for overseas persons to own or control sensitive New Zealand assets – that is, certain types of land, significant business assets (generally those worth at least $100 million) and fishing quota.

27. In these cases, the Act requires proposed investors to be screened – a process in which they must generally demonstrate that they have appropriate levels of business experience and acumen, that they are financially committed to the investments, and that they are of good character.

28. Where proposed investments involve sensitive land, overseas persons must also show that their investments will likely benefit New Zealand. Conditions can be imposed on investments to better ensure that they deliver those benefits.

29. The Overseas Investment Office (OIO) assesses applications from overseas persons lodged under the Act to determine whether they meet the relevant criteria for consent.

But it is not clear that the Act is operating efficiently or effectively

The Act's complexity and breadth may be discouraging investment

30. New Zealand is ranked as one of the easiest countries in the world in which to do business. However, the Act's perceived complexity and the breadth of investment screening may be discouraging the overseas investment that New Zealand needs. For example:

    - anecdotal evidence suggests applying for a consent can cost more than $100,000 (excluding application fees),[3]
    - it takes an average of about 100 working days to process an application for consent to acquire sensitive land.[4] Around half of this time is taken up by decision makers processing the application and the other half by overseas persons gathering information, and
    - it can take longer than 100 working days if the application is complex or goes through the 'proposal to decline' process.[5] Overseas persons report that it can take up to a year (in total) to receive a decision.

31. The Act also requires screening for investments that are not likely to be high risk, or relate to land unlikely to have significant ownership value to New Zealanders, such as land adjoining sports fields.

32. Some users of the Act and economic commentators believe that the regime's complexity and scope are partly responsible for New Zealand's underperformance relative to other small states in attracting overseas investment. This is consistent with evidence that restrictive investment screening reduces rates of overseas investment.[6] The Act may also compound other factors that can limit New Zealand's attractiveness to investment, including the increasing international competition for investment, and New Zealand's small size and distance from other markets.

33. New Zealand attracts proportionately less, and has correspondingly lower stocks of, foreign direct investment than many other small, advanced economies. While New Zealand's foreign direct investment stock as a percentage of GDP (38 per cent) is similar to the OECD average, it is significantly below that of other small, advanced economies. Foreign direct investment inflows as a percentage of GDP are also relatively low (see Figure 1).

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3 The maximum application fee is $54,000. This is for applications to acquire sensitive land under the benefits to New Zealand test and to acquire significant business assets, where Ministers are the decision maker.

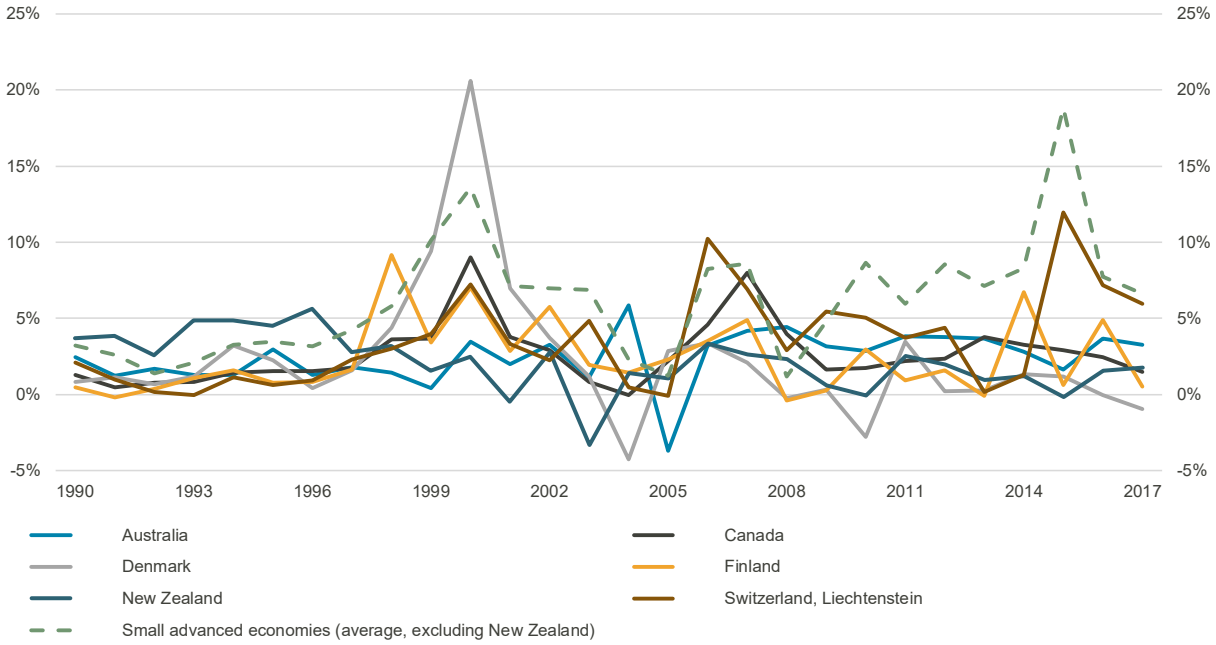
4 OIO data. Figure relates to cases in which the OIO is the delegated decision-maker.

5 This is where the OIO advises an applicant of its intention to decline an application and the reasons why, and offers the overseas person the chance to address any identified concerns before consent is denied.

6 Mistura, F. and Roulet, R. (2019). *The Determinants of Foreign Direct Investment: Do statutory restrictions matter?* (01/19). OECD Working Paper on International Investment.

34. Some international surveys have ranked New Zealand's investment screening regime among the most restrictive regimes in the world.[7] The OECD assesses New Zealand's regime as the seventh most restrictive in 68 countries, including all OECD countries. This ranking largely results from the significant amount of land subject to screening under the Act. While the breadth of New Zealand's screening regime means that any changes made as a result of this reform will not materially alter the ranking, there is an opportunity to improve New Zealand's perceived attractiveness to investment by reducing unnecessary complexity and scope.

Figure 1: Comparison of New Zealand's and other states' foreign direct investment inflows[8] as a percentage of GDP



35. New Zealand has also struggled to attract the most valuable forms of investment, such as greenfield investment.[9] Greenfield investment establishes new operations and therefore tends to be a particularly strong contributor to economic growth.

36. Compared to other small, advanced economies, New Zealand has a low number of announced greenfield investments ('announced' is a measure of investors' intentions to make greenfield investments, and is an indicator of future foreign direct investment).[10] This may partly be due to our small domestic market and distance from other markets. However, our newer technology sectors that target global markets have been attracting significant overseas capital in recent years, generally at levels and in entities that do not require approval under the Act.

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7 The IMD (Institute for Management Development) world competitiveness index ranked New Zealand 47th out of 63 countries in international investment in 2018. See OECD Foreign Direct Investment Regulatory Restrictiveness Index: http://www.oecd.org/investment/fdiindex.htm, IMD World Competitive Index: New Zealand country profile: https://www.imd.org/wcc/world-competitiveness-center-rankings/countries-profiles.

8 Treasury analysis of data from the United Nations Conference on Trade and Development (UNCTAD) (accessed 19/02/2019). Small advanced economies comprise Switzerland, Singapore, Denmark, Finland, Israel, and Ireland. Note that Singapore and Ireland have, at times, received significantly higher and more volatile inflows of foreign direct investment as a percentage of GDP than other states.

9 Wang, M. and Wong, M. (2009). What drives economic growth? The case of cross-border M&A and Greenfield FDI activities. *Kyklos* 62(2), 316-330.

10 UNCTAD (see: https://unctad.org/en/Pages/DIAE/World%20Investment%20Report/Annex-Tables.aspx).

37. The OIO recently changed some of its practices to reduce the length and overall cost of the application process to applicants, as part of its work to address problems identified in a 2016 internal review. These changes included improving guidance and application templates, offering pre-application meetings to give early feedback to applicants, triaging applications, streamlining elements of investor screening for repeat applicants, taking steps to improve engagement with the investment community, and establishing the OIO as a stand-alone business group within Land Information New Zealand.

38. Two external reviews commented on the OIO processes in 2018. One noted that the OIO's changes had improved the quality of applications being considered and reduced the time taken to process applications,[11] and the other noted that the OIO provided the right information to the decision makers.[12] The current problems associated with the Act's complexity, uncertainty and breadth are principally caused by legislative requirements, which the OIO and applicants must follow.

The Act's perceived gaps may limit holistic assessments of investments' effects

39. While the Act's complexity, uncertainty and breadth are causing concern, so too are perceived gaps in the screening regime.

40. The Act seeks to ensure that overseas investment is likely to benefit New Zealand, but it does not allow decision makers to assess investments' likely effects holistically. For example, there is a limited capacity to consider a proposed investment's implications for New Zealand's national security, water or Māori cultural values. These gaps limit the government's ability to decline certain high-risk investments that might have negative effects on New Zealanders' wellbeing.

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11 State Services Commission. (2018). *Performance Improvement Framework: Review for Land Information New Zealand Toitū te whenua*, Wellington, New Zealand: State Services Commission.

12 Office of the Auditor-General. (2018). *How the Overseas Investment Office Uses Information*, Wellington, New Zealand: Office of the Auditor-General.

Simplifying and improving the Act

This section introduces the Overseas Investment Act and the scope and purpose of this reform. It:

- provides a short overview of the Act,
- identifies the aspects of the Act that this reform covers,
- explains what the reform is seeking to achieve, and
- describes how options for reform are being assessed.

Note the overview of the Act is general in nature and not intended to be relied upon when considering any transaction that may require consent under the Act. For legal or other expert advice, you should contact a professional adviser.

Overview of the Overseas Investment Act

41. An overseas person cannot acquire an interest in sensitive land, significant business assets or fishing quota without receiving consent under the Act. This reflects the Act's purpose: acknowledging that it is a privilege for overseas persons to own or control sensitive New Zealand assets. Appendix B compares the Act's requirements with those in comparable jurisdictions.

42. In general terms, an overseas person is:[13]

    - an individual who is neither a New Zealand citizen nor 'ordinarily resident in New Zealand',
    - a body corporate (such as a company) that is incorporated outside New Zealand, or is a 25 per cent or more subsidiary of a body corporate incorporated outside New Zealand (that is, a company incorporated in New Zealand that is at least 25 per cent owned or controlled by a foreign company), or
    - a body corporate or another entity (and including a partnership or trust) that is 25 per cent or more beneficially owned or controlled by overseas persons (whether or not the entity is incorporated or established in New Zealand, or listed on a domestic stock exchange such as the New Zealand Stock Exchange [NZX]).

43. Land is 'sensitive' if it is of a particular type and size or adjoins other types of land of a particular type and size. For example, much agricultural land is sensitive because it is non-urban land greater than five hectares. As of October 2018, residential and lifestyle land, irrespective of size, are also deemed sensitive land.

[13] Section 7 of the Act contains a full definition of overseas person.

44. Acquisitions of 'significant business assets' by overseas persons require screening. Overseas investments in significant business assets are:[14]

- the acquisition of securities (for example, shares) in a person (for example, a company) if:
  - it results in the overseas person having a 25 per cent or more ownership of or control interest (or increasing an existing 25 per cent interest) in that entity, and
  - the value of the securities, consideration or assets of that entity (including subsidiaries of which it has at least 25 per cent ownership) exceeds $100 million,
- the establishment of a new business in New Zealand, costing more than $100 million, where that business operates for more than 90 days a year, or
- the acquisition of property used to carry on business in New Zealand if the total consideration paid exceeds $100 million.[15]

45. Under the Act and the Fisheries Act 1996, a direct investment by an overseas person in fishing quota must be screened. Acquiring securities (for example, ordinary shares) in a person that has an interest in fishing quota requires consent if the investment results in:

- an overseas person obtaining a 25 per cent or more ownership or control interest (or increasing an existing 25 per cent interest) in that entity, or
- the entity becoming an overseas person (that is, where total overseas ownership or control reaches 25 per cent).

46. Figure 2 provides an overview of the types of application made under the Act.

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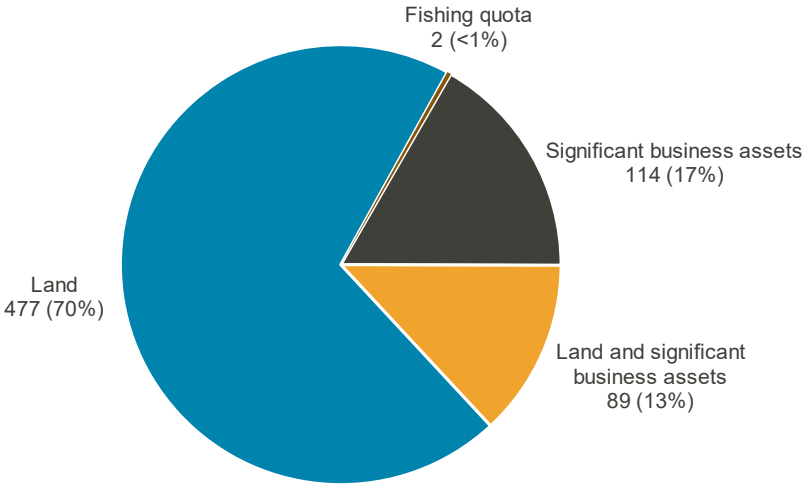
[14] There are higher monetary thresholds for investors from a number of jurisdictions in accordance with New Zealand's free trade agreements. For example, the threshold for screening for Australian non-government investors is currently $530 million.

[15] Through one or a series of related transactions.

Figure 2: Types of application made under the Act[16] (June 2013 to August 2018)



47. The tests that an investor must satisfy to obtain consent depend on the type of asset they are intending to acquire. The main asset types, and their associated tests, are:

- ***significant business assets:*** An overseas person must satisfy the 'investor test', which broadly assesses their character and capacity (this is further described from page 51),
- ***residential and lifestyle land only:*** There are a number of ways in which overseas persons can obtain consent to buy residential land. These largely depend on the land's intended use. For example, an overseas person wanting to buy a house to live in must demonstrate a commitment to do that. An investor wanting to buy land to develop generally must pass the investor test and commit to building new dwellings or development works to support new dwellings,
- ***sensitive land that is not residential:*** In addition to satisfying the investor test, an overseas person must satisfy the 'benefit to New Zealand test' (this is further described from page 61). Depending on the type of land being acquired, the overseas person must generally show that their investment is likely to benefit New Zealand or, where an applicant seeks to acquire an interest in non-urban land of at least five hectares, provide 'substantial and identifiable' benefits to New Zealand,[17]
- forestry activities on sensitive land (freehold, leasehold or forestry rights): An overseas person must satisfy the investor test and one of three tests:
  - the 'special forestry test' – a 'checklist' type of test for an investor who wants to either establish a new forest or acquire an interest in an existing forest and operate it with specified existing arrangements remaining in place (such as public access arrangements),

[16] OIO data.

[17] In certain circumstances, rather than satisfying the benefit to New Zealand test, an overseas person will be able to receive consent if they can satisfy the 'intention to reside' requirements.

- the 'modified benefit to New Zealand test', which is generally for an investor who wishes to either establish a new forest or acquire an interest in an existing forest but is unable to maintain existing arrangements (such as public access), or
- the benefit to New Zealand test, which is generally for an investor who wishes to acquire an interest in sensitive land for forestry and another purpose, and

- ***fishing quota:*** Investors must satisfy a range of requirements under the Fisheries Act 1996. These include the investor test and an assessment against a list of factors similar to some of those found in the benefit to New Zealand test (see page 61). The criteria also include a requirement for the interest in fishing quota to be capable of being registered in the Quota Register or the Annual Catch Entitlement Register and for the relevant overseas person to be a body corporate.

The scope of this reform

48. The Government's Terms of Reference for this reform are set out in Appendix A. The Government's objective is to ensure that the screening regime for overseas investments:

    - provides a clear pathway for consent for investments that support a productive, inclusive and sustainable economy and create opportunities for regions and businesses to grow and connect internationally,
    - provides appropriate protection against the risks to New Zealand associated with the overseas ownership of sensitive assets – particularly in ensuring that New Zealand's national interest is sufficiently protected, and
    - imposes compliance and administrative costs that are proportionate to the risks associated with the investments.

49. According to the Terms of Reference, the reform is to consider whether specific parts of the Act meet this objective. This includes considering the appropriateness of:

    - the definition of overseas person as it relates to bodies corporate,
    - the factors underpinning the benefit to New Zealand test (including whether those factors should include water extraction, tax residency, and Māori cultural values as they relate to the physical and historic characteristics of the relevant sensitive land),
    - the extent that any negative benefits of a prospective investment can be considered under the benefit to New Zealand test,
    - the investor test,
    - the existing levels of discretion afforded to decision makers, with regard to whether the appropriate balance is struck between certainty for overseas persons and allowing a more holistic and adequate consideration of the implications of overseas investment for New Zealand's national interest, and
    - the treatment of land adjoining other types of sensitive land.

50. This consultation document focuses on opportunities (that are consistent with the Act's purpose) to simplify and improve the Act's efficiency and effectiveness, while also addressing any gaps in the Act that pose risks to New Zealanders' wellbeing.

51. To help achieve the Government's objective, the next three sections seek your views on options to improve how the Act regulates:

- ***what we screen:*** Can we better identify sensitive assets and the types of interest in those assets that need to be screened? Stakeholders have expressed concern that the Act defines sensitive land too widely, imposing unnecessary compliance costs. This section discusses the treatment of land that adjoins other land with sensitive characteristics (from page 20), leasehold interests in land (from page 25) and periodic leases (from page 27),

- ***who we screen and when:*** There may be an opportunity to reduce both the number of entities that have to obtain consent to acquire sensitive New Zealand assets, and the number of transactions that require consent. This section discusses opportunities to address concerns:

  - that the current definition of an overseas person is overly broad and imposes disproportionate compliance costs (from page 31), and

  - about the extent to which the Act should screen small acquisitions or changes to shareholdings by overseas persons, and passive shareholdings where overseas persons have no control over sensitive assets or their level of control does not change (from page 42), and

- ***how we screen:*** There may be an opportunity to improve how we screen overseas investments, as existing requirements are complex and costly and limit decision makers' ability to consider the full effects of investments. This section discusses:

  - options for improving the investor test (from page 56),

  - options for improving the benefit to New Zealand test, including whether it should allow consideration of additional factors (from page 66),

  - whether New Zealand should introduce a national interest test or another test that would allow a more holistic assessment of an investment's likely effects, and how this test might interact with the benefit to New Zealand test (from page 70),

  - whether New Zealand should introduce a national security and public order 'call-in' power for transactions not currently captured by the Act (from page 73),

  - the requirement to offer certain types of land (special land) to the Crown (from page 91),

  - the requirement to publicly advertise farmland (from page 95), and

  - whether there is scope to improve decision-making times (from page 98).

How are reform options being assessed?

52. For each of the topics in the next three sections, this document describes concerns about how the Act currently operates.

53. The document uses three criteria (see below) to assess the extent to which options for change are likely to meet the Government's objectives for reform, compared with the status quo. Consistent with the Treasury's Living Standards Framework (see the box at right), these criteria reflect the broad range of ways that overseas investment can influence New Zealanders' wellbeing.

54. It is important to recognise that these criteria are often in tension – for example, if there is a reduction in decision makers' ability to manage the risks associated with overseas investment, then certainty for overseas persons will generally increase. Conversely, increasing decision makers' flexibility to decline prospective investments will often erode certainty. Balancing these objectives is central to this reform. Finally, no weighting has been applied to these criteria when assessing proposed options.

The Living Standards Framework

The Living Standards Framework is a Treasury analytical tool that seeks to ensure that policy analysis takes account of the key determinants of New Zealanders' wellbeing – financial/physical capital, human capital, social capital, and natural capital. Wellbeing depends on the sustainable development and distribution of the four capitals. The framework supports analysis in this document.

He Ara Waiora, a draft framework for bringing te ao Māori perspectives into policy, also supports analysis relating to the benefit to New Zealand test and Māori cultural values. More detail is available on the Treasury website (https://treasury.govt.nz/information-and-services/nz-economy/living-standards).

55. ***Criterion 1 – Manages the risk of overseas investment to New Zealanders' wellbeing:*** This criterion considers whether an option provides decision makers with the flexibility to effectively manage or protect against current and emerging risks from overseas investment to New Zealanders' wellbeing. It includes considering whether an option may create or increase opportunities for avoiding the Act. This criterion is therefore important for assessing how an option would likely manage any negative effects of overseas investment on the four capitals – financial/physical, human, social and natural.

56. In applying this criterion, it is necessary to consider whether risks are potentially better managed in ways other than through the Act, such as through other legislation.

57. ***Criterion 2 – Supports overseas investment in productive assets:*** This criterion considers whether an option supports confidence in New Zealand as an attractive investment destination for productive investment. It includes considering whether an option minimises the costs involved in preparing applications and complying with consent conditions, and in administering and enforcing the regime. The criterion is important as it considers whether a reform supports New Zealand's openness to investment that delivers benefits such as enhanced productivity. It is therefore most directly concerned with an option's likelihood of increasing the financial/physical and human capitals.

58. ***Criterion 3 – Encourages more predictable, transparent and timely outcomes:*** This criterion considers whether an option is consistent with the basic principles of best-practice regulation.[18] It considers whether the option achieves its objectives in a way that makes the law more certain, predictable and transparent, and encourages timely decision making. This criterion is important as it considers whether options will support investor and public confidence in the overseas investment regime. This is particularly relevant to assessing an option's likelihood of increasing the financial/ physical and social capitals.

59. The analysis in this consultation document reflects an estimate of each option's expected effect when considered in the context of the overall screening regime, rather than an option's likely effect in relation to the particular issue being discussed. Finally, while the status quo is not formally assessed in this document, there is always the option of retaining existing arrangements.

60. Some options for reform may, if adopted, have significant effects overall, while others may affect certain types of investor or investment. For example:

- most overseas persons and, in the case of non-natural persons (for example companies, other bodies corporate[19] and trusts), individuals with control of those overseas persons (such as directors) must satisfy the investor test when acquiring almost any type of sensitive asset. Consequently, options to better target the investor test, simplify its requirements or limit the number of times that repeat, high-quality investors must satisfy it could significantly improve the screening process's efficiency and investor certainty,

- options to change the process and tests used to determine whether an investment is likely to benefit New Zealand are the most significant aspect of this reform. For example, proposals that allow for a more holistic screening of particularly sensitive transactions (such as a national interest test), while streamlining requirements for less sensitive transactions, have the potential to increase significantly the regime's efficiency and better protect New Zealand's interests, and

- adjustments to 'who we screen' would likely affect only certain categories of investor (such as entities that identify, and are identified, as 'fundamentally New Zealand' bodies corporate, or portfolio investors), but could potentially offer those investors significantly greater certainty and reduced compliance costs.

61. All options are designed to be consistent with New Zealand's local and international obligations, including free trade agreements and obligations as a member of the World Trade Organization. New Zealand is able to make changes to the criteria that are used to assess applications made under the Act, consistently with our international obligations. However, international obligations constrain our ability to introduce investment screening for new categories of asset.

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[18] See: https://treasury.govt.nz/sites/default/files/2012-08/bpregmodel-jul12.pdf

[19] Bodies corporate are organisations with their own legal identities, separate from their members, owners and governing bodies. They include, but are not limited to, companies registered under the Companies Act 1993.

62. For each topic under consideration, the Government would like your views on the following questions:

- Do you agree that there is a problem, and:
  - if so, has this document described it accurately? Can you tell us about your experience, including when it happened?
  - if not, do you support the existing arrangements. If so, why?
- Do you have any comment on the potential effects of the options? Are you able to quantify potential effects on compliance costs?
- Do you think the right reform options have been identified, and:
  - if so, which of the options identified do you prefer and why?
  - if not, what alternative option would you support and why?

63. While this reform is focused on options for legislative change and consultation is led by the Treasury, you are welcome also to provide feedback on your operational experience with the OIO. The OIO will be able to use your feedback as part of its continuous improvement programme.

What assets do overseas persons need consent to invest in?

This section considers possible changes to the types of, and interests in, sensitive New Zealand assets that overseas persons must obtain consent to acquire.

In keeping with the reform's Terms of Reference, this section considers:

- ***sensitive adjoining land:*** Whether it is appropriate to classify land that adjoins land with sensitive characteristics as 'sensitive' to the extent that we do currently, and
- ***leases:*** Whether the threshold for consent to acquire a lease over sensitive land is too high.

This section does not propose changing screening requirements for freehold rural land over five hectares or residential land of any size.

This section focuses on options to better support overseas investment in productive assets and improve the regime's predictability and timeliness.

64. The Act requires overseas persons to obtain consent before they can invest in sensitive land, significant business assets and fishing quota. Sensitive land includes:
    - residential land,
    - non-urban land greater than five hectares,
    - the foreshore and seabed,
    - beds of lakes over 0.4 hectare,
    - land over 0.4 hectare that is subject to a heritage order or is heritage listed,
    - specified islands, and
    - sensitive adjoining land.

65. Consent is required to obtain sensitive land if the interest being acquired is for a term of three years or more. For example, leases of three years or more as well as freehold interests in sensitive land generally require consent.

Sensitive adjoining land

What currently happens?

66. The Act requires transactions to be screened if they involve land that adjoins other land that has sensitive characteristics, such as the foreshore, a lakebed, some types of conservation land, historic places and wāhi tapu (sacred places).[20] We call this land 'sensitive adjoining land'. The land with sensitive characteristics is sometimes called 'Table 2 land', referring to Table 2 in Schedule 1 of the Act.

67. Table 2 land includes land that is listed, or is part of a class that is listed, as a reserve, a public park or other sensitive area by the regulator (the OIO) under section 37 of the Act. The OIO has defined the section 37 list as including all land over 0.4 hectares that a regional plan, district plan or proposed district plan provides is to be used as a reserve, as a public park, for recreation purposes or as an open space. It also includes national parks.[21]

68. Screening seeks to ensure that transactions are beneficial to the conservation of, or public access to, Table 2 land (for example, the foreshore where access may be through land subject to a transaction). It recognises that the development and use of sensitive adjoining land could have environmental effects on, or affect access to, Table 2 land.

69. The Resource Management Act guides most decisions about the environmental effects of land development and use, as well as access to waterways. However, the Overseas Investment Act provides an opportunity for decision makers to negotiate conditions on the investment that provide benefits to New Zealand.

70. Of 567 applications involving sensitive land between June 2013 and August 2018, 14 per cent (78) were only screened because they involved sensitive adjoining land (that is, land next to Table 2 land) (Figure 3).[22]

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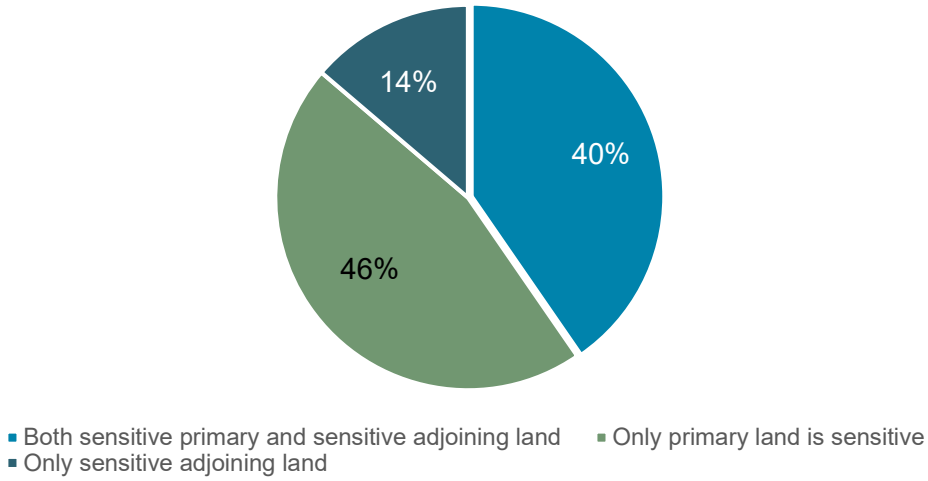
20 Whether screening is required depends on the size and characteristics of the particular piece of land. See Schedules 1 and 2 of the Act for additional information.

21 The section 37 list is available on the following web page: https://www.linz.govt.nz/overseas-investment/what-you-need-do-if-you-are-selling-new-zealand-assets-overseas-investors-non-residential/sensitive-land-non-residential

22 Treasury analysis of OIO data.

Figure 3: Types of sensitive land cited in applications (data from June 2013 to August 2018)



71. Of the applications involving only sensitive adjoining land, most (60 of 78) were screened as a result of their adjoining only one type of Table 2 land. Of these 60 transactions, consent was only required for 35 because the land adjoined land that was listed as a reserve, public park or other sensitive area designated under section 37. Due to changes in May 2017 to narrow the scope of the section 37 list, the share of screened transactions with these features has fallen.

What are the problems with current law and practice?

72. Some stakeholders have raised concerns that the current definition of sensitive adjoining land seems broader than necessary, and therefore could be creating unnecessary compliance costs. In particular:

- screening includes matters that are not relevant to a transaction's particular risks to Table 2 land. The most relevant factors are environmental, historic and cultural values, and access. However, an application for consent to acquire sensitive adjoining land must be assessed against a range of factors, such as the transaction's economic effects, which may not relate to environmental, historic, cultural or access concerns, and

- Table 2 land is defined broadly. This has three primary implications:

  - it includes some land of less environmental, historic or cultural sensitivity that is easily accessible. This issue is particularly relevant to some land listed under section 37. For example, consent may be required for commercial land in an industrial area because it adjoins land designated as a recreation reserve or a river that is part of the coastal marine area,

  - the way land is treated under the Act can depend on how individual local authorities designate it in their district plans. This means that land of similar sensitivity across New Zealand may not be treated equally under the Act, and

  - it increases the time and complexity associated with identifying whether land is sensitive. For example, a 'sensitive land certificate' may need to be obtained – at the overseas person's expense – to determine whether the land is sensitive or not.

73. Section 37 also has particular problems of its own. An important classification of land under the Act is set by the regulator (the OIO) rather than in the Act. Stakeholders have raised concerns that section 37, along with the different ways individual local authorities designate land, creates uncertainty about when consent is required.

How could these problems be fixed?

74. While options outlined elsewhere in this document (for example, to simplify the benefit to New Zealand test) would reduce the cost of screening transactions involving sensitive adjoining land, we have identified other options that could further address these problems.

75. **Option 1** would remove Table 2 land from the definition of sensitive land, with the exception of the following categories, which would continue to trigger screening requirements:

- foreshore or lakebeds. This would be consistent with provisions in the Resource Management Act for the maintenance and enhancement of public access to coastal marine areas and lakes, and
- some land that is significant to Māori. This would comprise Māori reservations, and land that includes a wāhi tapu or wāhi tapu area that is entered on the New Zealand Heritage List/Rārangi Kōrero or for which there is an application that has been notified.

76. The Resource Management Act would continue to govern the use of the land subject to a transaction (including the environmental effects on the types of land currently included in Table 2).

77. **Option 2** would narrow the definition of Table 2 land by removing the section 37 list, but would continue screening adjoining land of environmental, cultural or historic significance and/or where public access is important (the following box provides examples of the types of land currently captured by section 37 that could be retained in the Act).

78. This option would exclude most recreation reserves from screening requirements (except those adjoining the foreshore or lakebeds, and those managed by the Department of Conservation, if retained). These excluded recreation reserves are generally of the least environmental concern and can usually be accessed via public roads or tracks.

Types of land that could be retained in Table 2 if the section 37 list were removed

If the section 37 list were removed, some types of land currently captured by section 37 could potentially be retained in Table 2. This would ensure that investments in land of environmental, cultural or historic significance, and/or where public access is important, still have to be screened. These categories could include:

- national parks,
- scientific, scenic, historic or nature reserves under the Reserves Act 1977 managed by local authorities and others (in addition to those administered by the Department of Conservation),
- recreation reserves managed by the Department of Conservation,
- wildlife sanctuaries (under the Wildlife Act 1953),
- government purpose reserves and local purpose reserves held for wildlife purposes, and/or
- reserves managed by iwi following Treaty of Waitangi settlements.

79. These options are assessed against the reform criteria in Table 1 below.

Table 1: Assessment against the reform criteria of options to reduce the categories of adjoining land

	Option 1 – remove Table 2 land from the Act, with the exception of the foreshore, lakebeds, Māori reservations, and land that includes wāhi tapu	Option 2 – remove the section 37 list from Table 2 to reduce the screening of applications relating to adjoining land of low environmental value and with no access concerns
Manages the risk of overseas investment to New Zealanders' wellbeing	***Moderately negative*** Reduces decision makers' flexibility to negotiate benefits for New Zealand. The Resource Management Act would still cover the use of land and its effects on adjoining land, as it does for land in New Zealand ownership.	***Neutral/moderately negative*** Marginally reduces decision makers' flexibility to manage risks associated with foreign investment. Transactions involving some recreation reserves, which some may consider to be of local importance, would no longer be screened. Most transactions involving Table 2 land (including scientific, scenic, historic and nature reserves) would continue to be screened. The Resource Management Act would still cover the use of land and its effects on adjoining land, as it does for land in New Zealand ownership.
Supports overseas investment in productive assets	***Moderately/strongly positive*** Better supports investment by simplifying screening requirements through removing most Table 2 land (and corresponding compliance costs).	***Moderately positive*** Better supports investment by simplifying screening requirements (and compliance costs) to some extent. Retains most of the complexity that results from screening sensitive adjoining land. This option would address the inconsistencies in how similar types of land are treated as a result of how individual local authorities designate it in their district plans.
Delivers more predictable, transparent and timely outcomes	***Moderately positive*** The majority of transactions currently affected as a result of Table 2 land would not require screening. The number of transactions for sensitive adjoining land screened could reduce from around 10-15 per year to about 3-5 per year.	***Moderately positive*** Depending on whether any additional categories of Table 2 land are included, the number of transactions for sensitive adjoining land screened could reduce from around 10-15 per year to around 6-8 per year.

The Government would like your views

The Government would like your views on whether this document has accurately identified the problems, options for reform, and the effects of the options, and whether you have any alternative ideas. Please see page 18 for the full list of questions.

The Government would also like your views on the following questions:

- If the section 37 list were removed, should any of the types of land currently captured by it be retained in Table 2?
  - If so, which types and why?

Leases of sensitive land that require screening

80. Overseas persons must gain consent to lease sensitive land, or obtain a profit à prendre, for three years or more.[23] If an overseas person wishes to re-grant a lease, they can use an exemption to bypass screening as long as certain criteria are met.[24] This significantly reduces the compliance cost of re-grants of shorter-term leases.

81. Leases are screened as they can last for a long time and give the lessees use and enjoyment of land provided by freehold interests.

82. Solely leasehold transactions make up 14.2 per cent of all sensitive land transactions.

What are the problems with current law and practice?

83. Anecdotal reports from investors and lawyers suggest that overseas investment is being deterred by the disproportionate cost, time and stringency of the screening process for leases. Despite the often short-term nature of leases, these transactions are subject to the same scrutiny and compliance costs as higher-sensitivity transactions that involve land leaving New Zealand ownership or control indefinitely.

84. In addition, overseas persons find it difficult to demonstrate that short-term investments will deliver benefits that satisfy the consent process.

85. Because the costs of obtaining consent to enter a short-term lease are the same as those of applying to acquire a freehold interest, overseas persons may have incentives to acquire freehold interests. This is seemingly contrary to the Act's purpose.

How could these problems be fixed?

86. We have identified two options that could address these problems.

87. **Option 1** would exclude all short-term leases (for example, leases of 10 years or fewer) from the screening requirements to better recognise their relatively low-risk nature. However, there is a risk that this could encourage investors to enter a series of short-term leases rather than enter a long-term lease. This is distinct from leases that contain options to renew, where the tenure is calculated to include rights of renewal, which are generally captured by the Act's screening requirements.

88. If Option 1 were adopted, the criteria for the re-grant exemption would need to be reconsidered.

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[23] There are additional rules for determining whether profits à prendre over sensitive land require consent. See clause 8 of Schedule 3 of the Act.

[24] Regulation 5 of the Overseas Investment Amendment Regulations 2016 established an exemption from the requirement for consent for certain land transactions known as re-grants. The criteria for a re-grant of consent include that: (a) the new interest commences within three months of the expiry of the previous interest; (b) the sensitive land is the same as or a portion of the sensitive land that is the subject of the previous interest; (c) the term of the new interest is the same as or shorter than the term of the previous interest; (d) the terms and conditions of the new interest differ from the previous interest only to the extent they are permitted changes; (e) consent has previously been obtained for the previous interest; (f) the term of the new interest expires within 20 years of the date that the first consented interest in the land was acquired; and (g) the activity to be conducted on the land is substantially similar to that conducted under the interest that resulted from the previous consented transaction.

89. **Option 2** would create a split category of screening, under which the threshold for consent would be:

- for non-urban land of five hectares or more and residential land, leases that have tenures of 10 years or longer, and
- for all other classes of land, leases that have tenures of 35 years or longer. This is consistent with requirements under the Resource Management Act for a subdivision of land by a lease of part of the allotment.

90. Option 2 would remove screening requirements for some leases of less sensitive areas of land. The Act currently recognises this difference in sensitivity. For example, to obtain consent to acquire non-urban land of more than five hectares, an investment must be likely to have 'substantial and identifiable' benefits (rather than just benefits).

91. Under both options, consideration could be given to extending the relevant time period for screening profits à prendre over all or certain types of sensitive land.

Table 2: Assessment against the reform criteria of options to revise the treatment of leases

	Option 1 – exclude short-term leases (for example, fewer than 10 years) from screening requirements	Option 2 – screen (i) leases of non-urban land of five hectares or more and residential land with tenures of 10 years or longer; and (ii) leases of all other classes of land with tenures of 35 years or longer
Manages the risk of overseas investment to New Zealanders' wellbeing	***Neutral/moderately negative*** Exclusion from screening limits the ability to manage risks, depending on the threshold for exclusion, but only for a relatively low-risk type of transaction. Investors may be encouraged to enter into short-term leases instead of freehold transfers, in order to avoid screening. The general anti-avoidance provision in the Act mitigates this risk.	***Moderately negative*** Excludes short- and medium-term leases of less sensitive land from screening, and maintains screening of the most sensitive categories of land, which enables the effective management of risks. Investors may be encouraged to enter into short-term leases for smaller parcels of land instead of freehold transfers, in order to avoid screening. The general anti-avoidance provision in the Act mitigates this risk.
Supports overseas investment in productive assets	***Moderately positive*** Improvement in certainty and a reduction in compliance costs for transactions below threshold are expected to marginally increase attractiveness to investment.	***Moderately positive*** Improvement in certainty and a reduction in compliance costs for transactions below threshold are expected to improve attractiveness to investment.
Delivers more predictable, transparent and timely outcomes	***Moderately positive*** Exclusion from screening improves the transparency, predictability and timeliness of lease transactions below the threshold.	***Moderately/strongly positive*** Exclusion from screening improves transparency, predictability and timeliness for the majority of lease transactions.

The Government would like your views

The Government would like your views on whether this document has accurately identified the problems, options for reform, and the effects of the options, and whether you have any alternative ideas. Please see page 18 for the full list of questions.

The Government would also like your views on the following questions:

- Do you consider that raising the threshold for exemption from screening to leases with terms of 10 years or more is appropriate, and:
  - if so, why do you consider this the appropriate threshold?
  - if not, what alternative threshold would you support, and why?

Technical issue: periodic leases

What currently happens?

92. A periodic lease is a lease that has no set end date (that is, it is not a fixed-term lease) and that continues until either party gives written notice to end the lease. Historically, periodic leases have not been part of New Zealand's overseas investment regime unless they have provided certainty of a term of three years or more.

93. Reforms in 2018 amended the regime to make transactions involving residential land subject to the Act's screening process. Notably, Schedule 3 was enacted to clarify the law relating to periodic leases of residential land.

94. There is a risk that this provision has had the unintended effect of implying that all periodic leases other than those of residential land are part of the Act's screening regime.

What is the problem with current practice?

95. Periodic leases are inherently uncertain because they can be terminated at any time by either the lessors or the lessees. A requirement for consent seems to be a disproportionate response to the potential risks associated with these leases.

How could this problem be fixed?

96. We have identified one option to address this problem. This is to remove the requirement for consent for all periodic leases, irrespective of the type of land.

97. Table 3 assesses the option against the reform criteria.

Table 3: Assessment against the reform criteria of option to amend the treatment of periodic leases

	Option – state that consent is not required for all periodic leases
Manages the risk of overseas investment to New Zealanders' wellbeing	***Neutral*** Minimal overall effect as periodic leases currently are not screened and the risks posed by them are low.
Supports overseas investment in productive assets	***Neutral*** Clarifies the law by restating the legal position before the reforms, so negligible effect.
More predictable, transparent and timely outcomes	***Moderately positive*** Would marginally improve investor certainty to the extent that it clarifies the law.

The Government would like your views

The Government would like your views on whether this document has accurately identified the problem, the option for reform, and the effects of the option, and whether you have any alternative ideas. Please see page 18 for the full list of questions.

Who needs consent, and when, to invest in sensitive assets?

The Act's definition of an 'overseas person' is used to determine whether a person or entity requires consent to purchase sensitive assets. This section of the consultation document outlines the current law and potential changes to who needs consent and when screening is required. We do not propose changing the definition of individual overseas persons.

Changes to who needs consent and when screening is required could improve the Act's efficiency (while maintaining its effectiveness) by reducing:

- the number of entities required to obtain consent to buy sensitive New Zealand assets, and
- the number of very low-risk transactions that require consent.

This section focuses on options to support overseas investment in productive assets and improve the regime's predictability and timeliness. Issues include:

- ***the definition of overseas person as it applies to bodies corporate:*** Whether companies with strong connections to New Zealand but that qualify as overseas persons for technical reasons should be subject to the Act's requirements,
- ***the screening of portfolio investors:*** Whether the Act could do more to facilitate portfolio-style investments (where no control over sensitive assets is sought). Currently many portfolio investors are overseas persons under the Act and are required to obtain consent before acquiring interests in sensitive New Zealand assets – including in cases where investments are being made on behalf of, or by entities controlled by, New Zealanders (such as KiwiSaver schemes, which must be 100 per cent beneficially owned by New Zealand citizens or persons entitled to be in New Zealand indefinitely),
- ***the 'tipping point' for requiring consent:*** Whether small interests (for example, interests of less than five per cent) that result in entities becoming overseas persons ('the tipping point') should be screened. Currently, consent is required for any transaction that results in an entity that holds sensitive land or fishing quota becoming an overseas person, and
- ***incremental investments:*** Whether an investor should be able to increase an existing investment in an entity that holds sensitive assets without requiring additional consent. Currently consent is required when an overseas person increases, by any amount, an existing 25 per cent or more ownership or control interest in an entity that holds sensitive assets (with some exceptions).

98. Currently, overseas persons are generally required to obtain consent before they can acquire sensitive assets. The Act screens direct purchases of sensitive assets by overseas persons, such as an individual or entity buying sensitive land. It also screens indirect investments in sensitive assets by overseas persons, such as an individual buying shares in a company that owns sensitive land. Specifically, consent is required when an overseas person (and its 'associates'):

- attains a 25 per cent or more ownership or control interest in an entity (for example, 25 per cent of the ordinary shares in a company) that holds sensitive assets (this is called the '25 per cent threshold'),[25]
- increases, *by any amount*, an existing 25 per cent or more ownership or control interest in an entity that holds sensitive assets,[26] or
- acquires an interest, *of any size*, in an entity that holds sensitive land or fishing quota, and where that investment makes the entity an overseas person by being 25 per cent owned or controlled by overseas persons.[27]

99. While the Act's definition of an overseas person is relatively simple to apply to natural persons, it can be complex when legal entities that have multiple owners (some of whom may be New Zealanders or New Zealand entities).

100. The Act's definition of an overseas person focuses on the extent to which a person outside New Zealand has ownership or control of a sensitive asset. This appears to be because if they own the asset they can get value from it (for example, by using it or enjoying other economic benefits associated with it). A person who controls an asset has influence on how it is used, including the extent to which it is protected for future generations or the effects its use may have on New Zealanders' wellbeing.

101. These definitions work quite well for most entities and effectively ensure that their ownership and/or control of sensitive New Zealand assets requires consent. However, there is a view that, for some entities, the Act does not balance the government's need to manage the potential risks of foreign investment with the regime's compliance costs. This is particularly the case for:

- bodies corporate incorporated in New Zealand (especially those also publicly listed in New Zealand),
- portfolio investors,
- entities that are beneficially owned by New Zealanders (for example, KiwiSaver schemes that are managed by Australian trustees),
- investors acquiring small interests in an entity, where those acquisitions result in the entity becoming an overseas person (here the issue relates to the tipping point for an entity being deemed an overseas person), and

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25 Sections 12(b)(i) and 13(1)(a)(i) of the Act. Section 57D(b)(i) of the Fisheries Act 1996.

26 Sections 12(b)(ii) and 13(1)(a)(i) of the Act. Section 57D(b)(ii) of the Fisheries Act 1996.

27 Section 12(b)(iii) of the Act. Section 57D(b)(iii) of the Fisheries Act 1996.

- investors who often already have consent making small adjustments to their holdings, where those adjustments do not materially change their levels of control.

102. The problems with the treatment of these entities and the types of transactions, as well as potential options to resolve them, are discussed below.

The definition of overseas person as it applies to bodies corporate

What are the problems with current law and practice?

103. The Act should manage the risks associated with overseas persons' ownership and control of sensitive assets. However, the current definition of overseas person captures a range of domestically incorporated bodies corporate that are majority owned and controlled by New Zealanders. They include many of the largest 40 entities on the NZX.

104. The Act's capture of bodies corporate that some would consider fundamentally New Zealand companies imposes significant costs on affected entities and the broader New Zealand economy. This seems disproportionate to the risks being managed, as such entities are unlikely to be the targets of the Act – for example, because ownership of sensitive New Zealand assets by such companies does not raise public concern. Costs include:

    - the direct costs of obtaining consent, which stakeholders advise can exceed $100,000 due to the need for legal advice and other consulting services, and

    - the costs associated with the time taken to obtain consent, including lost opportunities. For example, entities may not be able to bid successfully for assets because vendors are unwilling to wait for consent, or the wait for consent may mean they have 'idle' capital that is not earning a return (or has a lower return than desired).

105. Listed bodies corporate, whose shareholders can change daily, have additional costs. New Zealand bodies corporate near the 25 per cent threshold for becoming 'overseas persons' cannot confirm their ownership in real time. An estimate of the ownership structure of a listed company typically takes around five working days, and it can take longer to determine beneficial ownership (if at all).

106. This results in:

    - some bodies corporate that are close to, but have not reached, the 25 per cent threshold obtaining consent to ensure that they do not inadvertently breach the Act, and

    - other bodies corporate likely unintentionally breaching the Act and exposing themselves to the risk of enforcement.

107. Problems with the current definition are likely to increase, because:

- since October 2018, when consent became required to purchase residential land, the number of transactions screened has increased, and
- overseas ownership of listed entities in New Zealand has been increasing.[28] This is expected to continue due to domestic capital markets maturing, large global investment funds increasingly diversifying, and proactive efforts by the NZX and the Government to attract foreign equity.

How could these problems be fixed?

108. We have identified four options to remove from the regime domestically incorporated bodies corporate with significant connections to New Zealand. While none would resolve broader issues associated with obtaining ownership information from relevant share registries, they would reduce the frequency with which screening requirements are triggered.

109. **Option 1** would increase the percentage of overseas ownership required for a domestically incorporated and listed body corporate to qualify as an overseas person, from 25 per cent to 49 per cent.[29]

110. This is designed to better target the regime at entities where the majority of economic returns associated with sensitive assets would flow offshore. It is similar to the approach used in Canada under the Investment Canada Act.

111. **Option 2** targets the screening regime at entities where overseas persons have material degrees of control over sensitive assets.

112. Under this approach, a domestically incorporated and listed body corporate would be an overseas person only if 'substantial holdings'[30] by overseas persons in classes of securities that confer control rights[31] cumulatively totalled 25 per cent. This is similar to the approach used in Australia under the Foreign Acquisitions and Takeovers Act 1975 and would effectively remove widely held companies (that is, listed companies with diverse shareholder bases) from the regime.

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28 The share of foreign ownership on the NZX is at its highest level since 2009, and investment by passive offshore-managed funds is at its highest level since 2005 (see https://www.jbwere.co.nz/assets/Uploads/JBWere-2017-Equity-Ownership-Survey3.pdf).

29 Setting the threshold at 49% (rather than "less than 50%") would always ensure that, for entities that are not overseas persons, a clear majority of economic returns would go to New Zealanders.

30 That is, holdings of five per cent or greater.

31 For example, control rights or rights relating to the board's composition.

The threshold for screening for overseas control

Options 2 and 3 set a threshold for overseas investment that relates to the concept of 'negative control'. Negative control gives an investor the right to block a special resolution.

A 25 per cent threshold for determining control could be seen as too restrictive. This is because:

- it is tied to the concept of negative control rather than 'positive control', and
- it presumes that groups of shareholders can control an entity as a bloc on the basis of their being overseas persons, rather than on the basis of association (for example, their working together in some way).

Despite this, changes are not proposed to the control threshold or the way of calculating when that threshold is reached, because:

- negative control allows special resolutions relating to constitutional amendments or major transactions to be blocked, which could have implications for managing sensitive assets,
- a higher threshold would increase the risk of overseas persons circumventing the regime by relying on associates to obtain positive control (because they could be closer to the 50 per cent threshold). While this would be an offence, the risk of it happening would place considerable pressure on the OIO's monitoring and enforcement capabilities and the provisions of the Takeovers Act 1993, and
- the test would be 'bright-line' and simple to understand and enforce. While a more sophisticated test could, for example, count holdings by overseas persons that are working together or are otherwise associated, the associated administrative and enforcement costs would likely outweigh the benefits.

113. **Option 3** would impose screening requirements on domestically incorporated and listed bodies corporate when:

    - more than 49 per cent of the economic returns flow to overseas persons (that is, the entity is majority, or close to majority, foreign owned), and/or
    - overseas persons collectively hold substantial holdings in a securities class that confers control rights at a level of 25 per cent or more (that is, the entity is subject to foreign control).

Restricting the new definitions to bodies corporate listed in New Zealand

Options 1-3 would only change the definition of overseas person for domestically incorporated and publicly listed bodies corporate. This is a significant limitation given that 80-90 per cent of applications for consent lodged by domestically incorporated bodies corporate have been from entities that are not publicly listed.

The options have been limited to listed entities because these entities are subject to requirements (such as the Financial Markets Conduct Act 2013 and NZX listing rules) that mitigate some of the risks associated with the ownership and/or control of sensitive assets. These include:

- an obligation to disclose when a person has a substantial holding in a listed issuer and when that person's holding changes in size or nature.[32] This mitigates the risk of an overseas person building a controlling stake in a company without authorities knowing about it, and
- the ability to determine more easily and accurately (relative to unlisted entities) whether a company is more than 49 per cent owned by overseas persons. This reduces the risk of avoidance and makes enforcement more straightforward (noting that difficulties associated with identifying beneficial owners would remain).

114. **Option 4** would not change the definition of an overseas person. Instead, all domestically incorporated bodies corporate could apply for an exemption from the Act if they have a strong connection to New Zealand and a strong record of compliance. For example, an entity could qualify if:

    - it is incorporated in New Zealand,
    - it is headquartered in New Zealand,
    - it is at least 51 per cent owned by New Zealanders,
    - New Zealanders control the board (that is, New Zealanders constitute at least half of the board of directors),
    - it is listed on a securities exchange, is listed on a New Zealand securities exchange and has dispersed overseas shareholdings. That is, 'substantial holders' do not comprise 25 per cent or more of a class of securities with control rights,
    - no 'foreign government'[33] or its associate(s) owns equity in the entity,
    - it has received consent for at least two investments under the Act in the previous five years, and

[32] Sections 273 to 283 of the Financial Markets Conduct Act 2013.

[33] 'Foreign government' could be defined similarly to the definition in section 4 of Australia's Foreign Acquisitions and Takeovers Act 1975.

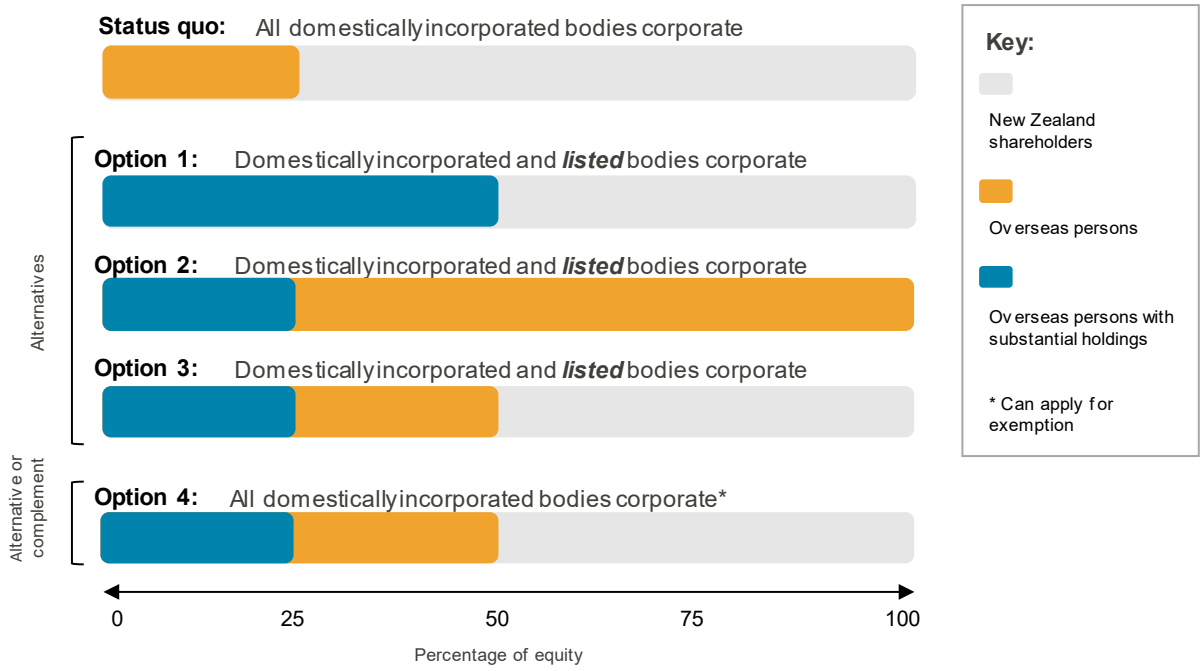
- it has a strong record of compliance with the requirements of the Act and New Zealand law more broadly. For example, no enforcement action under the Act has been validly taken against the entity.

115. To support compliance, exempted entities would be required to notify the OIO whenever there was a material change in their ownership or control (for example, the appointment of a new director to the board).

116. **Option 4** could operate as an alternative to, or complement, any of Options 1-3.

117. Options 1-4 are summarised in Figure 4. They are assessed against the reform criteria in Table 4.

Figure 4: Comparison of options to remove 'New Zealand' companies from the regime[34]



[34] Shading presents the maximum possible shareholdings under each option before the entity would become an overseas person.

Table 4: Assessment against the reform criteria of options to exclude 'New Zealand companies' from the Act's requirements

	Option 1 – do not screen domestically incorporated and listed entities that are majority owned by New Zealanders	Option 2 – do not screen domestically incorporated and listed entities that are not controlled by overseas persons	Option 3 – do not screen domestically incorporated and listed entities that are majority owned by New Zealanders and not controlled by overseas persons	Option 4 – allow domestically incorporated entities with significant connections to New Zealand to apply for exemption
	Alternative options			Alternative or complementary option
Manages the risk of overseas investment to New Zealanders' wellbeing	***Moderately/strongly negative*** Significantly reduces the ability to manage risks of sensitive assets controlled by overseas persons. For example, one overseas person could hold 49% of a body corporate's equity. The entity would not be screened, but the shareholder could alter the board's composition or block major transactions.	***Strongly negative*** Significantly reduces the ability to manage risks of sensitive assets owned by overseas persons. For example, a body corporate that is 100% foreign owned with all returns from sensitive assets flowing offshore would not necessarily be screened.	***Neutral*** Only marginally reduces the ability to manage risks of sensitive assets owned or controlled by overseas persons. Bodies corporate seeking to acquire assets that would be either majority owned or materially controlled by overseas persons would always be screened.	***Neutral*** Only marginally reduces the ability to manage risks of sensitive assets owned or controlled by overseas persons. Residual risks are reduced by requiring entities to apply for exemption and have proven records of compliance. Requiring entities to apply may better ensure public support for investment.
Supports overseas investment in productive assets	***Moderately positive*** Expected to increase the attractiveness of New Zealand bodies corporate to investment because additional capital could flow into them before screening is required (with compliance costs that this entails removed). Costs remain for private bodies corporate that have strong connections to New Zealand.	***Moderately positive*** Expected to increase the attractiveness of New Zealand bodies corporate to investment because additional capital could flow into them before screening is required (with compliance costs that this entails removed). Compliance costs would reduce further as it would be simpler for entities to determine whether they are overseas persons – substantial holdings must be reported in real time. Costs remain for private bodies corporate that have strong connections to New Zealand.	***Moderately positive*** Expected to increase the attractiveness of New Zealand bodies corporate to investment because additional capital could flow into them before screening is required (with compliance costs that this entails removed). Some additional costs associated with determining whether an entity is an overseas person. Costs remain for private bodies corporate that have strong connections to New Zealand.	***Strongly positive*** Would not automatically reduce compliance costs or increase attractiveness because exemption must be applied for. However, this would cost less than applying for consent. Once exemption is received, it is expected to increase the attractiveness of New Zealand bodies corporate to investment because additional capital could flow into them before screening is required. Attractiveness is also supported due to ongoing compliance costs being near zero (some costs will be linked to periodic corporate status updates). Effect amplified because the option would be available to a very large number of entities. Also would not risk distorting corporate structure choices.

	Option 1 – do not screen domestically incorporated and listed entities that are majority owned by New Zealanders	Option 2 – do not screen domestically incorporated and listed entities that are not controlled by overseas persons	Option 3 – do not screen domestically incorporated and listed entities that are majority owned by New Zealanders and not controlled by overseas persons	Option 4 – allow domestically incorporated entities with significant connections to New Zealand to apply for exemption
Delivers more predictable, transparent and timely outcomes	***Strongly positive*** Affected entities would be removed from the regime and have complete certainty of outcomes when acquiring sensitive New Zealand assets.	***Strongly positive*** Affected entities would be removed from the regime and have complete certainty of outcomes when acquiring sensitive New Zealand assets.	***Strongly positive*** Affected entities would be removed from the regime and have complete certainty of outcomes when acquiring sensitive New Zealand assets.	***Moderately/strongly positive*** Entities that obtain exemption would have complete certainty of outcomes when acquiring sensitive New Zealand assets. Some uncertainty is associated with the need to apply for, and receive, exemption. This will be lower than obtaining consent currently.

The Government would like your views

The Government would like your views on whether this document has accurately identified the problems, options for reform, and the effects of the options, and whether you have any alternative ideas. Please see page 18 for the full list of questions.

The Government would also like your views on the following questions:

- Have the right requirements been identified for the exemption in Option 4?
  - If not, what requirements, or additional requirements, do you think should be included?

Screening of portfolio investors

What currently happens?

118. A portfolio investor is an entity that obtains a significant minority interest (that is, generally less than 10 per cent) in a body corporate, investment fund or individual project but has no, or a limited, ability to influence any material control over that entity. As it has no controlling interest and long-term returns are generally the priority, its investments are deemed passive investments.

119. Structured as trusts or bodies corporate, portfolio investors are generally professional investors that comply with international regulatory best practice. Many are overseas persons under the Act, so are required to obtain consent before acquiring interests in sensitive New Zealand assets. They can include portfolio investors (such as KiwiSaver schemes)[35] that are investing on behalf of, or controlled by, New Zealanders, if 25 per cent of the entities' governing bodies are overseas persons. This is despite the fact that those New Zealanders would generally be able to acquire such assets in their own right without consent.

120. The Overseas Investment Regulations 2005 (the Regulations) theoretically enable qualifying[36] portfolio investors and entities that are New Zealand controlled to apply for an exemption from the Act's consent requirements in relation to significant business assets and sensitive land. An exemption would be in the form of an Order in Council, which generally requires Cabinet approval.[37]

121. Under the exemption regime, an investment made by an exempted entity (Entity A) in another entity (Entity B)[38] generally would not contribute to Entity B being deemed an overseas person. For example, if Entity B is 20 per cent owned by overseas persons and Entity A acquires five per cent of Entity B, Entity B would not qualify as an overseas person, despite being 25 per cent owned by overseas persons.

What are the problems with current law and practice?

122. There is a question about when screening should apply to transactions in which overseas persons do not obtain majority ownership or meaningful control of sensitive New Zealand assets. As portfolio investors do not have majority ownership or exert control, it could be seen as inappropriate – as indicated by the existing exemption provisions in Schedules 3 and 4 – that they be required to obtain consent to acquire sensitive New Zealand assets in all cases.

123. In addition, imposing consent requirements (with associated compliance costs and delays) on such investments may disincentivise investment in New Zealand. This is

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35 Section 6(1) of the KiwiSaver Act 2006 and section 128(2) of the Financial Markets Conduct Act.

36 Criteria to qualify for the exemptions can be found at: http://www.linz.govt.nz/system/files_force/media/file-attachments/oio-resource-exemptions-schedule-3-and-4.pdf?download=1&download=1

37 See regulation 48. Exempted portfolio investors are listed in Schedule 3 of the Regulations. Exempted entities that are beneficially owned/controlled by New Zealanders are listed in Schedule 4 of the Regulations.

38 Interests of 25 per cent or more by a single entity listed in Schedule 3, or of 75 per cent or more by any two entities listed in Schedule 3, will still contribute to the target entity being deemed an overseas person. Any interest held by a Schedule 4 entity will not contribute to the target entity being deemed an overseas person.

particularly problematic given New Zealand's financing gap for large infrastructure, and stakeholders' views that portfolio investors:

- have an important role in meeting New Zealand's funding requirements, and
- can offer unique expertise to domestic partners.

124. Imposing screening requirements on entities (beneficially owned or controlled by New Zealanders) such as KiwiSaver schemes and other regulated superannuation funds may also inhibit the Government's broader objective of maximising New Zealanders' retirement savings.

The existing exemptions do not resolve these issues

125. The existing exemptions were designed to resolve some of these issues for portfolio investors that met relevant requirements. However, there are a number of significant problems with their operation. In particular:

- a requirement to amend the Regulations to exempt entities from the Act increases the regime's complexity and delays decision making relative to other exemptions, because Cabinet approval is required,
- there are no legislative criteria for the types of entity likely to qualify for the exemption. This creates uncertainty about the provisions' scope and limits their usefulness for investors, and
- in 2018, amendments to the Act's exemption-making power mean that adding new portfolio investors or New Zealand-controlled persons to Schedule 3 or Schedule 4 might not be possible.

What are the options for reform?

126. We have identified four options to amend the treatment of portfolio investors. These aim to ensure that screening is only required for transactions in which sensitive assets will be majority owned or materially controlled by overseas persons. Under each option, broadly consistent with the Schedule 3 and 4 exemptions, it is proposed that any investments made by an exempted entity in a New Zealand entity would not contribute to the entity being deemed an overseas person.

127. **Option 1** would establish a class exemption for a portfolio investor where the entity's policy is to:

- limit its interest in New Zealand companies to portfolio minority investments. It does not seek to control these companies, and
- not seek representation on the boards of companies in which it holds securities.

128. This option is modelled on OIO guidance to access the existing Schedule 3 exemption. However, unlike the Schedule 3 exemption, investors would self-assess their compliance with the requirements. That is, Cabinet would not determine whether any entity qualified for the exemption in advance of that entity acquiring sensitive assets.

129. **Option 2** would establish a class exemption for entities beneficially owned or controlled by New Zealanders. That is where:

- at least 51 per cent of the entities' funds are invested on behalf of non-overseas persons (that is, New Zealanders), and
- any control rights associated with the entities' holdings are at least 76 per cent beneficially held by New Zealanders (that is, overseas persons cannot have negative control over any entity in which the entities invest).

130. **Option 3** would be a narrower class exemption, aimed at entities that are beneficially owned or controlled by New Zealanders but limited to domestically regulated superannuation funds, such as KiwiSaver schemes.

131. **Option 4** would amend the Act to allow individual exemptions for portfolio investors and entities beneficially owned or controlled by New Zealanders. Entities could apply for an exemption if they met the criteria specified in Options 1 and 2 for portfolio investors and entities beneficially owned or controlled by New Zealanders. Ministers would make the decisions and conditions could be applied (consistent with other exemptions under the Act).

132. Options 1-3 are alternatives. Option 4 could operate either in isolation or in conjunction with any other option.

133. Table 5 assesses these options against the reform criteria.

Table 5: Assessment against the reform criteria of options to amend the treatment of portfolio investors and entities beneficially owned or controlled by New Zealanders

	Option 1 – class exemption for all portfolio investors	Option 2 – class exemption for investors that are beneficially owned and controlled by New Zealanders	Option 3 – class exemption for regulated superannuation funds, such as KiwiSaver schemes	Option 4 – individual exemptions granted by the Minister(s) for qualifying entities
	Alternative options			Alternative or complementary option
Manages the risk of overseas investment to New Zealanders' wellbeing	***Strongly negative*** Broad class exemption linked to entities' internal policies would present significant avoidance risks. Low-risk nature of some portfolio investors mitigates this to a degree.	***Neutral*** Unclear what risks are presented by New Zealanders owning or controlling sensitive New Zealand assets.	***Neutral*** Regulated superannuation funds invest on behalf of New Zealanders. New Zealanders are not the intended target of the Act. Fund managers have a statutory obligation to maximise returns for fund members.	***Neutral*** Government would retain the ability to manage risks as each entity would have to apply for exemption.
Supports overseas investment in productive assets	***Strongly positive*** Strong signal of openness to portfolio investors is expected to better support overseas investment, as it will eliminate compliance costs for portfolio investors.	***Moderately positive*** Better supports investment by New Zealanders within New Zealand. It is expected to affect a reasonably limited number of entities, as will the elimination of compliance costs for entities beneficially owned or controlled by New Zealanders.	***Neutral/ moderately positive*** Better supports investment by regulated superannuation funds in New Zealand. However, there are not a large number of schemes, and funds under management are reasonably small relative to total investment flows.	***Moderately positive*** Signals openness to high-quality foreign investment. The need to apply for exemption limits the positive effects of this option on the attractiveness of New Zealand as an investment destination.
Improves predictability, transparency and timeliness of outcomes	***Moderately/ strongly positive*** Exclusion from screening improves transparency and certainty for portfolio investors that meet the statutory criteria.	***Moderately positive*** Exclusion from screening improves transparency and certainty for entities beneficially owned by New Zealanders.	***Neutral/ moderately positive*** Exclusion from screening improves transparency and certainty for superannuation funds.	***Moderately positive*** A large number of entities could apply for this exemption. Additional clarity about the criteria and Ministerial (rather than Cabinet) approval is a significant improvement on the status quo.

The Government would like your views

The Government would like your views on whether this document has accurately identified the problems, options for reform, and the effects of the options, and whether you have any alternative ideas. Please see page 18 for the full list of questions.

Technical issue: 'tipping point' for requiring consent

What currently happens?

134. An overseas person seeking to acquire an interest in an entity (including a body corporate, partnership or trust) that owns or controls an interest in sensitive land or in fishing quota requires consent if the acquisition results in that entity becoming an overseas person. For example, Person A requires consent to buy one per cent of Company B if Company B is 24 per cent overseas owned and also owns or controls sensitive land.

135. This provision – section 12(b)(iii) of the Act[39] – reduces the risk of a group of overseas persons (who are not associates)[40] gaining control of sensitive assets without demonstrating that the overseas ownership or control would benefit New Zealand.

What are the problems with current law and practice?

136. The Act imposes consent requirements on overseas persons making small investments that give them no control. The requirements could disincentivise investment in New Zealand entities and increase the risk of overseas persons breaching the Act inadvertently. This is because:

- screening requirements can impose costs that outweigh the potential returns from small investments. This is particularly problematic for listed entities close to the threshold for being overseas persons, where consent requirements could be triggered many times a day, and securities may only be held for short periods,
- it is difficult to determine when a transaction will trigger a requirement for consent, particularly for overseas persons investing in listed entities.[41] This increases the chance of overseas persons inadvertently breaching the Act, and
- even if an entity seeks consent for its investment because it believes the investment's value will exceed the compliance cost, it is challenging to satisfy the screening criteria. This is because it is difficult to demonstrate any additional benefit to New Zealand from owning a small, non-controlling stake in an entity.

137. While inadvertent breaches of the law are likely happening, the provision may not be enforced because it is difficult to establish when breaches occur. While other changes proposed in this chapter could reduce the frequency with which the provision is triggered, additional reforms would ensure that the regime operates effectively.

How could these problems be fixed?

138. We have identified three options to address the problems with section 12(b)(iii) of the Act. However, general limitations regarding identifying the beneficial ownership of entities listed on the NZX mean that none addresses the problem of identifying when an entity is close to becoming an overseas person.

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39 Also section 57D(b)(iii) of the Fisheries Act 1996.

40 If the overseas persons were associates, consent may be required under section 12(b)(i).

41 As discussed above, it currently takes about five working days to determine the ownership of a listed company.

139. **Option 1** would replace section 12(b)(iii) with a general anti-avoidance provision that prohibits a person delaying a transaction that would result in an entity becoming an overseas person, in order to allow the entity to buy sensitive land without obtaining consent. This would simplify the regime by targeting the Act at deliberate attempts to undermine its intent.

140. Options 2 and 3 aim to better target the regime at cases where an acquirer of securities in a transaction that results in an entity becoming an overseas person could theoretically have control over sensitive assets.

141. **Option 2** would require consent for a transaction in an entity that owns or controls an interest in sensitive land where an overseas person acquires a class of securities in that entity, if:

- when the transaction is complete, the acquirer will hold at least five per cent of the total number of securities in that class, and
- as a result of the transaction, the entity invested in will be an overseas person (or the acquisition is the first such transaction after the entity becomes an overseas person).

142. **Option 3** would establish the same control thresholds for consent as Option 2, but limit their application to publicly listed entities (the provision for other entity types would stay the same). This is designed to target the arguably more significant problems that section 12(b)(iii) presents for listed entities. Under this option, the rules could be closely aligned with the substantial product holder regime under the Financial Markets Conduct Act 2013.[42] For example, there could also be a one per cent threshold for transaction size.[43]

143. Table 6 gives examples of how Options 2 and 3 would work. Table 7 assesses each option against the reform criteria.

Table 6: Overview of Options 2 and 3[44]

Overseas ownership of Company B before Person A's acquisition	Stake to be acquired by Person A	Stake already owned by Person A	Is consent required?
15%	8%	5%	No. The transaction does not result in Company B becoming an overseas person.
24%	2%	2%	No. The transaction results in Company B becoming an overseas person. However, Person A's stake is less than 5% following the transaction.
24%	2%	4%	Yes. The transaction results in Company B becoming an overseas person and Person A's stake is at least 5%.

42 Sections 273 to 283 of the Financial Markets Conduct Act 2013.

43 Section 277 of the Financial Markets Conduct Act 2013.

44 In each scenario, Person A is seeking to acquire an interest in Company B, which owns sensitive land.

Table 7: Assessment against the reform criteria of options to amend when consent is required if a transaction results in an entity becoming an overseas person

	Option 1 – replace section 12(b)(iii) with a general anti-avoidance provision	Option 2 – require consent to acquire a class of securities in an entity that owns or controls an interest in sensitive land	Option 3 – the same thresholds for consent as in Option 2, with application limited to publicly listed entities
Manages the risk of overseas investment to New Zealanders' wellbeing	***Moderately negative*** Provision is only targeted at deliberate avoidance. It may be difficult to enforce due to the need to prove intent. It would not prevent an overseas person obtaining gradual control (but not exceeding 25%) over sensitive assets held by an entity. May not add much beyond the anti-avoidance provision in section 43 of the Act.	***Neutral*** Acquisition of non-controlling stakes does not put assets at risk. Not screening such transactions does not undermine the Act's intent. Enforcement is easier for investments in listed companies than it is for those in other entities due to 'substantial holding' disclosure rules. Problems remain in identifying breaches of the Act for investments in other entities.	***Neutral*** Acquisition of non-controlling stakes does not place assets at risk. Not screening such transactions does not undermine the Act's intent. Limiting the change to listed entities where acquisitions of at least 1% by persons holding at least 5% require public notification supports the enforcement of the suggested new provision.
Supports overseas investment in productive assets	***Moderately positive*** Better supports overseas investment as a result of greater certainty about consent requirements, particularly for listed entities where problems are more pronounced. Also significantly reduces compliance costs, as it removes costs associated with all acquisitions for cumulative stakes totalling less than 25% where the intent is not to circumvent the Act. Supports maturation of securities markets.	***Moderately positive*** Better supports investment as a result of greater certainty about consent requirements, particularly for listed entities where problems are more pronounced. Also significantly reduces compliance costs, as it removes costs associated with all transactions that result in the purchaser holding less than 5%. Supports maturation of securities markets.	***Neutral/moderately positive*** Better supports investment as a result of: • greater certainty about the consent requirements for listed entities, and • a moderate reduction in compliance costs associated with acquisitions by persons holding less than 5%. Supports maturation of securities markets. However, it does not resolve problems for the majority of entities.
Delivers more predictable, transparent and timely outcomes	***Strongly positive*** Improves predictability and transparency about when consent is required for investors in *all* entities. Investors no longer need to assess the ownership of target entities before acquiring securities.	***Moderately/strongly positive*** Improves predictability and transparency about when consent is required for investors in *all* entities. Investors still need to assess the ownership of target entities before acquisition. This remains difficult, particularly for widely held companies.	***Neutral/moderately positive*** Improves predictability of and transparency about when consent is required for investors in *listed* entities. Investors still need to assess the ownership of target entities before acquisition. This remains difficult, particularly for widely held companies. Does not fix problems for most entities.

The Government would like your views

The Government would like your views on whether this document has accurately identified the problems, options for reform, and the effects of the options, and whether you have any alternative ideas. Please see page 18 for the full list of questions.

Technical issue: incremental investments above a 25 per cent interest

What currently happens?

144. The Act requires screening for a transaction where an overseas person makes additional incremental investments (directly or indirectly) in a sensitive asset for which they already have consent to hold a 25 per cent interest.

145. Some small incremental investments that do not materially change an investor's control of sensitive New Zealand assets are exempted from the requirement to obtain consent under the Regulations.[45] The exemption applies if:

- the overseas person already has consent to hold shares[46] in the target company that holds (directly or indirectly) sensitive assets,
- the shares being bought (the incremental investment) are of the same class as those for which the overseas person holds consent,
- the investment is for either:
  - less than five per cent of the total number of shares for which the overseas person initially had consent, or
  - less than 10 per cent of all shares in the class and does not result in the overseas person crossing a control threshold (25, 50, 75 or 90 per cent), and
- the investment occurs within five years of the overseas person initially getting consent.

146. The exemption reflects the view that the risks of some small transactions are so minimal that obtaining consent is disproportionately costly.

What are the problems with current law and practice?

Primary problem

147. It is not clear why the Act needs to screen incremental investments that do not cross important control thresholds.

148. Arguably, any increase in a control or ownership interest that does not cross a key control threshold does not result in a substantial change in ownership or control. Requiring consent for such incremental investments unduly restricts investors reinvesting in companies. The risks from reinvestment that does not cross an important control threshold are low.

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45 Regulation 38.

46 To make things simpler, this description talks about 'shares', 'shareholders' and 'companies'. The legislation refers to 'securities' and a 'person', so that the rules apply to all entity and trust types, and so would any reforms.

149. An investor's interest in a company can also increase because of other investors' actions that are outside their control, such as when other shareholders in a company participate in a share buyback[47] and the investor does not participate. In this case, consent is technically required even though the overseas person took no action.

Secondary technical problems

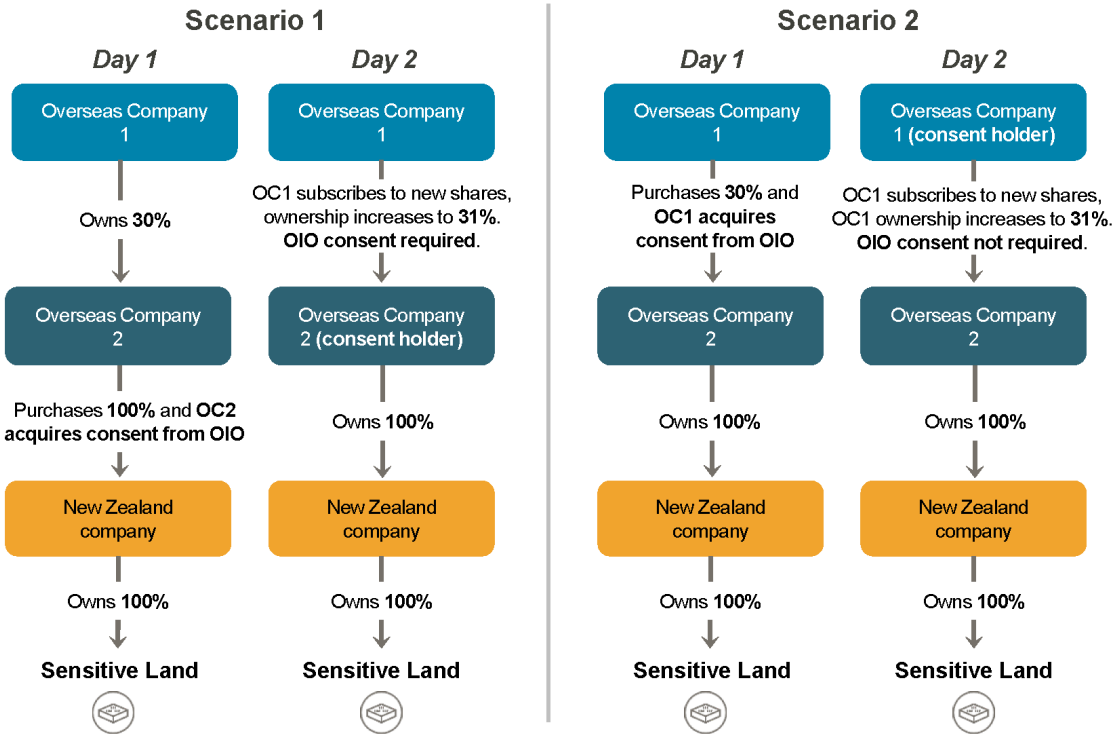
150. The OIO has indicated that it screens transactions that, but for technical issues, would qualify for the exemption. This creates unnecessary compliance costs for investors and the OIO and there is anecdotal evidence that:

- these costs are discouraging overseas persons from increasing their interest in companies by relatively small amounts, and
- companies are unknowingly breaching the Act.

151. The technical issues are described below.

152. ***Technical Issue 1: Investments where the person increasing the shareholding is not the consent holder.*** The exemption only applies to a person who already has consent. It does not apply to transactions if a company 'downstream' or 'upstream' of the consent holder wishes to increase its shareholding – even if the transaction does not materially alter the company's ownership or control structure. This situation is illustrated in Figure 5, and explained in the subsequent paragraph.

Figure 5: Two scenarios showing changes in the upstream ownership of sensitive assets and how they interact with the exemption for minor and incremental changes in ownership or control



[47] Under a share buyback, a company offers to buy shares from shareholders. The company buys the shares back from shareholders then cancels those shares. This reduces the total amount of issued shares, so a shareholder who does not sell any shares will increase their relative shareholding. Share buybacks are a common way for companies to return capital to shareholders instead of, for example, using a special dividend.

153. The differences between the two scenarios in Figure 5 are the timing of the transactions and who holds the consent (there is no difference in ownership structure and risk).

- In Scenario 1, Overseas Company 2 acquires consent on Day 1. Its shareholder, Overseas Company 1, does not qualify for the exemption for the share subscription on Day 2 because it does not hold the consent.
- In Scenario 2, Overseas Company 1 acquires the consent on Day 1 and qualifies for the exemption on Day 2 because it holds the consent.

154. ***Technical Issue 2: Investments in assets that did not require consent at the time of the initial investment.*** The exemption does not apply to a transaction if the asset was not sensitive when the overseas company initially acquired its interest. An asset can become sensitive over time if:

- there is a law change or regulatory change – for example, a rating category of land changes to residential, or a neighbouring property becomes a reserve, or
- a change to the asset's nature makes the asset sensitive. For example, an increase in the value of a company (to more than $100 million) makes shares in the company become 'significant business assets'.

155. ***Technical Issue 3: Five-year restriction.*** The exemption is only available for incremental investments made within five years of the original consent. This limit may be to prevent a company's ownership or control structure changing over an extended period. However, there are other protections against this, such as the ongoing good character conditions in a consent. The rule can also be considered inconsistent with the basis of the exemption (that is, that small changes in ownership present limited risks in general).

How could these problems be fixed?

156. **Option 1** would address the primary problem. It would allow an overseas person to increase its control interest by any amount below the relevant key control threshold. This could be done by amending the trigger sections in the Act[48] rather than expanding the exemption in the Regulations.

157. Any increases in ownership interest would also be restricted within those thresholds. However, this may depend on any changes in the definition of 'overseas person' as it relates to bodies corporate, as discussed in the previous section. Table 8 provides examples of how it would apply.

[48] See sections 12(b)(ii) and 13(1)(a)(i) of the Act and section 57D(b)(ii) of the Fisheries Act 1996.

Table 8: Incremental changes in ownership and consent requirements under Option 1

Securities already owned by Person A	Additional securities to be acquired by Person A	Would Person A need consent?
26%, with consent to hold 25% or more	23%, making a total of 49%	No. They remain under the 50% threshold.
49%, with consent to hold 25% or more	3%, making a total of 52%	Yes. They would go over the 50% threshold, giving them control over simple resolutions.
55%, with consent to hold more than 50%	19%, making a total of 74%	No. They would remain under the 75% threshold.
70%, with consent to hold more than 50%	6%, making a total of 76%	Yes. They would go over the 75% threshold, giving them control over special resolutions.
80%, with consent to hold more than 75%	11%, making a total of 91%	Yes. They would go over the 90% threshold, meaning they could potentially force a takeover to acquire the final 10% of the company (in some cases).

158. **Option 2** addresses Technical Issue 1 by allowing any upstream or downstream shareholder in the consent holder (direct or indirect) to qualify for the exemption. This would ensure that small upstream transactions (such as capital raisings) that will not result in any material changes to the ultimate ownership or control of the sensitive asset do not require consent.

159. **Option 3** addresses Technical Issue 2 by allowing a shareholder to qualify for an exemption if:

- consent was not required at the time of the original transaction, and was not in fact obtained, and
- the underlying asset has become sensitive since the original transaction.

160. **Option 4** addresses Technical Issue 3 by removing the five-year limit from the exemption.

161. These options could be adopted in isolation or as a package. Table 9 assesses these options against the reform criteria.

Table 9: Assessment against the reform criteria of options to better facilitate minor and incremental changes in ownership of sensitive assets

	Option 1 – allow all movements within the control limit	Option 2 – allow (direct or indirect) upstream shareholders to use the exemption	Option 3 – allow entities that acquired a sensitive asset before that asset required consent to use the exemption	Option 4 – remove the five-year restriction from exemption
Manages the risk of overseas investment to New Zealanders' wellbeing	***Neutral/moderately negative*** Will increase the risk that a material change in control of sensitive assets will not trigger consent requirements (for example, if an entity's constitution grants different levels of control between legislated control limits).	***Neutral*** Should not reduce the ability to manage the risks associated with foreign investment, as individuals with control (at any time) must, as an ongoing condition to consent, continue to satisfy the good character test.	***Neutral/moderately negative*** In some cases will reduce the ability to manage risks associated with foreign investment. Entities that acquire sensitive assets before they become sensitive may not be of good character; this removes the ability to screen those entities on smaller transactions that occur after assets become sensitive.	***Neutral*** Should not reduce the ability to manage the risks associated with foreign investment, as individuals with control (at any time) must continue to be of good character.
Supports overseas investment in productive assets	***Moderately positive*** Somewhat better supports initial investment. Will greatly improve investors' ability (and attractiveness) to increase investments for which they already have consent.	***Neutral/moderately positive*** Unlikely to better support an initial investment that requires screening, but additional flexibility will increase the likelihood of investors increasing their interests (directly or indirectly). Will result in a number of investors not needing to incur application and legal fees for further investment.	***Neutral/moderately positive*** Investors that acquired interests in a sensitive asset before that asset was sensitive will be more likely to increase their investments in that asset as screening will not be required. Will result in a number of investors not needing to incur application and legal fees for further investment.	***Neutral/moderately positive*** Investors will be able to increase their interests in sensitive assets without consent, regardless of when they went through the consent process. Will result in a number of investors not needing to incur application and legal fees for further investment.
Delivers more predictable, transparent and timely outcomes	***Moderately positive*** A number of small and medium-sized investments will be exempted from the application process. Reduces the risk of inadvertent breaches of the Act.	***Moderately positive*** A number of small investments will be exempted from the application process, resulting in quicker and more certain outcomes. Reduces the risk of inadvertent breaches of the Act.	***Moderately positive*** A number of small investments will be exempted from the application process, resulting in quicker and more certain outcomes (for example, the OIO has indicated that many investors have required consent to increase their investments). Reduces the risk of inadvertent breaches of the Act.	***Moderately/strongly positive*** A number of small investments will be exempted from the application process, resulting in quicker and more certain outcomes. Reduces the risk of inadvertent breaches of the Act.

The Government would like your views

The Government would like your views on whether this document has accurately identified the problems, options for reform, and the effects of the options, and whether you have any alternative ideas. Please see page 18 for the full list of questions.

How does the Act screen transactions in sensitive assets?

The Act sets out criteria that investors and investments in sensitive assets must satisfy before they can receive consent. This section considers whether the process for granting consent could be improved by simplifying some requirements and filling some potential gaps that mean important issues cannot currently be considered.

The section has two parts. These are:

- ***assessing investors' character and capacity:*** Whether the Act appropriately balances the need to assess potential investors' character and capacity to contribute to New Zealand with the compliance costs imposed, and
- screening the impacts of investments: Whether:
  - the process for determining whether an investment is likely to benefit New Zealand could be simpler, allows the most important factors to be considered in a holistic way, and is applied to the right transactions,
  - the government should be able to block certain transactions not currently covered by the Act (for example, those involving businesses worth less than $100 million) if they have negative implications for national security or public order,
  - the processes for requiring farmland to be advertised and special land (broadly, the foreshore, the seabed, lakebeds and riverbeds) to be offered back to the Crown are as efficient as they could be, and
  - having legislated timeframes for decisions under the Act would effectively boost investor confidence without undermining decision makers' ability to assess applications for consent.

This section proposes options to:

- provide decision makers with additional powers to manage possible risks associated with overseas investment,
- support overseas investment in productive assets, and
- improve the regime's predictability and timeliness.

In developing the options to expand decision makers' discretion, we have considered processes and other regulatory tools that could be used to mitigate the options' potential effects on investor confidence.

If the changes proposed in this section are adopted, they will likely have the most material effect on the overall operation of the investment screening regime. This is because they would alter the consent requirements in almost all the investment categories covered by the Act, and amend the treatment of some transactions that are not screened.

Assessing investors' character and capacity

What currently happens?

162. Overseas persons seeking consent to invest in sensitive New Zealand assets must, in most cases, satisfy the investor test (some sensitive land transactions are exempt[49]).

163. The investor test seeks to ensure that overseas investors will behave in a way that is consistent with New Zealand laws and norms. It therefore considers the nature of the investor rather than the investment.

164. The test is transaction based, which means repeat investors must satisfy it for each transaction. However, the OIO is streamlining its processes for repeat investors, including by building investor profiles that can be used to speed up assessments.

Who the investor test is applied to

165. The investor test focuses on the overseas person(s) with the most influence over the proposed investment – that is, the 'relevant overseas person' (ROP) or the 'individual with control' (IWC) over the ROP (if the ROP is not a natural person; see Table 10). It is for decision makers to determine who the relevant ROP and IWC are in respect of each transaction. This reflects:

- the commercial reality that, for many investments, looking solely at the entity acquiring an asset does not reveal who actually has control of relevant assets, and
- that a bright-line definition of ROP/IWC could lead overseas persons to take avoidance measures. For example, defining all entities two levels up an asset's ownership chain as ROPs could result in the asset's ultimate owners avoiding screening by creating additional holding companies between themselves and the overseas person.

Table 10: Examples of ROPs and IWCs

Relevant overseas person (ROP)	Individual with control over the relevant overseas person (IWC)
• The person making the overseas investment, irrespective of whether they are an overseas person or an associate of an overseas person. • Any associate of the person making the investment.	• The individual or individuals who each have an ownership or control interest in the ROP of 25% or more. • The member or members of the ROP's governing body (for example, a director of a company). • The individual or body of individuals who the decision maker considers has this control (whether directly or indirectly).

[49] See section 16(3) of the Act.

What risks the investor test seeks to manage, and how

166. Each ROP/IWC must satisfy the investor test's four criteria: business experience and acumen, financial commitment, good character, and immigration eligibility. These criteria assess the risks that overseas investors may pose, for example to New Zealand's economy, society, security or reputation. In doing so, they seek to ensure that overseas investors will behave in a way that is consistent with New Zealand's laws and norms.

What are the problems with current law and practice?

167. The investor test imposes compliance costs that are potentially disproportionate to the risks posed by most overseas persons.

Who the investor test is applied to

168. Consistent with the Act's purpose, it is appropriate to screen overseas persons who may have material ownership of, or meaningful control over, sensitive assets (that is, ROPs and IWCs). However, stakeholders have raised concerns that:

- the broad definition of ROP/IWC can mean the investor test is applied to individuals who, in practice, have limited involvement with prospective investments. This could increase compliance costs considerably and give New Zealand a reputation for having an overly intrusive screening regime,
- the investor test can apply to New Zealanders despite their being entitled to acquire sensitive assets in their own right without being screened. For example, New Zealand directors of overseas companies seeking consent to acquire sensitive assets may be designated as IWCs,
- the investor test does not allow decision makers to consider the broad 'character' of a corporate entity involved in a transaction (separate from its owners/directors), and
- repeat investors are required to satisfy the test every time. This could impose compliance costs disproportionate to the risks posed by the investor in respect of each investment.

What risks the investor test seeks to manage, and how

169. It is not clear that the investor test assesses risk in the most effective way, or that its benefits outweigh the compliance costs it imposes. Table 11 considers all of the test's criteria in terms of the risks the criterion seeks to manage, and how decision makers consider compliance with those criteria. It also assesses each criterion's merits.

Table 11: Overview of the investor test's criteria

Criterion	How compliance with criterion is considered	Assessment of criterion's merits
Business experience and acumen (***Assesses economic risks***)	Decision makers consider: • curriculum vitae for each ROP/IWC, • curriculum vitae for key individuals who will be involved in the project, such as managers and industry experts. This recognises that while investors may not individually have the required expertise, project managers often do, • submissions on why the ROPs/IWCs, collectively, have the necessary business experience and acumen for the proposed investment, and • where relevant, input from third parties, such as other New Zealand regulators.	• The benefits of this criterion are not clear and the criterion's inclusion is inconsistent with most screening regimes globally. • The criterion does not seem to assess a material risk, nor one that is isolated to overseas persons. For example, while an overseas person could lack business experience and acumen (the OIO has seen such applications, although they are not common) and have their investment fail, no such requirement is imposed on domestic investors. It is also not clear why other regulatory regimes that seek to manage these risks (such as insolvency law when a business fails, or environmental law for environmental concerns) are not enough. • Given the Act's purpose, it could be argued that it is appropriate to require overseas persons to meet a higher threshold than domestic investors. However, it is questionable whether decision makers are better able to judge an investor's capabilities than the investor themselves (who would be unwilling to invest if they thought the investment would fail), particularly given decision makers' reliance on information provided by overseas persons.
Financial commitment (***Assesses economic risks***)	Decision makers consider factors such as whether the ROP/IWC has: • incurred due diligence costs in relation to the investment, • entered into a sale and purchase agreement, • engaged professional advisers, and/or • previously acquired other business assets associated with the proposed investment.	• The benefits of this criterion are not clear and the criterion's inclusion is inconsistent with most screening regimes globally. • It is questionable whether the risk this criterion is assessing is material. It is unclear what harm New Zealand would face if an investor did not proceed with a purchase after lodging an application and paying the relevant fees. The financial costs associated with applying for consent (the OIO fees alone can be up to $54,000) should be sufficient to demonstrate financial commitment.

Criterion	How compliance with criterion is considered	Assessment of criterion's merits
Good character (***Assesses all risks***)	The Act specifies that decision makers must consider, without limitation: • offences or contraventions of the law by the ROP/IWC or any person in which the ROP/IWC has a 25% or more ownership or control interest (whether convicted or not, or whether charges were ever laid), and • any other matter that reflects adversely on the person's fitness to have the particular overseas investment. Applicants must provide statutory declarations attesting to the good character of the ROP/IWC. The onus is on the applicant to disclose all information that is potentially relevant, but the OIO also makes its own enquiries. The OIO has the capability to undertake in-depth character checks (as well as proactive monitoring for ongoing risks) and has in place, or is establishing, information-sharing mechanisms with 18 government agencies to support this. It is the OIO's practice to have conditions of consent that require the ROP/IWC to remain of good character. If a matter arises post-consent that reflects negatively on the investor's character, the OIO may investigate.	• This criterion is helpful for assessing all risks, particularly those relating to security and reputational matters. • However, there is concern that the scope of the good character criterion is too broad. Requiring decision makers to take account of offences or contraventions of the law, "whether convicted or not", as well as "any other matter" means that overseas persons must provide, and decision makers must assess, "all matters potentially relevant to the [investor's] good character", including unproven or untested allegations. This criterion therefore creates uncertainty and imposes considerable compliance costs on overseas persons. However, it does enable decision makers to take account of allegations made, but no convictions recorded, in jurisdictions with less robust legal systems than New Zealand's. • This criterion is broader than good character requirements in comparable New Zealand legislation. For example, the Financial Advisers Act 2008 includes a broad good character requirement but does not require the regulator to take allegations or "any other" adverse matter into account.[50] The Financial Service Providers (Registration and Dispute Resolution) Act 2008 has a bright-line specifying a range of criteria that will disqualify a person from being registered.[51]

[50] See section 54 of the Financial Advisers Act 2008.

[51] See section 14 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

Criterion	How compliance with criterion is considered	Assessment of criterion's merits
Immigration eligibility **(*Assesses security and reputational risks*)**	The Act specifies that the ROP/IWC must not be "an individual of a kind referred to in section 15 or 16 of the Immigration Act 2009". These sections provide that no visa or entry permission may be granted and no visa waiver may apply to any person who: • has been sentenced to imprisonment for more than five years or for more than 12 months in the previous 10 years, • has been the subject of a removal order, • has been removed or deported 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.	• While on its own this criterion is useful for assessing security and reputational risks, when used in addition to the current good character criterion its added value is unclear. This is because an overseas person who fails to meet the Immigration Act requirements would not satisfy the good character criterion of the investor test.

How could these problems be fixed?

170. We have identified three options to resolve the investor test's problems, and several other changes to improve the test. The latter could be adopted in addition to Options 1-3, or in isolation.

171. **Option 1** would slightly narrow the scope of the investor test. It would:

- retain the business experience and acumen criterion but remove the financial commitment and immigration criteria,
- simplify the 'good character' criterion by:
  - narrowing the "whether convicted or not" aspect of the requirement to consider offences or contraventions, so that allegations are only considered for certain crimes (for example, those relating to fraud, dishonesty, corruption or tax avoidance), and
  - removing the requirement for decision makers to consider "any other matter that reflects adversely on the person's fitness to have the particular overseas investment".

172. **Option 2** would significantly narrow the scope of the investor test. It would:

- remove the business experience and acumen, financial commitment and immigration eligibility criteria, and
- simplify the good character criterion by removing:
  - the "whether convicted or not" aspect of the requirement to consider offences or contraventions, and
  - the requirement for decision makers to consider "any other matter that reflects adversely on the person's fitness to have the particular overseas investment".

173. **Option 3** would fundamentally amend the investor test by shifting to a bright-line, 'checklist'-style assessment. The assessment would require, for example, that an ROP/IWC:

- does not have any criminal convictions (punishable by a term of imprisonment) or civil penalties,
- has not had any adverse findings from a security agency,
- is not/has not been an undischarged bankrupt,
- is not/has not been disqualified from directing a business under the Companies Act, or disqualified under any provision of the Securities Act 1978, the Securities Markets Act 1988, the Financial Markets Conduct Act or the Takeovers Act (or equivalent law in other jurisdictions), and
- is not/has not been subject to a confiscation order under the Proceeds of Crime Act 1991 (or equivalent law in other jurisdictions).

174. If a bright-line test were adopted, the appropriate time limits for the chosen criteria would need to be considered (that is, how recently a breach would need to have occurred for it to be relevant). For example, under the Financial Service Providers (Registration and Dispute Resolution) Act the consideration of some disqualifying convictions is limited to those that took place within the previous five years.

175. Under Options 1-3, the requirement for an applicant to make a statutory declaration of 'good character' could continue, as could the OIO's practice of having conditions of consent that require an ROP/IWC to remain of good character (and taking enforcement action if these conditions are not met).

Additional potential changes

- ***New Zealanders:*** Remove the requirement for New Zealanders identified as ROPs/IWCs to satisfy the investor test given that New Zealanders are not the intended subjects of the Act.

- ***Corporate character:*** Expand the test's scope by allowing it to apply to non-natural persons (for example, bodies corporate and trusts). This would enable a broad consideration of corporate character rather than it being assessed by proxy through an entity's governing members. It could consider, for example, a parent company's tax arrangements or its labour and environmental practices. The test would continue to be applied to natural persons identified as ROPs/IWCs.

- ***Standing consent:*** Introduce a 'standing consent' for the investor test. This would exempt overseas persons who have previously received consent via the investor test if there have been no changes in ROPs'/IWCs' nature and suitability. The notification of any such changes would be mandatory and the standing consent could be removed if conditions, such as compliance with the Act, were not met. If there has been a change in ROPs/IWCs (for example, new directors have been appointed to a board), only those involved would be tested/re-tested.[52]

176. Table 12 assesses these options against the reform criteria.

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[52] For this option to work, and depending on the final options adopted, it may be necessary to amend the investment-specific aspects of the investor test's criteria:

- section 19(1)(b) of the Act (which covers the good character criterion) would need to be amended so that it no longer referenced the particular overseas investment, and/or
- the business experience and acumen and financial commitment criteria may need to be removed, because both relate to the investment in question. If they were retained, the standing consent could potentially apply only to the good character criterion.

Table 12: Assessment against the reform criteria of options to improve the investor test

	Option 1 – slightly narrow the scope of the investor test	Option 2 – significantly narrow the scope of the investor test	Option 3 – adopt a 'checklist'-style investor test	Exclude New Zealanders	Include corporate character	Introduce standing consent
	Alternative options			Complementary options		
Manages the risk of overseas investment to New Zealanders' wellbeing	***Moderately negative*** Reduction in the decision maker's ability to consider character. Very few overseas persons are rejected on other criteria – therefore there would be limited effects on risk management. Regime is not intended to capture New Zealanders. There is no effect on the ability to manage risk.	***Moderately/strongly negative*** Significant reduction in the decision maker's ability to consider character, particularly alleged offences that may have occurred in jurisdictions with less robust legal systems. Very few overseas persons are rejected on other criteria – therefore there would be limited effects on risk management. Regime is not intended to capture New Zealanders. There is no effect on the ability to manage risk.	***Neutral/moderately negative*** Would remove the decision maker's ability to consider a wide range of factors at the time an application is lodged. Evidence of relevant poor character that emerged in the future could still be used to unwind a consented transaction.	***Neutral*** Would result in the investor test not being applied where all those with substantive control over an investment were New Zealanders (this is consistent with the intention of the test, which is to focus on risks posed by overseas investors rather than New Zealanders. It is also consistent with options discussed elsewhere in this document, such as those to remove 'New Zealand' companies from the regime). In this situation, any other requirements for consent (such as the benefit to New Zealand test for investments in sensitive land) would still apply, and other domestic legislation would address many of the risks on which the investor test focuses.	***Moderately positive*** Increases the number of entities that can be investigated, and therefore the government's scope to manage the risks of overseas investment.	***Neutral*** Requirement to notify changes in ownership/ control, and imposition of conditions means no change in the ability to manage risks.
Supports overseas investment in productive assets	***Moderately positive*** Test simplification signals an openness to foreign investment. There would be a moderate reduction in compliance costs, as the costs of complying with the investor test are mainly associated with the good character criterion. The costs of satisfying the business experience and acumen criterion remain.	***Moderately/strongly positive*** Test simplification signals an openness to foreign investment. There would be a large reduction in compliance costs, as the costs of complying with the investor test are mainly associated with the good character criterion. There would be some savings from the removal of the business experience and acumen criterion.	***Strongly positive*** Significant relaxation of the good character requirements signals an openness to foreign investment. This significantly reduces compliance costs. Overseas persons are only required to provide limited amounts of information.	***Moderately positive*** Potentially a moderate reduction in compliance costs. For example, if a New Zealand director of an overseas company were identified as an IWC, they would no longer need to undertake the investor test.	***Moderately negative*** Increase in the number of entities that can be investigated and the compliance costs associated with requiring additional information may be interpreted as a signal that New Zealand is less open to investment than others may be.	***Strongly positive*** Standing consent signals an openness to repeat investment from high-quality foreign investors. It removes the compliance costs associated with the investor test for all repeat investors.

	Option 1 – slightly narrow the scope of the investor test	Option 2 – significantly narrow the scope of the investor test	Option 3 – adopt a 'checklist'-style investor test	Exclude New Zealanders	Include corporate character	Introduce standing consent
	Alternative options			Complementary options		
Delivers more predictable, transparent and timely outcomes	***Moderately positive*** Very few applications are rejected on the financial commitment or immigration eligibility criterion. Some are rejected on business experience and acumen – meaning this option would result in a limited increase in predictability. Moderate effect comes from the narrowing of the good character requirements. The removal of the ability to consider any other relevant matter improves certainty for overseas persons. Screening fewer ROPs/IWCs should improve timeliness.	***Strongly positive*** Very few applications are rejected on the financial commitment or immigration eligibility criterion. Some are rejected on business experience and acumen – meaning this option could result in a moderate increase in predictability. Large effect comes from the narrowing of the good character requirements. The removal of the ability to consider allegations significantly improves certainty for overseas persons. Screening fewer ROPs/IWCs should improve timeliness.	***Strongly positive*** Checklist approach significantly improves certainty for overseas persons. Processing times are expected to reduce considerably.	***Moderately positive*** May have minor effect on processing times if fewer ROPs/IWCs are captured by the test.	***Moderately negative*** Application of test to non-natural persons would be new and increase uncertainty, particularly in the short term until decision precedent emerges. .	***Strongly positive*** Streamlines the consent process and removes uncertainty around the investor test for repeat investors.

The Government would like your views

The Government would like your views on whether this document has accurately identified the problems, options for reform, and the effects of the options, and whether you have any alternative ideas. Please see page 18 for the full list of questions.

The Government would also like your views on the following questions:

- What types of allegation relating to potential criminal or civil offences do you think should be included in Option 1, if adopted, and why?
- What factors do you think should be included in the bright-line test in Option 3, if adopted, and why?

Screening the impacts of investments

This section sets out potential options for amending the tests that are used to establish whether a prospective investment is likely to benefit New Zealand.

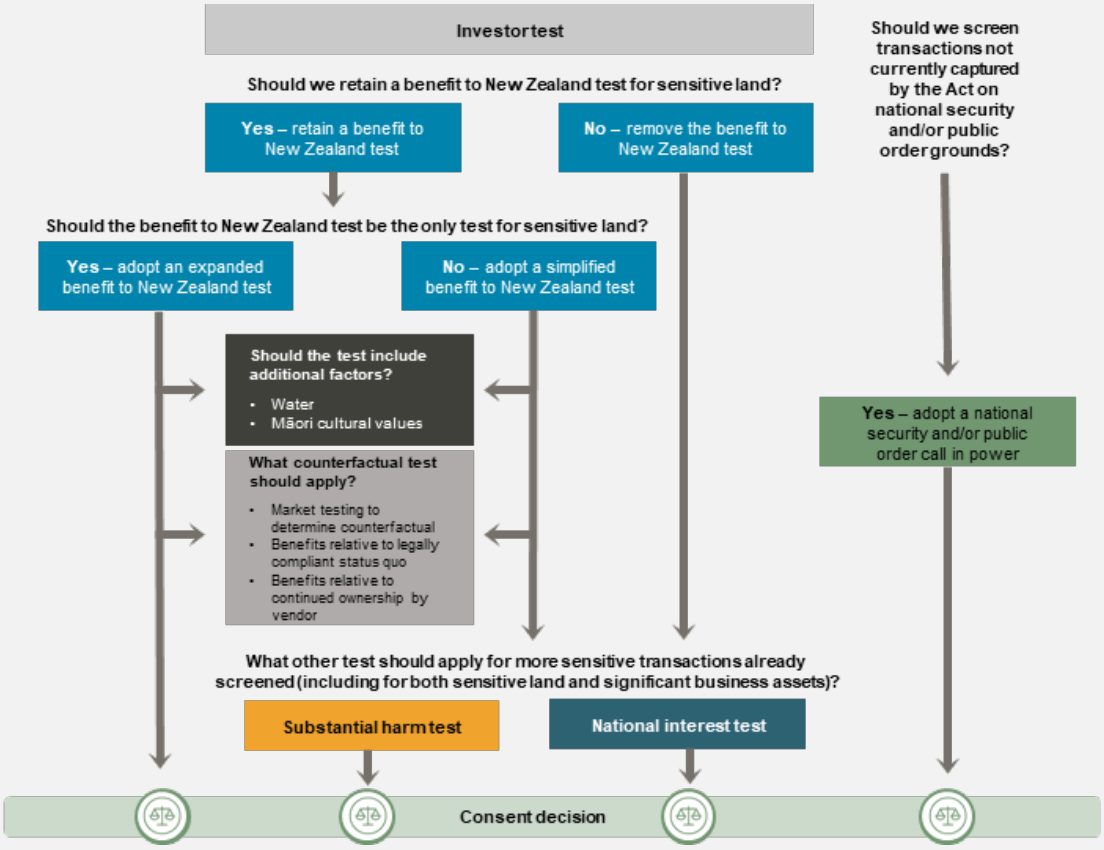
It considers whether the benefit to New Zealand test should be retained, and if so whether additional factors should be included and what the appropriate 'counterfactual test' should be.

It also looks at whether an additional, or alternative, test is needed to enable decision makers to deny consent for transactions that have already been screened under the Act and either pose risks of substantial harm to New Zealand or are contrary to New Zealand's national interest.

Finally, it considers whether decision makers should have the power to screen transactions not currently captured by the Act if the transactions pose risks to New Zealand's national security or public order.

Figure 6 illustrates how these options could fit together to form the Act's broader consent framework.

Figure 6: Overview of options for the Act's consent framework



What currently happens?

177. As well as satisfying the investor test, overseas persons wishing to buy sensitive land must generally satisfy the benefit to New Zealand test.[53] This test requires them to demonstrate that their investment will, or is likely to, benefit New Zealand (or any part of it or group of New Zealanders). If the relevant land includes non-urban land of more than five hectares, the benefits must be, or be likely to be, substantial and identifiable.

178. In considering whether a prospective investment satisfies the test, decision makers examine the proposed investment's likely effects on up to 21 economic, environmental and cultural factors (see Table 13). These factors are included in the Act and the Regulations. Decision makers determine the factors that are relevant to their decisions, and their relative importance. The test is unique among global investment screening regimes. Its closest comparator is Canada's 'net benefit' test (under the Investment Canada Act), but this focuses on economic factors.

Table 13: Existing benefit to New Zealand test factors

Economic factors	**Whether the overseas investment will, or is likely to, result in:** • the creation of new, or the retention of existing, jobs in New Zealand, • the introduction into New Zealand of new technology or business skills, • increased export receipts for New Zealand exporters, • added market competition, greater efficiency or productivity, or enhanced domestic services, in New Zealand, • introduction into New Zealand of additional investment for development purposes, and/or • increased processing in New Zealand of New Zealand's primary products. **Whether New Zealand's economic interests will be adequately promoted by the overseas investment, including:** • whether New Zealand will become a more reliable supplier of primary products in the future, • whether New Zealand's ability to supply the global economy with a product that forms an important part of New Zealand's export earnings will be less likely to be controlled by a single overseas person or its associates, • whether New Zealand's strategic and security interests are or will be enhanced, and/or • whether New Zealand's key economic capacity is or will be improved.
Environ-mental factors	**Whether there are or will be adequate mechanisms in place for protecting or enhancing:** • existing areas of significant indigenous vegetation and significant habitats of indigenous fauna, for example, any one or more of the following: – conditions as to pest control, fencing, fire control, erosion control or riparian planting, – covenants over the land, and/or – existing areas of significant habitats of trout, salmon, wildlife protected under section 3 of the Wildlife Act, and game as defined in section 2(1) of that Act.

[53] See section 17 of the Act and regulation 28 of the Regulations. The exceptions to this relate to the acquisition of sensitive land for forestry activities (where consent can be dependent on satisfying either the special forestry test or the modified benefit to New Zealand test [see page 13]), the acquisition of residential (but not otherwise sensitive) land in some circumstances, and the acquisition of residential land that is also sensitive land for another reason under the 'commitment to reside' pathway.

Social factors	**Whether there are or will be adequate mechanisms in place for providing, protecting, or improving walking access to:** • the habitats described above, by the public or any section of the public, and/or • the relevant land or a relevant part of that land by the public or any section of the public. **Whether there are or will be adequate mechanisms in place for protecting or enhancing historic heritage within the relevant land, for example any one or more of the following:** • conditions for conservation (including maintenance and restoration) and access, • agreement to support registration of any historic place, historic area, wāhi tapu or wāhi tapu area under the Historic Places Act 1993, • agreement to execute a heritage covenant, and/or • compliance with existing covenants. **If the relevant land is or includes foreshore, seabed or a bed of a river or lake, whether that foreshore, seabed, riverbed or lakebed has been offered to the Crown.**
Other factors	**Whether the overseas investment, or the granting of the application for consent, will, or is likely to:** • result in other consequential benefits to New Zealand (whether tangible or intangible benefits), • give effect to or advance a significant Government policy or strategy, • enhance the ongoing viability of other overseas investments undertaken by the relevant person, • assist New Zealand to maintain New Zealand control of strategically important infrastructure on sensitive land, and/or • result in the owner of the relevant land undertaking other significant investments in New Zealand. **Whether the overseas person:** • has previously undertaken investments that have been, or are, of benefit to New Zealand, and/or • is a key person in a key industry of a country with which New Zealand will, or is likely to, benefit from having improved relations. **Whether refusing the application for consent will, or is likely to:** • adversely affect New Zealand's image overseas or its trade or international relations, and/or • result in New Zealand breaching any of its international obligations. **The extent to which New Zealanders will be, or are likely to be, able to oversee, or participate in, the overseas investment and any relevant overseas person, including, for example, matters such as all or any of the following:** • whether there is or will be any requirement that one or more New Zealanders must be part of a relevant overseas person's governing body, • whether a relevant overseas person is or will be incorporated in New Zealand, • whether a relevant overseas person has or will have its head office or principal place of business in New Zealand, • whether a relevant overseas person is or will be a party to a listing agreement with NZX Limited or any other registered exchange that operates a securities market in New Zealand, • the extent to which New Zealanders have or will have any partial ownership or controlling stake in the overseas investment or in a relevant overseas person, and/or • the extent to which ownership or control of the overseas investment or of a relevant overseas person is or will be dispersed amongst a number of non-associated overseas persons.

179. Decision makers must use a counterfactual test to help determine if a proposed investment is likely to benefit New Zealand. The test, defined in case law, compares what is likely to happen if an overseas investment proceeds with what is likely to happen without it ('the counterfactual').[54]

180. The OIO generally considers that a "competent and adequately funded alternative New Zealand purchaser" would be the most likely counterfactual. An applicant may be able to use a different counterfactual if they can provide convincing evidence in support of it (for example, if they can show that the vendor is the most likely alternative owner if the overseas investment does not proceed).[55]

181. The Ministerial Directive Letter provides additional guidance to the OIO on applying the benefit to New Zealand test.

What are the problems with current law and practice?

182. Parts of the benefit to New Zealand test are unclear and unnecessarily complex. This can create uncertainty, impose unnecessary costs and result in time-consuming processes, all of which can deter overseas investment.[56] In addition, the test's design and gaps in coverage may undermine decision makers' ability to deny consent to investments that are not in New Zealand's national interest.

183. These problems relate to:

- the types of factors used for screening,
- the way in which these factors are reflected in legislation, and
- the threshold for determining whether an investment is beneficial.

The type of factors assessed

184. ***There are gaps in the test that undermine the government's ability to manage the risks of overseas investments:*** The Act generally seeks to ensure that investments in sensitive assets are only allowed where they are beneficial to New Zealand. It should therefore enable decision makers to consider holistically a proposed investment's likely benefits and risks, while acknowledging that some risks are potentially better managed through legislative tools other than the Act.

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54 *Tiroa E and Te Hape B Trusts v Chief Executive of Land Information New Zealand* [2012] NZHC 147.

55 See: https://www.linz.govt.nz/overseas-investment/applying-for-consent-purchase-new-zealand-assets/preparing-your-application-oio/benefit-new-zealand-test/counterfactual-analysis-benefits-new-zealand

56 The OECD has described the test as "increasingly opaque and need[ing] to be simplified to increase certainty, clarity and consistency": OECD. (2011) *Economic Surveys New Zealand*, Paris, France: OECD Publishing. See: https://www.oecd-ilibrary.org/docserver/eco_surveys-nzl-2011-en.pdf?expires=1545277000&id=id&accname=ocid56017414&checksum=E2ABE27F411EF15C0B14930B2A8CF7B8

185. While the test includes a large number of factors, there are gaps that may limit decision makers' ability to consider an investment's full effects. In particular:

- there is limited ability to manage risks to national security associated with a particular investment (rather than an investor).[57] The Act does not:
  - distinguish between non-government and government investors (or their associates). Government investors may have broader political or strategic foreign investment objectives,
  - allow decision makers to consider national security when determining whether an investment is likely to be beneficial. It does allow decision makers to consider whether New Zealand's strategic and security interests are or will be enhanced by a prospective investment, but they have only a limited ability to look at the risks,[58] or
  - allow the government to assess whether an investment in a significant business asset (where the transaction does not include any sensitive land) is beneficial. This is despite the fact that investments in strategically important industries (such as transport and media) and critical infrastructure[59] (such as electricity distribution networks and financial markets) could provide opportunities for espionage or sabotage, and allow investors to exert inappropriate leverage over New Zealand,
- there is no ability to manage any risks to national security and public order presented by investments not currently subject to screening (for example, investments in business assets below the monetary threshold). This could be particularly problematic with respect to small firms with advanced dual-use technology (that is, technology with both civilian and military applications). The risks of foreign ownership and control are receiving increasing international attention and partner countries are taking steps to manage them,[60]
- there is limited ability to deny consent to transactions (above the monetary threshold) that could be seen to present risks of substantial economic harm to New Zealand, such as investments in critical infrastructure (such as the financial sector, electricity and water distribution networks, and fuel pipelines), entities that link New Zealand to global value and distribution networks, and where investors have access to subsidised capital that may distort the allocation of economic resources or trade flows, and

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57 If an investor posed a national security risk they could be denied consent through failing to satisfy the investor test.

58 Refer regulation 28(i)(iii).

59 Critical infrastructure broadly refers to processes, systems, facilities, technologies, networks, assets and services essential to New Zealanders' health, safety, security or economic wellbeing and the effective functioning of government.

60 In 2018 the United States' government passed the Foreign Investment Risk Review Modernisation Act to close gaps in its foreign investment regime particularly related to access to sensitive information and technology held by US businesses.

- there are concerns that the Act does not allow certain other types of risk to be fully considered. In keeping with the Terms of Reference, this consultation document considers concerns about:

  - ***water extraction:*** There are some public concerns about overseas investments involving water bottling. These include the potential environmental effects and that overseas persons may profit from a high-value resource without paying a charge (further discussed from page 82),

  - ***the integrity of New Zealand's tax system:*** There is a concern that overseas persons may not pay enough tax or return enough value to New Zealand (from page 85), and

  - ***Māori cultural values as they relate to physical and historical features of sensitive land:*** Media commentary, protests and submissions show some concern that the existing benefit to New Zealand test does not consider Māori cultural values enough (from page 88).

186. ***There is uncertainty about the extent to which negative effects can be considered when assessing consent applications:*** When determining whether an investment is beneficial, decision makers' practice has been to not consider potential downsides of an investment because the Act does not specifically refer to them. For example, if an investment is likely to result in reduced walking access, this would not be weighted as a cost against any benefits that the investment brings (though it might inform the counterfactual).

187. ***The government's flexibility to add factors to the test undermines certainty:*** The Act allows the government to add factors to the benefit to New Zealand test by regulation. Depending on the amendment regulations' transitional provisions, the new factors can affect any applications that are undecided at that point. This provides the government with the flexibility to quickly address any perceived screening gaps but, as noted by the OECD,[61] it undermines investor certainty. Parliament's Regulations Review Committee has also criticised the provision because it enables the executive branch of government to make regulations that effectively amend primary legislation made by Parliament.[62]

How the factors are reflected in legislation

188. ***The large number of test factors (and overlaps between them) increases compliance costs and limits decision makers' ability to assess effects holistically:*** Despite contrary guidance from the OIO, the large number of factors in the test can lead overseas persons to structure their applications to meet as many as possible (even if the likelihood of a benefit arising is doubtful) or use one action to satisfy many. For example, if an investor plans to buy a business on sensitive land, expanding a product line could demonstrate benefits across five factors:

    - the creation of new jobs,

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61 OECD. (2011). *Economic Surveys New Zealand*, Paris, France: OECD Publishing. See: https://www.oecd-ilibrary.org/docserver/eco_surveys-nzl-2011-en.pdf?expires=1545277000&id=id&accname=ocid56017414&checksum=E2ABE27F411EF15C0B14930B2A8CF7B8

62 See: https://www.parliament.nz/resource/en-nz/48DBSCH_SCR4225_1/0b2c2a95bc93dd997d5e481d5b93d919ea5fe96c

- increased export receipts,
- greater productivity on the land,
- additional investment for development purposes, and
- increased processing in New Zealand of New Zealand's primary products.

189. This encourages unnecessarily lengthy, complex, fragmented and duplicative applications that increase costs for overseas persons and decision makers. It can also limit decision makers' ability to assess proposals holistically and result in long processing times.

The threshold for determining whether an investment is beneficial

190. ***The counterfactual test is complex, increasing uncertainty and compliance costs:*** This test is one of investors' main concerns. They find it unclear and costly to comply with and suggest that it has limited relevance in many cases. The OIO likewise reports that counterfactual submissions vary in quality. It says overseas persons can struggle to develop appropriate counterfactuals and identify their 'points of difference' (how their investments will be more beneficial than the counterfactuals, and why).

191. The test is particularly difficult to apply:

- where the relevant land could have many uses, so there is no obvious counterfactual. For example, empty land zoned for development, particularly for commercial purposes, could be used in many ways, and
- in cases involving proposed sales of well managed assets between overseas persons, where a prospective purchaser must demonstrate benefits additional to those already demonstrated in the vendor's original application.

192. The second of these scenarios arises often,[63] and investors have described it as a significant hurdle to investing in New Zealand. Anecdotal evidence also suggests that the law can lead vendors to underinvest in land planned for sale (or the assets on that land) to better enable overseas persons to satisfy the test. These do not appear to be intended consequences of the law, given the relevant land is already owned by overseas persons.

How could these problems be fixed?

193. Options outlined elsewhere in this consultation document could reduce some of the problems outlined above. For example, reforms to the definition of overseas person and sensitive adjoining land will help to ensure that screening focuses on higher-risk transactions.

194. Table 14 describes five options that could address the problems further. Options 1-4 are alternative approaches. Option 5 could operate in isolation or as a complement to any other option.

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[63] Between June 2016 and August 2018, overseas persons seeking to purchase sensitive land from other overseas persons made up 66 per cent of cases in which overseas persons sought to purchase both significant business assets and sensitive land, and 20 per cent of cases involving sensitive land alone: OIO data.

Table 14: Overview of options to reform screening of an investment's likely effects

Option	Overview
Option 1 (*Expanded benefit to New Zealand test*)	The existing consent framework would be retained – that is, investments in sensitive land would have to continue to satisfy both the investor and benefit to New Zealand tests to receive consent. However, the benefit to New Zealand test would be expanded to enable decision makers to consider: • the effects of a proposed transaction on national security, and • any negative effects an investment may have on the factors in the test. This option would also remove the ability to add factors to the test by regulation. As with other options that retain the benefit to New Zealand test in some form, decision makers could also be given the power to consider water extraction and Māori cultural values when assessing likely effects of prospective investments.
Option 2 (*Simplified benefit to New Zealand test with 'substantial harm test'*)	The existing consent framework would be retained. However, decision makers would be able to assess applications to acquire sensitive land or significant business assets against a reserve 'substantial harm test'. This would operate in conjunction with a simplified benefit to New Zealand test, under which the number and specificity of factors would be reduced and the ability to add factors by regulation would be removed. The need for benefits to be 'substantial and identifiable' for some types of sensitive land would also be removed. Under the substantial harm test, consent could be denied to any proposed transaction that causes substantial harm, or the risk of substantial harm, to public order, public health and safety, or essential security interests (including economic security interests). Before denying consent, decision makers would have to consider the extent to which the risk of substantial harm could be mitigated by consent conditions or other New Zealand legislation.
Option 3 (*Simplified benefit to New Zealand test with 'national interest test' for higher risk applications*)	The existing consent framework would be retained. However, decision makers would have the power to use a national interest test to assess 'higher risk' applications to acquire sensitive land or significant business assets. The test would operate in conjunction with a simplified benefit to New Zealand test, which would continue to apply to all investments in sensitive land. A set of criteria would generally determine whether the national interest test were to apply.
Option 4 (*National interest test*)	The benefit to New Zealand test would be replaced with a national interest test. This test would apply to most transactions screened under the Act (including those relating to significant business assets).
Option 5 (*National security and public order 'call-in' power*)	The existing consent framework would be retained. However, decision makers would have the additional ability to call in for screening any transaction by an overseas person in New Zealand where it is necessary to protect New Zealand's security interests and/or public order. This power could be supported by a mandatory notification regime, a voluntary notification regime, or a combination of both.

195. **Option 1** would retain much of the design of the existing benefit to New Zealand test, while broadening its coverage to address perceived gaps. Decision makers would be able to consider:

- any negative effects of a proposed investment to the extent that those effects relate to factors in the test (such as job losses), and
- the effects that the investment will or is likely to have on New Zealand's national security.

196. The ability to add factors to the benefit to New Zealand test by regulation would be removed.

197. **Option 2** would introduce a substantial harm test that would operate in conjunction with a simplified benefit to New Zealand test. That is:

- all investments would have to satisfy the investor test,
- investments in sensitive land would also have to satisfy the simplified benefit to New Zealand test, and
- certain transactions to acquire sensitive land or significant business assets would also be subject to the substantial harm test.

198. The substantial harm test would provide decision makers with broader grounds to decline prospective investments. It would be based on OECD guidance on managing risks associated with investments, and be similar to the test that underpins Japan's foreign investment screening regime. In particular, decision makers would have the power to deny consent to investments that pose risks of substantial harm to New Zealand. These could broadly include:

- ***threats to public order:*** Investments that would damage the functioning of New Zealand's society or threaten New Zealand's political or economic survival,
- ***threats to public health and safety:*** Investments that would severely damage the health and safety of the New Zealand public or a section of the public, and/or
- ***threats to essential security interests:*** Investments that would threaten New Zealand's economic wellbeing and/or national security. Ministers would be able to decline transactions proposed for completion during a time of war or armed conflict, or any other emergency in international relations.

199. The high threshold for activating the substantial harm test means it could only be exercised by Ministers (that is, it could not be delegated). Ministers would be accountable for its use and for determining what constitutes 'substantial harm' (rather than, for example, assessing a prospective investment against legislated criteria that attempt to define substantial harm). This would ensure that the test is responsive to a dynamic global environment. The threshold for substantial harm would be a policy decision for each government.

200. Operationally, the test would be used for any transaction identified by the security services as presenting potential national security risks. The Minister would also be able to call in any other prospective investment (generally screened under the Act) for consideration against the substantial harm test.

201. To balance the additional flexibility that the substantial harm test provides for decision makers in assessing applications for consent, all applications involving sensitive land would be assessed against a simplified benefit to New Zealand test. The existing test would be reformed to:

- combine factors with similar objectives to reduce their number and specificity,
- remove the requirement for benefits associated with non-urban land of more than five hectares to be 'substantial and identifiable'. This is because any investment that has a risk of causing substantial harm to New Zealand could be denied consent under the substantial harm test. This would also reduce the framework's complexity, and
- remove the ability to add factors to the test by regulation.

202. With reference to the applicable counterfactual (from page 75), a simplified test could ask decision makers to consider whether:

- an investment will or is likely to result in economic benefits to New Zealand, including but not limited to the introduction of new technology or skills, increased efficiency or productivity, and the creation of new job opportunities,
- there will be adequate mechanisms to provide, protect or enhance areas of:
  - significant indigenous vegetation,
  - significant habitats of indigenous fauna, and
  - significant habitats of trout, salmon and wildlife protected under section 3 of the Wildlife Act, and game defined in section 2(1) of that Act,
- there will be adequate mechanisms to:
  - provide, protect or enhance public access to or across the relevant land, and
  - protect or enhance historic heritage, including wāhi tapu, within the relevant land, and
- the overseas investment will or is likely to give effect to or advance a significant government policy or strategy.

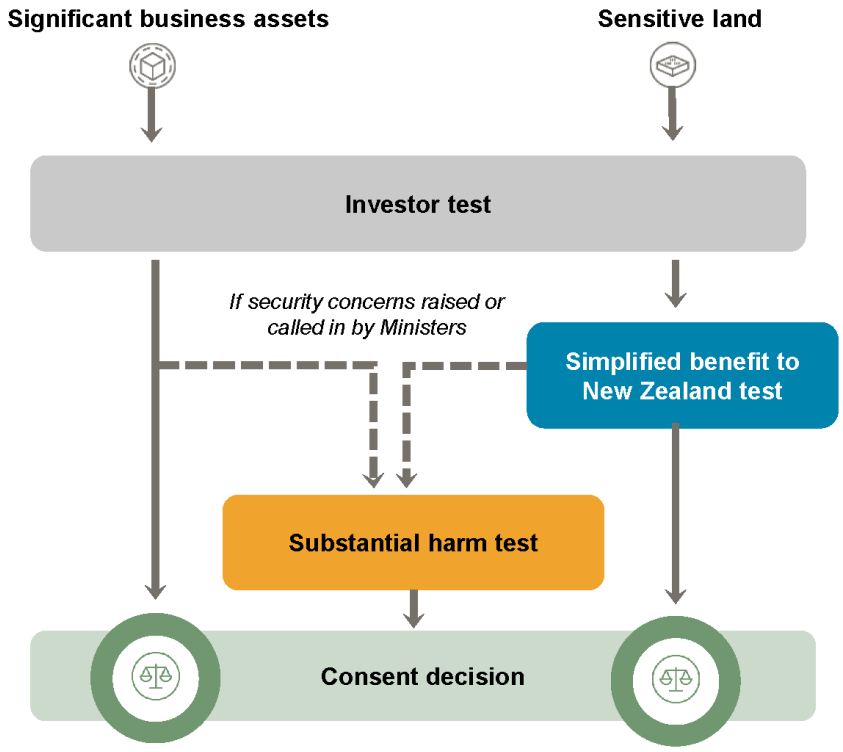
203. As with the current test, a relevant requirement could be whether any special land (for example the foreshore) has been offered to the Crown or whether farmland has been advertised for sale (subject to the potential changes outlined in the sections starting on pages 91 and 95 respectively). Depending on the decisions made, the simplified benefit to New Zealand test could also include factors related to water extraction and Māori cultural values as they relate to the physical and historical characteristics of the relevant sensitive land.

204. The simplified benefit to New Zealand test would largely encompass factors covered by the existing test, with many of the currently narrowly expressed factors captured in a new 'economic benefits' factor. This new test would not include some factors that applications cite reasonably frequently, such as those relating to consequential benefits[64] and New Zealanders' oversight of and participation in the investment and the overseas person.[65] This is based on the assumption that benefits relating to these factors could be raised through other factors in the simplified test (for example as economic benefits).

205. The simplified benefit to New Zealand test would not cover negative effects (as proposed under Option 1). This is because the substantial harm test would empower decision makers to deny consent to investments with significant negative effects.

206. Figure 7 illustrates Option 2.

Figure 7: Overview of Option 2 (substantial harm test and simplified benefit to New Zealand test)



207. **Option 3** would operate similarly to Option 2. The primary difference is that the national interest test would allow decision makers to consider whatever features of a prospective investment – both positive and negative – they consider relevant when determining whether to grant consent. This is in contrast to the prescribed factors in the existing benefit to New Zealand test and those proposed in the substantial harm test.

208. As with the proposed substantial harm test, only Ministers would be able to use the test and they would determine what is, or is not, in New Zealand's national interest. However, unlike the substantial harm test, a national interest test would allow Ministers

64 Regulation 28(a).

65 Regulation 28(j).

to consent to transactions that they determine to be in New Zealand's national interest rather than only deny consent to those that pose substantial harm.

209. To support investor confidence, if a national interest test were adopted it is proposed that:

- the government would provide guidance on the factors likely to be considered, and their relative importance, in determining what constitutes New Zealand's national interest,
- before an application could be declined, the relevant Minister would consult security Ministers and other Ministers as relevant (for example the Minister of Foreign Affairs or the Minister for Economic Development). This is similar to the requirements under the Outer Space and High-altitude Activities Act 2017,
- Ministers could be required to publish the reasons for declining prospective investments unless it risked the release of sensitive national security information, and
- decisions could be reviewable (either on the merits or judicially).

210. As in Option 2, all applications involving sensitive land would continue to be assessed against a simplified benefit to New Zealand test, even if they were also expected to be subject to the national interest test.

The national interest test's design

211. When considering whether a prospective investment is in the national interest, the Minister (in a way similar to the national interest test in the Outer Space and High-altitude Activities Act) could consider:

- economic or other benefits,
- any risks to national security, public safety, international relations or other national interests,
- the extent to which risks can be mitigated by consent conditions or other legislation, and
- any other matters that they consider relevant, such as the investment's environmental or cultural implications.

The national interest test's application

212. The national interest test could be used to assess applications to acquire:

- an interest in a strategically important industry or activity (that is, one critical to New Zealanders' wellbeing) such as:
  - media,
  - telecommunications,
  - transport,

- defence and military,
- encryption and securities technologies and communications, and/or
- finance,

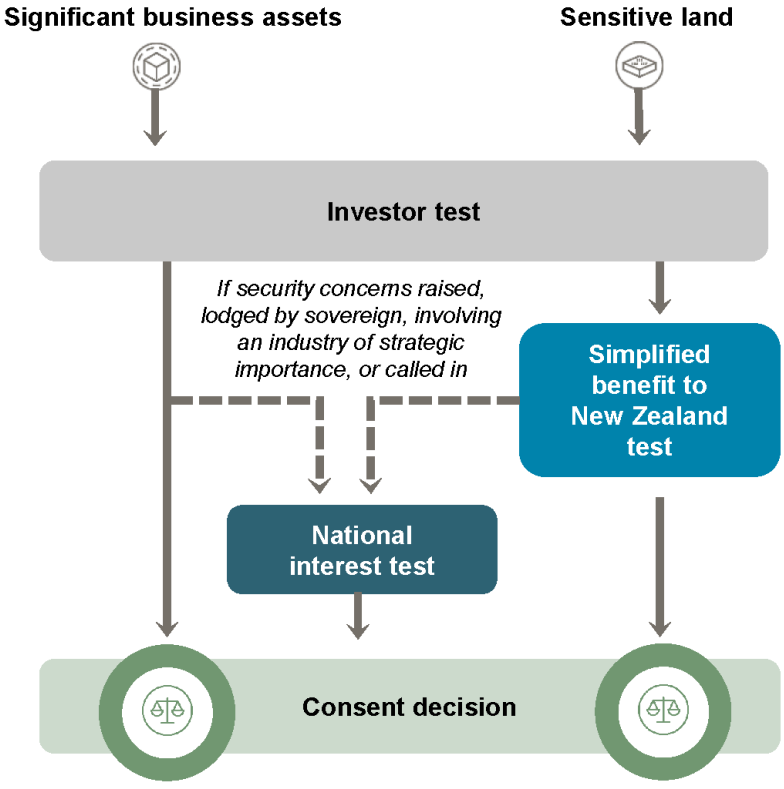
- critical infrastructure, and
- any asset where the applicant is a ‘foreign government’ or its associate.

213. Note the list is more likely to be specified in regulations than in primary legislation, to ensure that the Act remains responsive to changes in government and the types of risk presented by foreign investment.

214. The national interest test could also apply to investments that the security services identify as posing a potential risk to national security or that are called in by Ministers. This means that Ministers could elect to apply the national interest test to any transaction screened under the Act. This is important to ensure that Ministers and security agencies have the discretion to assess applications that may not present as higher risk at face value or as higher risk today, but could in the future as the threat environment changes.

215. Figure 8 illustrates Option 3.

Figure 8: Overview of Option 3 (national interest test and simplified benefit to New Zealand test)

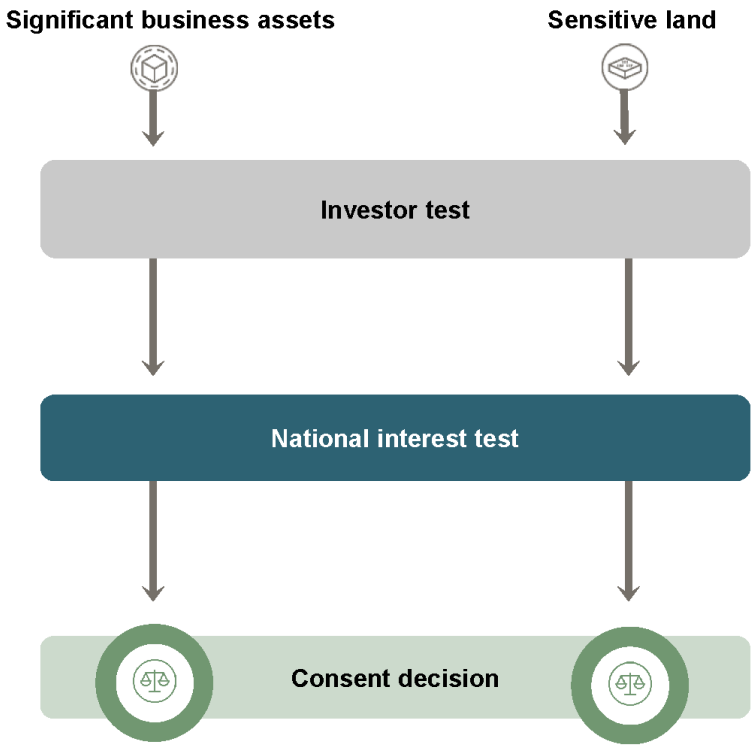


216. **Option 4** would more fundamentally alter the Act's consent framework and considerably increase decision makers' discretion. The benefit to New Zealand test would be replaced with a national interest test (that is, all transactions would be subject to the national interest test). The test itself would be designed in the same way as in Option 3 and would apply to all investments screened under the Act, excluding those in residential land and forestry assets on sensitive land (unless the acquisitions would be subject to satisfying the current benefit to New Zealand test).

217. This is the simplest approach to addressing the identified problems, and most similar to Australia's foreign investment screening regime. It is depicted in Figure 9.

218. Under this option, consideration would be given to whether to retain the existing requirement to offer special land back to the Crown. It is necessary because this requirement is currently triggered under the benefit to New Zealand test for certain transactions.

Figure 9: Overview of Option 4 (national interest test)



219. **Option 5** would grant Ministers the power to call in for screening certain transactions involving an overseas person (or their associates) if they raised national security and/or public order risks, even if they would not ordinarily require screening under the Act (that is, if they were below the current screening threshold of $100 million).

220. Transactions that could be called in on national security grounds could include, for example, investments in dual-use technology firms and critical direct suppliers to the government's defence, security and/or intelligence functions. The public order grounds are intended to be used to call in investments in the media sector (although it is possible that the media sector may be called in on national security grounds).

221. International agreements that generally restrict New Zealand's ability to screen additional classes of investment provide exceptions for measures that address certain types of national security, and certain agreements also allow for measures to address public order concerns.

222. Transactions that raise national security or public order risks, but are ordinarily screened under the Act, would only be subject to this test if Option 5 were adopted on its own. If any of Options 1-4 were adopted, such transactions would be screened under the new general consent framework, because each option would allow decision makers to consider prospective transactions' implications for national security and public order (in addition to other matters).

223. Such powers are not unusual globally. For example:

- under Canada's National Security Review of Investments regime, transactions that are otherwise not subject to investment screening can be assessed to manage any potential national security risks,
- the Committee on Foreign Investment in the United States (CFIUS) can block, modify or unwind any transaction by or with any foreign person that could result in foreign control of a United States business,
- the US Foreign Investment Risk Review Modernization Act, upon commencement, will expand on the CFIUS to include, among other matters, investments in real estate located near sensitive government facilities, and minority investments that might not be controlling but that provide access to sensitive information or technology (such as dual-use technology), and
- in late 2018, the German Government agreed to include German media companies within the scope of its foreign investment screening regime, which includes considering whether the acquisition of a domestic company by a non-EU resident poses a threat to German "public order or security".

224. If a national security and public order call-in power were adopted, the government could provide guidance on the types of transaction likely to be affected.

Design of the call-in test

225. In considering whether to consent to a transaction that has been called in (and that does not ordinarily require screening under the Act), Ministers would only be able to consider factors that relate to protecting or enhancing New Zealand's national security and public order. The investor test and benefit to New Zealand test (or a potential replacement/supplement, such as a national interest test) would not apply.

226. Before deciding whether a prospective investment can proceed, Ministers could also be required to consider whether any risks could be mitigated by consent conditions or regulatory tools in other legislation, and to consult security Ministers and other Ministers as relevant (for example, the Minister of Foreign Affairs).

227. It is likely that only a small number of transactions would be called in using this power, and that the government would only impose conditions on, or block or unwind transactions in rare circumstances where there are significant national security or public order risks.

Identifying relevant transactions

228. For the call-in power to be effective, the government must be able to identify relevant transactions that may raise national security concerns. International models used to achieve this include, but are not limited to:

- ***mandatory notification:*** Overseas persons are required to notify the government of all prospective investments that fit within a defined range of assets or sectors (those considered more likely than others to raise national security and/or public order concerns). Penalties for non-compliance include the unwinding of transactions. This is similar to Canada's regime, except that all investments in Canada by overseas persons must be notified, whatever their nature,

- ***voluntary notification:*** Overseas persons can elect to notify the government of prospective investments that fit within a defined range of assets or sectors. Transactions that are not notified at application but later found to present security risks could be unwound. This is similar to the CFIUS process, and

- ***a combined approach:*** Overseas persons are required to notify the government of all prospective investments that fit within a defined range of assets or sectors (those considered more likely than others to raise national security or public order concerns). Outside these assets and sectors, a broader range of assets and sectors and assets would be subject to voluntary notification. This is similar to an option considered by the United Kingdom during consultation on its 'National Security and Infrastructure Investment Review' green paper.[66]

229. Table 15 assesses Options 1-5 against the reform criteria.

The counterfactual test

Options 1-3, which all continue the benefit to New Zealand test in some form, could operate with different counterfactual tests (including the status quo).

The sub-options below seek to address problems with the counterfactual test. Their effects are likely to be enhanced by other options in this document that would focus screening on the risks associated with sensitive transactions (for example through reforms to adjoining land). Table 16 provides an analysis of each sub-option against the reform criteria.

Under **Sub-Option A**, the counterfactual test would compare what an overseas person would do with the state of the land, and activities on the land, at the time the application is lodged. This would seek to avoid the complexity and unpredictability involved in referring to a theoretical counterfactual, as currently happens in about 40 per cent of applications.[67] In cases where the current state of the land does not comply with minimum legal requirements for land use and management (for example under the Resource Management Act), remediating the land to meet minimum legal requirements could not count towards the benefit of a proposal.

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66 See paragraph 114: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/652505/2017_10_16_NSII_Green_Paper_final.pdf

67 Between June and December 2018, overseas persons submitted 24 'alternative New Zealand purchaser' counterfactuals and 27 counterfactuals assuming continued ownership by the vendors. These were raised across 57 sensitive land applications (overseas persons sometimes submit on both counterfactuals).

Where a transaction involved transferring land between two overseas persons, a 'no-detriment test' (rather than the benefit to New Zealand test and counterfactual) would require a prospective overseas purchaser to demonstrate that their application would at least maintain the benefits associated with the vendor's ownership of the land (with the latter measured at the point the application was lodged). This would allow Overseas Person A to acquire sensitive land from Overseas Person B where Person B had previously satisfied the benefit to New Zealand test – as long as Person A maintained the existing benefits linked to the land.

Sub-Option B would compare what an overseas person would do with what would happen if the vendor continued to own the land (or, in the case of leases, the leaseholder continued to hold the land). This option would aim to reduce the current law's unpredictability and complexity by requiring reference to the vendor's or leaseholder's future plans, rather than a more theoretical counterfactual.

As in Sub-Option A, it would be assumed that the counterfactual state meets the minimum legal standards for land use. Where a transaction involved transferring land between two overseas persons, a no-detriment test would require a prospective overseas buyer to demonstrate that they would at least maintain the benefits associated with the vendor's continued ownership of the land.

Sub-Option C would tweak the status quo to give greater certainty at the start of the application process about the applicable counterfactual. It would provide that, where genuine market testing has shown that there is no domestic interest in the relevant land, the relevant counterfactual is the vendor's continued ownership of the land. In other circumstances the existing law would apply (so the 'vendor's continued ownership' counterfactual could still be used by overseas persons that had not previously tested the market, if – as under the current law – they provided convincing supporting evidence).

This option would not make market testing mandatory, but any such testing could influence the applicable counterfactual. It aims to give overseas persons greater certainty about the relevant counterfactual to use. In relevant cases it could also assure decision makers that there are no alternative New Zealand purchasers, and thereby give them greater confidence that the benefits set out in an application can be attributed to the overseas investment.

Table 15: Assessment against the reform criteria of options to reform the Act's consent framework

	Option 1 – expand the scope of the benefit to New Zealand test	Option 2 – simplify the benefit to New Zealand test and introduce a substantial harm test	Option 3 – simplify the benefit to New Zealand test and apply a national interest test for certain applications	Option 4 – replace the benefit to New Zealand test with a national interest test	Option 5 – introduce a national security and public order call-in power
	Alternative options				Alternative or complementary option
Manages the risk of overseas investment to New Zealanders' wellbeing	***Neutral/moderately positive*** Increased ability to consider the negative effects of investments and manage the national security risks associated with ownership of sensitive land. There would be no change for significant business assets.	***Moderately positive*** Significant increase in the ability to manage risks to national security and other fundamental New Zealand interests, particularly for significant business assets. Reducing the number and specificity of benefit factors is expected to enable more holistic assessments of risk. The slight decrease in the scope of assessments for all transactions is not expected to materially change the ability to manage risk. The option may reduce public confidence in the screening regime.	***Strongly positive*** Significant increase in the ability to manage risks. All pros and cons of higher-risk/sensitivity applications (as judged by Ministers) can be considered. Reducing the number and specificity of benefit factors is expected to enable more holistic assessments of risk. The slight decrease in the scope of assessments for 'low-risk' transactions is not expected to materially change the investment risk profile. The option may reduce public confidence in the screening regime for low-risk transactions.	***Strongly positive*** Significant increase in the ability to manage risks. All pros and cons of almost all applications can be considered before granting consent.	***Moderately positive*** Increased ability to consider and manage national security and public order risks posed by a narrow range of foreign investment transactions not currently screened under the Act. The mechanism adopted for identifying relevant transactions will have implications for the call-in power's effectiveness. For example, a mandatory notification regime could mitigate the risk of assets being compromised before the government becomes aware of a transaction.

	Option 1 – expand the scope of the benefit to New Zealand test	Option 2 – simplify the benefit to New Zealand test and introduce a substantial harm test	Option 3 – simplify the benefit to New Zealand test and apply a national interest test for certain applications	Option 4 – replace the benefit to New Zealand test with a national interest test	Option 5 – introduce a national security and public order call-in power
	Alternative options				Alternative or complementary option
Supports overseas investment in productive assets	***Neutral/Moderately negative*** The ability to consider negative effects would increase uncertainty and compliance costs.	***Moderately positive*** Simplification of benefit to New Zealand test is expected to better support investment. A simplified benefit to New Zealand test should significantly reduce preparation times for overseas persons. Compliance costs may increase for investors subject to the substantial harm test (particularly for significant business assets), although this is expected to be rare. Costs may fall over time as the operation of the test becomes clearer. Benefits are somewhat offset, particularly in the short term, by uncertainty created by the substantial harm test. The risk is somewhat mitigated by the fact that these arrangements are not unusual internationally.	***Neutral/moderately negative*** Simplification of benefit to New Zealand test is expected to better support investment. A simplified benefit to New Zealand test should significantly reduce preparation times for overseas persons. Compliance costs may increase for investors subject to the national interest test (a reasonable portion of transactions, particularly for significant business assets). This is particularly the case for transactions involving sensitive land that becomes subject to the national interest test, which would be required to satisfy two tests. Costs may fall over time as the operation of the test becomes clearer. Benefits may be largely offset, particularly in the short term, by uncertainty created by the national interest test. The risk is somewhat mitigated by the fact that these arrangements are not unusual internationally.	***Moderately negative*** Significant risk of disincentivising investment, particularly in the short term. The risk is somewhat mitigated by the fact that these arrangements are not unusual internationally. Compliance costs are expected to increase in the short term, particularly for significant business assets and fishing quota. Costs may fall over time as the operation of the test becomes clearer. Longer-term outcomes are not clear. They will depend on precedent.	***Moderately negative*** Potential screening of additional transactions may signal that New Zealand is not open to foreign investment. This could be mitigated through guidance on the power's scope, the fact that these arrangements are not unique internationally, and the fact that we anticipate a very small number of transactions to be called in. Compliance cost burden will partly depend on how relevant transactions are identified. For example, a mandatory notification regime would impose greater compliance costs upfront, but provide greater certainty to overseas persons. The reverse would be true for a voluntary regime. Regardless, compliance costs will increase where Ministers call in applications due to a need for additional information, delays in finalising transactions, and compliance with any conditions.

	Option 1 – expand the scope of the benefit to New Zealand test	Option 2 – simplify the benefit to New Zealand test and introduce a substantial harm test	Option 3 – simplify the benefit to New Zealand test and apply a national interest test for certain applications	Option 4 – replace the benefit to New Zealand test with a national interest test	Option 5 – introduce a national security and public order call-in power
	Alternative options				Alternative or complementary option
Delivers more predictable, transparent and timely outcomes	***Moderately negative*** Existing framework is effectively retained. The ability to consider negative effects may increase uncertainty and extend timelines for applications.	***Neutral*** Substantial harm test will increase uncertainty for a *limited* number of investors. Negatives can be mitigated by guidance and decision precedent in the longer term. These costs are more than offset by savings for most investors subject to the simplified benefit to New Zealand test. May increase decision times for applications subject to the substantial harm test.[68] On average timeframes should reduce.	***Neutral/moderately negative*** National interest test will increase uncertainty for a *moderate* number of investors, particularly in the short term. Negatives can be mitigated by guidance and decision precedent in the longer term. These costs are offset by savings for most investors subject to the simplified benefit to New Zealand test. Could increase decision times for applications subject to the national interest test. On average timeframes should reduce.	***Moderately negative*** National interest test will increase uncertainty for *all* investors, particularly in the short term. Negatives can be mitigated by guidance and decision precedent in the longer term. Could increase average decision times.	***Moderately negative*** Call-in power will increase uncertainty for some investors. However, because few applications are expected to be called in, this risk could be managed through guidance and decision precedent in the longer term.

[68] The effects of any new test – substantial harm or national interest – on the timing of decisions will depend on whether statutory deadlines are adopted across the Act.

Table 16: Assessment against the reform criteria of sub-options to reform counterfactual tests

	Sub-Option A – compares an overseas person's plans with the state of the land at the time of application; no-detriment test for sales between overseas persons	Sub-Option B – compares what the overseas person would do with what would happen if the vendor continued to own the land; no-detriment test for sales between overseas persons	Sub-Option C – adjusted status quo, under which the relevant counterfactual is defined to be 'continued ownership by the vendor' in cases where genuine market testing has shown there to be no New Zealand interest in the relevant land; status quo would otherwise apply
Manages the risk of overseas investment to New Zealanders' wellbeing	***Moderately negative*** Reduced ability to manage risk. More certain counterfactual would reduce decision makers' discretion. Compares the existing state with the investor's future plans, so may overstate benefits (particularly for greenfield investment).	***Neutral*** Likely no or small negative change in the ability to manage risk. More certain counterfactual would reduce decision makers' discretion.	***Neutral*** Likely no or marginal positive change in the ability to manage risk. Evidence of market testing may in some cases give decision makers greater assurance that claimed benefits can be attributed to investments. It is likely to have an effect on the nature of information provided to the OIO about prior market testing, but it is less clear that it would incentivise market testing in cases in which it was not already planned. Current rates of market testing are not known.
Supports overseas investment in productive assets	***Moderately positive*** Better supports investment due to a simpler test, lower compliance costs and, in many cases, a lower threshold for satisfying the benefit to New Zealand test (for example, sales between overseas persons).	***Moderately positive*** Better supports investment due to a simpler test, lower compliance costs and, in many cases, a lower threshold for satisfying the benefit to New Zealand test (for example, sales between overseas persons). Some new compliance costs from identifying vendors' plans.	***Neutral*** Easier for investors to identify relevant counterfactual in cases where market testing has occurred, but unlikely to have an effect on overall investment attractiveness. Negligible or small reduction in costs as it becomes easier for some investors to identify relevant counterfactual.
Delivers more predictable, transparent and timely outcomes	***Moderately/strongly positive*** Counterfactual is much easier to identify, significantly improving predictability, transparency and timeliness.	***Moderately positive*** Counterfactual is easier to identify, improving predictability, transparency and timeliness.	***Neutral/moderately positive*** Negligible or small increase in predictability and timeliness in some cases as it becomes easier for some investors to identify relevant counterfactual, but the complex 'alternative New Zealand purchaser' counterfactual would remain the test for many cases (data is not available to indicate the proportion).

The Government would like your views

The Government would like your views on whether this document has accurately identified the problems, options for reform, and the effects of the options, and whether you have any alternative ideas. Please see page 18 for the full list of questions.

The Government would also like your views on the following questions:

- Do you think the Act should expressly enable decision makers to consider any negative effects of a proposed investment, as described in Option 1? Why/Why not?
- Do you think the right risks have been identified in the definition of substantial harm in Option 2, and:
  - if so, why do you think this?
  - if not, which other risks do you suggest and why?
- Do you think the right factors have been identified in the simplified benefit to New Zealand test in Options 2 and 3, and:
  - if so, why do you think this?
  - if not, which other factors do you suggest and why?
- Do you agree that the 'substantial and identifiable benefit' threshold for non-urban land over five hectares should be removed from the simplified benefit to New Zealand test in Options 2 and 3? Why/Why not?
- Do you think the right industries have been identified as industries of strategic importance in Option 3, and:
  - if so, why do you think this?
  - if not, which other industries do you suggest and why?
- If a national security and public order call-in power were adopted (as proposed under Option 5), do you have a view on:
  - which agency or agencies should be responsible for assessing prospective transactions (for example, the OIO, security agencies or an alternative) and, if so, why do you think this?
  - how the government could become aware of transactions that could be called in for screening (that is, a compulsory, voluntary or combined approach, or another option entirely) and, if so, why do you think this?
  - which Minister should be responsible for making decisions under this test and, if so, why do you think this?
  - whether the responsible Minister (whoever that should be) should have to consult other Ministers before denying consent to a transaction using this power and, if so, which Ministers and why do you think this?

Water extraction and the Act

There are some public concerns about overseas investments involving water extraction (particularly for water bottling for export). These include the potential environmental effects of water bottling and that overseas persons may profit from a high-value resource without paying a charge.

Water bottling is a small industry in New Zealand. In 2016 it accounted for less than 0.02 per cent of total New Zealand water use. Irrigation makes up around 66 per cent of consented use of water, drinking 8.2 per cent, and all industrial uses five per cent.[69] Currently only a small proportion of water bottled is for export purposes, with the majority of consumption occurring within New Zealand.

How does New Zealand regulate water extraction?

Environmental effects

Existing legislation deals with environmental effects of water extraction. The Resource Management Act is the principal tool for managing these effects, including the effects of water bottling. Before a resource consent for water use can be granted, a consenting authority is required to primarily consider a proposal's environmental impacts. Depending on the Resource Management Act plan rules, the authority can also consider impacts on the community's social, economic and cultural wellbeing. The Resource Management Act applies equally to New Zealanders and overseas persons, and all land (whether sensitive or not). This recognises that environmental impacts are not specific to overseas persons' ownership and control, or to sensitive land.

The Overseas Investment Act allows limited consideration of the environmental impacts of a proposed investment involving water extraction, and only to the extent that water use relates to factors in the benefits test. Decision makers can take into account mechanisms in place to protect or enhance significant indigenous vegetation or fauna, for example, but not how water will be used.

Charging regime

Currently there is no charging regime for water use. The Government is considering how to introduce a charge on exports of bottled water. It is proposed that Cabinet will consider this issue this year. This work is occurring separately from this reform of the Overseas Investment Act.

Could the Act address concerns about water extraction?

The Overseas Investment Act is not able to comprehensively address concerns about water extraction. The Act only applies to overseas persons' proposals involving water extraction when water will be extracted on sensitive land (and this is signalled in an investor's business plan), or a significant business asset is involved (such as an application to purchase a large water-bottling company). For example, the Act is unable to screen transactions involving overseas persons seeking to bottle water from an aquifer on non-sensitive land. The Act therefore only screens a small number of water extraction proposals (only three unique proposals involving water bottling appear to have been submitted since the Act was introduced in 2005).

Because of the Resource Management Act's clear role in regulating water extraction, there would be a risk of conflicting decisions if the Overseas Investment Act addressed water extraction more extensively. This would increase investor uncertainty.

Options for reform

This document seeks feedback on whether the Act should deal with water extraction (in either a narrow or a broad way). We have identified two potential options for change if a decision were made to increase decision makers' ability to consider water use issues. These options could only be adopted if the Act's broader consent framework retained the benefit to New Zealand test in some form. They would only apply to the small portion of water extraction proposals that are subject to the Act.

- **Option 1** would amend the benefit to New Zealand test to include a factor such as, 'whether, for transactions involving an existing or proposed resource consent for *water bottling or bulk water export*, there are or will be adequate mechanisms in place to protect or enhance the environment or cultural or economic wellbeing'.
- **Option 2** would amend the benefit to New Zealand test to include a factor such as, 'whether, for transactions involving an existing or proposed resource consent for *water extraction*, there are or will be adequate mechanisms in place to protect or enhance the environment or cultural or economic wellbeing'.

Table 17 assesses the effects of Options 1 and 2 against the reform criteria.

[69] Statistics New Zealand (2017). *Consented freshwater takes. 2013-14*. Retrieved from http://archive.stats.govt.nz. Data excludes hydroelectricity.

Table 17: Assessment against the reform criteria of options to increase the ability to consider water extraction

	Option 1 – consider the effects of water bottling or bulk export on economic, social and cultural wellbeing under the benefit to New Zealand test	Option 2 – consider the effects of water extraction on economic, social and cultural wellbeing under the benefit to New Zealand test
Manages the risk of overseas investment to New Zealanders' wellbeing	***Neutral*** Unclear whether the Act is the most appropriate or effective way to regulate water extraction. The Resource Management Act manages water use nationwide. Would give decision makers greater discretion on these applications, but not full discretion. Grants additional scope to decline transactions that include water bottling and bulk water export where they could be harmful. However, only a small portion of such water extraction proposals are subject to the Act.	***Neutral*** Unclear whether the Act is the most appropriate or effective way to regulate water extraction. The Resource Management Act manages water use nationwide. Would give decision makers greater discretion over these applications, but not full discretion. Grants additional scope to decline transactions where proposed water extraction could be harmful. However, only a small portion of proposals involving water extraction are subject to the Act.
Supports overseas investment in productive assets	***Neutral*** New factor creates additional uncertainty that could discourage prospective investment and will likely increase submission lengths and costs for overseas persons. However, very few transactions are affected	***Moderately negative*** Significant number of transactions that are screened include some water extraction (for example for viticulture and agriculture). The new factor creates additional uncertainty that could discourage prospective investment, and will likely increase submission lengths and costs for overseas persons.
Delivers more predictable, transparent and timely outcomes	***Neutral*** Duplicates regimes for managing water use, which will reduce transparency and increase the risk of conflicting outcomes. However, only a small portion of such water extraction proposals are subject to the Act.	***Moderately negative*** Duplicates regimes for managing water extraction, which will reduce transparency and increase the risk of conflicting outcomes. May increase average processing times.

The Government would like your views

The Government would like your views on whether this document has accurately identified the problems, options for reform, and the effects of the options, and whether you have any alternative ideas. Please see page 18 for the full list of questions.

Tax and the Act

There is a concern about overseas persons acquiring sensitive New Zealand assets and not paying enough tax in New Zealand. This could be viewed as contrary to the Act's purpose, which recognises that it is a privilege for overseas persons to own or control such assets.

How does New Zealand regulate tax arrangements?

Tax arrangements are principally regulated under the Income Tax Act 2007 (Tax Act) and international agreements. This recognises the fact that tax avoidance is an issue with domestic and international dimensions. The Tax Act reflects international best practice in this area by:

- appropriately limiting double taxation that could reduce New Zealand's attractiveness to productive overseas investment, while
- maintaining New Zealand's tax base by limiting tax-avoidance activities.

The Overseas Investment Act allows, but does not explicitly require, tax arrangements to be considered under the good character test. Tax arrangements may be relevant if they:

- contravene the law, and/or
- reflect adversely on a person's character.

The OIO is most likely to consider an investor's tax arrangements if they:

- have resulted in prosecution, which should be revealed in the open-source searches the OIO undertakes as part of the good character test, and
- involve a natural person's tax history. Only natural persons are subject to the good character test, so a body corporate's tax compliance history may not be considered unless it can be attributed to an individual with control (for example, a company's actions may be attributed to a director).

The OIO generally imposes a condition on consent holders that individuals with control will continue to satisfy good character requirements, and this could include tax compliance.

Options for reform

The reform of the Overseas Investment Act provides an opportunity to consider whether it should address any issues with existing tax arrangements. This document seeks feedback on whether the Act should specifically deal with tax considerations. There are three options. Each option could be adopted irrespective of decisions taken on the Act's broader consent framework.

- **Option 1** would expressly include tax compliance history as part of the investor test. While tax compliance history can already be considered under the good character test, this option is designed to *ensure* that the decision maker considers tax arrangements (for example, residency in low-tax jurisdictions, tax disputes and shortfall penalties) when determining an overseas person's character.

  This option is primarily for bodies corporate rather than individuals with control. If the investor test is not extended to bodies corporate, this option could still be imposed on them, but only if the Act is amended to include a standalone requirement. If the investor test is extended to bodies corporate, this option could be implemented using the Ministerial Directive Letter.

If information provided by an overseas person were found to be inaccurate, the government could take enforcement action.

- **Option 2** would require, as part of the investor test, each ROP/IWC to certify that, in any jurisdiction, it (or any entity under its control):
  - is not involved in any tax avoidance scheme,
  - has not breached any tax legislation (including whether it has been subject to shortfall penalties, or an equivalent, for non-compliance), or
  - is not currently involved in a dispute with any tax authority.

  If an investor were unable to certify, they would be required to explain any contraventions (and certify subject to those contraventions). The decision maker could exercise discretion as to whether the explanation is adequate (for example, the breach could be historical and the investor may have since made material changes), and consent could still be granted.

  The decision maker could also consider the severity of the breach and whether denying consent is appropriate; for example, shortfall penalties can be imposed for fairly minor, administrative breaches as well as more serious non-compliance. As with Option 1, this option is designed to apply to corporates, and a director of each relevant overseas person would be required to certify.
- Under **Option 3**, investors would be required to obtain binding rulings from Inland Revenue on the treatment of transactions under New Zealand's tax rules – for example, the structure and funding arrangements used to acquire land. This would ensure that the tax arrangements were not in breach of domestic tax law. Given the time and costs involved in obtaining binding rulings, this option could be limited to acquisitions over a certain threshold.

We also considered whether an investor's current or future New Zealand tax residency could be part of the investor test or benefit to New Zealand test. While this is legislatively possible, this would not address the concerns relating to tax because:

- tax residency does not involve consideration of a taxpayer's character or their tax contribution, and
- the benefit to New Zealand test only applies to transactions involving sensitive land, not transactions involving significant business assets.

Table 18 assesses the effects of Options 1-3 against the reform criteria.

Table 18: Assessment against the reform criteria of options to better account for investments' likely effects on New Zealand's tax base

	Option 1 – expressly referring to tax compliance as a component of the good character test	Option 2 – certification on tax avoidance and compliance with tax law	Option 3 – require overseas persons to obtain binding rulings from Inland Revenue that tax arrangements relating to the investments comply with New Zealand law
Manages the risk of overseas investment to New Zealanders' wellbeing	***Neutral*** Unlikely to have an effect as the Act already allows consideration of tax arrangements under the good character test. It would have a marginal positive effect if the investor test is *not* extended to bodies corporate and this option is applied to bodies corporate as a standalone certification.	***Neutral/moderately positive*** Unlikely to have an effect as the Act already requires disclosure of any contravention of tax law or any arrangement that reflects adversely on a person's character. It would have a small effect if the investor test is *not* extended to bodies corporate and this option is applied to bodies corporate and each member of their groups as a standalone certification.	***Neutral*** Could ensure that structuring of acquisitions and the tax arrangements relating to sensitive assets following acquisition are consistent with New Zealand tax law. Investors would not be able to change the structure without OIO consent. Would not allow decision makers to consider overseas persons' overseas arrangements and/or the likely contribution of investment to the tax base, because binding rules only apply to New Zealand tax arrangements and do not relate to the actual amount of tax being paid.
Supports overseas investment in productive assets	***Neutral*** Unlikely to have an effect as the Act already allows consideration of tax arrangements under the good character test. Creates additional compliance cost if the investor test is *not* extended to bodies corporate and this option is applied to bodies corporate as a standalone certification.	***Moderately negative*** Creates additional compliance, particularly if the investor test is *not* extended to bodies corporate as a standalone certification.	***Strongly negative*** Obtaining a binding ruling is expensive (between 2013 and 2015, the average fee charged by Inland Revenue was $16,750,[70] excluding professional adviser fees) and time consuming (three months), which may be disproportionate for many smaller investments (and potentially inappropriate for less complex structures).
Delivers more predictable, transparent and timely outcomes	***Neutral*** Unlikely to have an effect because it does not change screening requirements. Even if it is applied as a standalone requirement, it involves self-certification so is unlikely to affect timeframes.	***Moderately/strongly negative*** Decision makers may have to form a view on tax arrangements, breaches or disputes disclosed by investors. In some cases this may require significant expertise in tax law (including tax law in other jurisdictions). It is not clear that the government currently has enough expertise in tax law in other jurisdictions, so forming a view could be time consuming. This could occur either at the point an application was made or later if evidence suggests that information provided by the overseas person was inaccurate.	***Strongly negative*** Would dramatically increase the number of binding ruling applications, so timeframes for rulings would likely increase, with flow-on effects for decisions under the Act.

The Government would like your views

The Government would like your views on whether this document has accurately identified the problems, options for reform, and the effects of the options, and whether you have any alternative ideas. Please see page 18 for the full list of questions.

[70] See https://www.ird.govt.nz/technical-tax/binding-rulings/need-to-know/need-to-know-index.html

Māori cultural values and the Act

Land has special significance for Māori, reflected in the concept of kaitiakitanga: a responsibility to exercise guardianship and sustainable management to protect a resource for future generations, in recognition of the reciprocal obligations that arise from whakapapa links (kinship bonds) with the resource. Kaitiakitanga comes from the whakapapa of mana whenua (those with territorial rights), which may arise through genealogy, occupation or conquest, or a combination of all three.

There are some concerns that investment screening does not consider Māori cultural values enough.

How are Māori cultural values considered in the regulation of land use?

The Resource Management Act is the principal tool for managing land use. It requires people exercising powers under the Act to provide for matters of national importance, which include the relationships of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga (treasures). Te Ture Whenua Maori Act 1993 recognises the particular cultural significance of land to Māori, and provides safeguards for certain categories of land.

The Overseas Investment Act allows Māori cultural values to be considered as part of the historic heritage factor in the benefit to New Zealand test. Decision makers may consider whether applications include adequate mechanisms for protecting or enhancing historic heritage, which includes sites of significance to Māori (such as wāhi tapu). The OIO may recommend that overseas persons consult iwi on applications that appear to involve sites of particular significance to Māori.

Between July 2013 and June 2018, six applications referred to wāhi tapu.[71] In the past decade a handful of applications have involved leases of Māori freehold land.

Options for reform

Concerns in this area appear to focus on whether the Act sufficiently recognises Māori relationships with land, such as whether it adequately manages:

- the ability to access, and undertake customary activity on, sensitive land, and
- any effects of an overseas person's proposed activities on neighbouring, culturally important sites.[72]

The extent of these concerns is unclear, as is whether they can be strictly characterised as relating to ownership and control by overseas persons, rather than land use and management regulated by the Resource Management Act.

It is also unclear whether the Overseas Investment Act, with its focus on overseas investment in specific asset types, could comprehensively address concerns relating to Māori cultural values. Doing so would duplicate government-wide decision-making processes and resource requirements, and could result in conflicting decisions under the Act and the Resource Management Act, increasing investor uncertainty.

This document seeks feedback on whether the Act should deal with Māori cultural values as they relate to the physical and historical features of sensitive land. We have identified three options for change if a decision were made to increase decision makers' ability to consider Māori cultural values. These options could only be adopted if the Act's broader consent framework retained the benefit to New Zealand test in some form.

- **Option 1** would broaden the benefit to New Zealand test to allow decision makers to take account of an overseas person's plans to allow lawful 'existing arrangements' in respect of the land to continue, where those arrangements are recorded in writing. Relevant existing arrangements could be defined. This could be similar to regulation 29, which provides for some recognition of existing arrangements, such as an agreement to provide access for a section of the public where an application involves forestry activities.
- **Option 2** would clarify and broaden the benefit to New Zealand test to enable decision makers to take account of overseas persons' intentions to protect or enhance wāhi tūpuna that are listed under the Heritage New Zealand Pouhere Taonga Act 2014,[73] and/or promote or enhance a Māori reservation established under section 338 of Te Ture Whenua Maori Act.[74] This would enable decision makers to take into account a range of sites of ancestral, historical, spiritual or emotional significance to Māori when they are considering the benefits of applications.
- **Option 3** would expand the benefit to New Zealand test to allow decision makers to consider 'Māori cultural values as they relate to the physical and historical characteristics of the relevant sensitive land'.

Table 19 assesses these options against the reform criteria.

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71 OIO data. It is possible that this figure does not reflect the full number of applications that contained wāhi tapu, as in some cases applications may have bundled wāhi tapu together with archaeological sites.

72 These concerns have been raised in media commentary, submissions on the past reforms of the Act, and protests about particular applications.

73 Wāhi tūpuna is defined in the Heritage New Zealand Pouhere Taonga Act as places important to Māori for their ancestral significance and associated cultural and traditional values.

74 Under Part 17 of Te Ture Whenua Maori Act, a Māori reservation can be set aside on any Māori freehold land or general land (or, on application of a Minister, Crown land with historical, spiritual or emotional significance to Māori) for the benefit of the owners, the descendants of a tīpuna/tūpuna (ancestor), the members of a hapū, and/or a group, a community or the people of Aotearoa.

Table 19: Assessment against the reform criteria of options to include a broader consideration of Māori cultural values

	Option 1 – broaden the benefit to New Zealand test to enable consideration of whether existing arrangements (where on record) will continue	Option 2 – clarify and broaden the benefit to New Zealand test to enable consideration of overseas persons' plans for wāhi tūpuna or Māori reservations on sensitive land	Option 3 – broaden the benefit to New Zealand test to enable consideration of Māori cultural values as they relate to the physical and historical characteristics of sensitive land
Manages the risk of overseas investment to New Zealanders' wellbeing	***Neutral/moderately positive*** Enables decision makers to take account of a wider range of potential investment effects. However, it is not expected to affect many applications.	***Neutral/moderately positive*** Clarifies and slightly broadens the effects that decision makers may take account of, although there is relatively limited change (as the existing benefit to New Zealand test is likely broad enough to capture wāhi tūpuna and many of the possible purposes for which Māori reservations can be established).	***Moderately positive*** Could enable a broader range of interests to be considered, but likely to be difficult for the OIO and overseas persons to put into practice effectively given cultural values are multidimensional, evolve over time and vary across iwi and hapū.
Supports overseas investment in productive assets	***Neutral/moderately negative*** While likely to affect a limited number of applications, it may reduce attractiveness to investment as it will increase complexity and costs for the OIO to confirm the existence of relevant interests and monitor compliance.	***Neutral*** Potential for marginal negative effect as the breadth of screening is clarified and broadened. No material changes in compliance costs are likely, as the existing benefit to New Zealand test is likely broad enough to capture wāhi tūpuna and many of the possible purposes for which Māori reservations can be established.	***Moderately negative*** Likely to reduce attractiveness to investment due to the additional hurdle, less clear assessment criteria and likely increase in compliance costs involved in overseas persons and the OIO identifying and responding to the range of cultural dimensions that could be relevant to an application.
Delivers more predictable, transparent and timely outcomes	***Neutral/moderately negative*** May take more time to prepare and assess some applications, and may be challenging to monitor.	***Neutral*** Not clear that there would be any effect given the existing breadth of the test.	***Moderately negative*** Likely to result in a longer, less predictable and less transparent process due to the multidimensional nature of values.

The Government would like your views

The Government would like your views on whether this document has accurately identified the problems, options for reform, and the effects of the options, and whether you have any alternative ideas. Please see page 18 for the full list of questions.

The Government would also like your views on the following question:

- What types of activity do you think should be defined as relevant arrangements under Option 1, and why do you think this?

Special land provisions

What currently happens?

230. The Act provides that where sensitive land includes foreshore, seabed, riverbed or lakebed land (special land), this land is offered to the Crown before consent is granted.

231. This provision was introduced with the 2005 Act. It reflects the concept of 'ownership value'. That is, that some New Zealanders derive a welfare benefit from knowing that certain types of land are owned and controlled by New Zealanders (in this case, the Crown).

232. The process for offering special land to the Crown is set out in regulations 12-26 and is summarised below.

Special land provisions – offer process

Written notice: The owner must give written notice to the Crown that a proposed transaction includes special land.

Right of waiver: The Crown may waive its right to acquire the special land under regulation 15 at any time after a notice has been given and before a final agreement is entered into.

Surveying and valuation: If the Crown chooses not to waive its right to acquire the special land, the land is surveyed and valued according to the procedure set out in regulations 16-21. The Crown pays for the survey where required and, in conjunction with the owner, appoints a public valuer for the valuation.

Negotiation: Under regulation 22, the owner and the Crown must negotiate in good faith an agreement in principle to the terms and conditions of the acquisition. If this is successful, the owner must offer the special land on the terms and conditions in that agreement. At this point the special land provision has been satisfied.

Crown decision: Under regulation 24 the Crown must decide whether to accept or waive the offer within 30 working days of receiving it from the owner. If the offer is accepted, the special land is conveyed to the Crown (the Regulations do not say how this occurs).

233. The special land provisions have applied to approximately 16 per cent of sensitive land applications in the past five years, and 66 per cent of forestry applications since the introduction of a special forestry pathway in October 2018. The Crown has acquired an interest in special land (mostly riverbed land) in a very small number of cases since the provision was introduced in 2005.

What problems are there with current law and practice?

234. The main problem with the current special land provisions is that they create significant compliance costs, delays and uncertainty for vendors, overseas persons and the Crown. These issues stem from both the Act and the Regulations.

235. In the Act, the main issues are:

- ***coverage:*** The Act does not specify when the special land provisions apply – that is, whether they apply only to direct purchases of freehold interests or also to leasehold interests and indirect interests (such as when an investor is acquiring securities in an entity that has an interest in special land),
- ***inconsistency:*** The special land provisions differ according to the pathway to consent used:
  - in the benefit to New Zealand test, an offer of special land to the Crown is one of 21 factors that decision makers *may consider* when assessing the benefits of a potential overseas investment in sensitive land, and
  - in the special forestry test, offering special land to the Crown is a *compulsory requirement*. Consent cannot be granted to an overseas person until the Crown waives its right to the land or agrees in principle to the sale, and
- ***access:*** The special land provisions do not secure access to the special land.[75] This means that the public may not be able to access special land acquired by the Crown, and may make it difficult for the Crown to manage the special land and for the public to enjoy it.

236. In the Regulations, key concerns relate to:

- ***responsibility:*** Unlike other aspects of the consent process, the responsibility for a special land offer sits with the vendor, despite the offer process influencing whether the overseas person receives consent, and
- ***surveying and valuation:*** Surveying and valuing special land – particularly riverbeds – is a time-consuming process that can delay a sale (it can take up to six months). In practice this means that vendors often offer land to the Crown for free to speed up the consent and sale process. In many cases the cost to the Crown of obtaining a survey and valuation exceeds the financial value of the special land (although not necessarily the ownership value).

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[75] Access is considered elsewhere in the Act; however, nowhere is it a requirement for consent. Where the special land is on land being acquired under the benefit to New Zealand test, investors can propose access under the walking access benefit factor. However, this is not mandatory and decision makers cannot impose access requirements. Where special land is on land being acquired under the special forestry test, the only requirement is to maintain existing arrangements.

How could these problems be fixed?

237. We have identified three options to resolve the above problems, which could be adopted on their own or as a package.

238. **Option 1** would clarify in the Act that the special land provisions apply only where an overseas person is buying a freehold interest in special land (either directly or in clear cases of total ownership, such as through using a holding company).

239. **Option 2** would treat the special land provisions consistently in the Act by making them a requirement for consent (not merely a factor in the benefit to New Zealand test).

240. **Option 3** would establish a way to provide access (via adjoining land) to special land that is acquired by the Crown (for riverbeds and lakebeds) or put into the common marine and coastal area (for the foreshore and seabed). For example, agreement on access arrangements could be required as part of the offer negotiation.

241. **Option 4** would improve the offer process described in the Regulations by:[76]

- providing a process for special land to be offered to the Crown for free if the parties choose to do so,
- making the overseas person rather than the vendor responsible for carrying out the process of offering land to the Crown, and
- requiring special land to be valued only if the Crown rejects the offer price.

242. Table 20 assesses these options against the reform criteria.

[76] These options would also involve clarification of how the land would be acquired by the Crown and the status of the land once acquired. This would differ by type of land:

- For foreshore and seabed: rather than coming under Crown ownership, the foreshore and seabed would be transferred to the common marine and coastal area under the Marine and Coastal Area (Takutai Moana) Act 2011. (At present, the special land provisions are inconsistent with the treatment of the marine and coastal area that is governed by that Act, which does not generally provide for Crown ownership of the marine and coastal area but instead contains pathways for it to be returned to the common marine and coastal area.)
- For riverbed and lakebed: these would enter Crown ownership under the Land Act 1948 (after which the land could be administered by other parties, such as the Department of Conservation).

Table 20: Assessment of options against the reform criteria

	Option 1 – clarify that special land provisions apply to the acquisition of freehold interests only	Option 2 – make special land provisions a requirement for consent	Option 3 – establish a way to provide access to special land acquired by the Crown	Option 4 – improve the offer process
Manages the risk of overseas investment to New Zealanders' wellbeing	***Neutral*** No change in decision makers' ability to manage risks.	***Neutral*** No change in decision makers' ability to manage risks.	***Moderately positive*** Some increase in decision makers' ability to manage the risk that overseas ownership could limit access.	***Neutral*** No change in decision makers' ability to manage risks.
Supports overseas investment in productive assets	***Neutral*** No change in compliance costs.	***Neutral*** No change in compliance costs.	***Moderately negative*** May increase compliance costs.	***Strongly positive*** Substantial reduction in compliance costs.
Delivers more predictable, transparent and timely outcomes	***Moderately positive*** Greater certainty for entities acquiring less than freehold interests.	***Moderately positive*** Improves certainty.	***Neutral*** Improves certainty but may add delays.	***Strongly positive*** Substantial reduction in timeframes and increased certainty.

The Government would like your views

The Government would like your views on whether this document has accurately identified the problems, options for reform, and the effects of the options, and whether you have any alternative ideas. Please see page 18 for the full list of questions.

Farmland advertising

What currently happens?

243. Farmland must be advertised for sale on the open market before consent can be given to an overseas person to purchase it. The intent of this requirement is to ensure that New Zealanders have the opportunity to acquire, enjoy and use farmland rather than overseas persons acquiring that land through private sales, where no New Zealanders can make competing offers.

244. In the past two years, approximately 51 applications have met the farmland advertising requirement. An additional 14 applications have been granted an exemption from the requirement.

What are the problems with current law and practice?

245. The current requirement does not appear to be meeting the Act's policy objectives. This is because:

- ***the advertising requirement can be met after a conditional sale and purchase agreement has been entered into:*** Land must be genuinely available for acquisition in order to meet the requirement. However, the land may be advertised after a conditional agreement has been signed, provided the agreement allows the vendor to accept any alternative offer from a non-overseas person. This means vendors can do the minimum necessary to meet the requirement, knowing that agreements for transactions have already been signed. Buyers can also seek to influence advertising methods to minimise competing interest in farmland. This can lead to advertising that is not genuine,
- ***the minimum advertising standards are ineffective:*** Some advertising methods are outdated and ineffective (for example, a vendor can meet the requirements by placing a placard on the relevant land), and the advertising period of 20 working days is not always long enough for buyers to complete enough due diligence, particularly for high-value investments,
- ***the process lacks flexibility:*** Before consent can be granted, the advertising requirement in the Regulations must be met, or alternatively the transaction must be exempted from the requirement. There is no middle ground (for example, allowing an alternative form of advertising, better suited to the circumstances, to be undertaken, such as enabling focused advertising in cases in which there is only a small pool of potential buyers), and
- ***there is no legal guidance on when it may be appropriate to grant a discretionary exemption:*** This can make it difficult to obtain exemptions outside certain established situations, such as a boundary adjustment where there is only one plausible buyer of the land.

How could these problems be fixed?

246. We have identified two options to address the current issues relating to the farmland advertising requirement.

247. **Option 1** would strengthen the current requirement and allow greater flexibility to address situations where advertising serves little or no purpose, or the requirement is unsuitable for the assets that must be advertised. It would do this by:

- requiring advertising before a sale and purchase agreement is entered into with an overseas person (noting that the overseas person could still make an offer),
- changing the minimum advertising standards to require at least two forms of advertising, while removing a notice or placard as an acceptable form of advertising,
- making exemptions more flexible by specifying that:
  - an application for an exemption may be submitted and decided before an application for consent, and setting a fee for doing so. This would provide overseas persons with certainty about the application of the farmland advertising requirement *before* they apply for consent, and
  - exemptions may be granted subject to conditions. These conditions could include requiring an alternative mode of advertising to address situations where the requirement leads to unsuitable advertising, and
- providing guidance (either Ministerial or through clear legislative provisions) that clarifies when discretionary exemptions should be granted.

248. Not all of these changes would need to be adopted for this option to proceed. For example, the changes to minimum advertising standards and exemptions could be made without requiring advertising before a sale and purchase agreement is entered into with an overseas person.

249. **Option 2** would remove the requirement to advertise farmland (consent to acquire farmland would still be required). It is based on the assumption that:

- if a vendor wishes to test the market and receive the best offer from a competitive process, they will likely do so, or
- if they do not wish to test the market, they will likely have reasons for this. This means they will have little or no interest in effective advertising or competing offers resulting from that advertising.

250. Table 21 assesses these options against the reform criteria.

Table 21: Assessment against the reform criteria of options to address problems with the farmland advertising requirement

	Option 1 – advertise before agreement only (with enhanced exemptions)	Option 2 – remove the requirement to advertise farmland
Manages the risk of overseas investment to New Zealanders' wellbeing	***Neutral/moderately positive*** Requiring advertising to occur before a sale and purchase agreement is entered into, and changing minimum advertising standards, could better ensure that land advertised is genuinely on the market.	***Neutral/moderately negative*** Does not ensure that farmland is advertised, but not clear that the current law is leading to genuine advertising.
Supports overseas investment in productive assets	***Neutral/moderately negative*** Makes current advertising requirement more stringent, although this is somewhat mitigated by a clearer process and increased scope for exemptions.	***Moderately positive*** Removes compliance costs associated with advertising (where this would not otherwise occur) and signals greater openness to foreign investment in farmland.
More predictable, transparent and timely outcomes	***Moderately positive*** Establishes a clearer process for farmland advertising and enables greater transparency.	***Moderately positive*** Removes complexity and a process step that can delay a transaction.

The Government would like your views

The Government would like your views on whether this document has accurately identified the problems, options for reform, and the effects of the options, and whether you have any alternative ideas. Please see page 18 for the full list of questions.

Timeframes for decisions

What currently happens?

251. There are no time limits for decisions on applications for consent under the Act. While the OIO has committed to process certain applications quickly (for example, to process an application to acquire residential land through the 'commitment to reside' pathway within 10 days) and has agreed a number of key performance indicators with Ministers for different types of consent application, these are not binding.

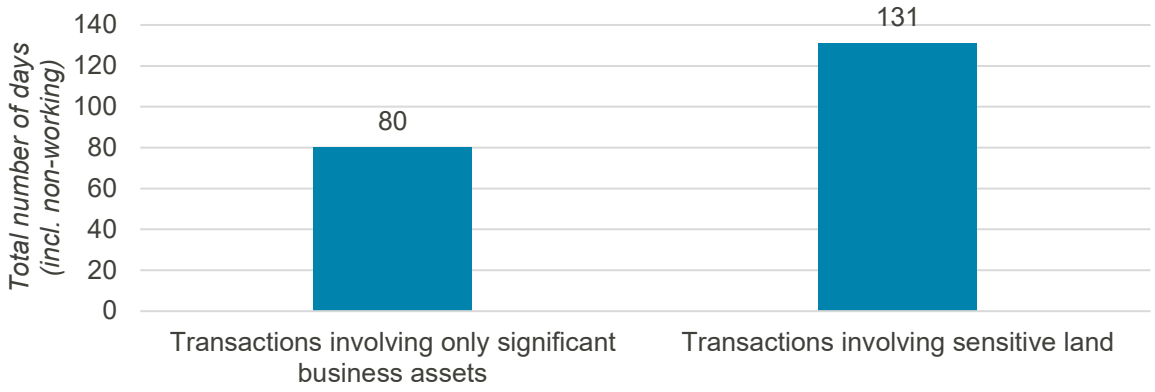
What problems are there with current law and practice?

252. OIO data suggests that it takes around 100 working days on average for an application under the Act to be processed (see Figure 10).[77] The process for assessing applications is iterative, as an overseas person applying to acquire sensitive assets may be asked to provide additional information to support a consent decision (particularly for more complex applications). This raises the following problems:

- the process is significantly longer than similar processes overseas (which generally have statutory time limits), reducing New Zealand's attractiveness to investment relative to other countries. For example, Australia generally requires decisions within 30 days, Canada generally within 45 days and France generally within two months,
- there is no certainty about processing times in advance of an application being lodged (although the OIO does provide guidance on likely processing times once an application has been accepted for processing). This reduces investors' ability to enter into contracts for purchase that are conditional on OIO approval within a reasonable period, or to otherwise plan their businesses,
- it increases costs for investors, including legal costs and delay costs (such as the cost of having 'idle' capital while an application is considered), and
- it can result in some investors submitting lower-quality applications, increasing costs for the OIO (for example, because investors are aware that they will have multiple rounds of feedback to finalise their applications).

[77] This includes periods when the OIO has sought and is waiting to receive additional information from overseas persons. Overseas persons have advised that it can take up to one year (in total) to receive a decision on applications.

Figure 10: Median number of days from an application being accepted to being approved



253. These timeframes, and the associated lack of certainty, increase the regime's regulatory burden and reduce New Zealand's attractiveness as an investment destination. They can also impose significant costs on New Zealand vendors. For example, a vendor may have to accept a lower sale price from a New Zealander to avoid uncertainty and delay, and forgo other opportunities while waiting for a prospective buyer to obtain consent.

254. These problems have two primary drivers:

- the regime's complex administration and compliance requirements (although OIO process improvements have reduced application processing timeframes). Options to address the overly complex legislative requirements have been discussed in other parts of this document, and
- the absence of statutory timeframes for decision makers, which makes the process uncertain and open-ended. The following sections discuss this issue.

How could these problems be fixed?

255. These problems may be resolved if the Act were to include deadlines for making decisions on applications. This could be done in two main ways:

- **Option 1** would impose a deadline for decisions on all applications (for example, 45 working days), with decision makers empowered to either unilaterally extend the deadline by a period of up to 30 working days or by another agreed period
- **Option 2** would introduce deadlines tailored to each of the Act's consent pathways, with decision makers similarly empowered to either unilaterally extend the timeframe by up to a prescribed period or by a period agreed to by the overseas person. The following deadlines (and extension periods) could apply:[78]
  - 60 working days for consent applications subject to a national interest or substantial harm test (if adopted), with a possible extension of up to 30 working days,

[78] Timeframes are illustrative only and could be scaled depending on the complexity of the application.

- 45 working days for consent applications subject to the benefit to New Zealand test (or the modified benefit to New Zealand test), with a possible extension of 30 working days,
- 30 working days for consent applications subject to the investor and bright-line residential tests[79] or special forestry tests, with a possible extension of 15 working days,
- 20 working days for consent applications subject only to the investor test, with a possible extension of 10 working days, and
- 10 working days for consent decisions involving only a bright-line residential test.

256. Under each option, if the timeline were not met and there had been no contact between the decision maker and the overseas person about either an extension of the deadline or a proposal to decline the investment,[80] the relevant transaction could be deemed to have received consent. This is consistent with the approach taken in Canada, which, like New Zealand, generally only provides consent to transactions deemed beneficial.[81] This approach should provide incentives for investors to submit high-quality applications (lest they be declined) and for decision makers to direct resources to assessing applications within the statutory period (lest consent be automatically granted to potentially non-beneficial transactions). Finally, if this option were adopted consideration would also be given to the OIO's resourcing.

257. These options are assessed against the reform criteria in Table 22.

The ability to extend timeframes

Allowing decision makers to extend deadlines would reduce investor certainty (relative to options where this is not possible). However, the options propose that decision makers be granted such a power, consistent with comparable international regimes – including Canada and Australia – to reduce the risk that an inability to assess complex or sensitive applications fully within the time limit could result in applications:

- receiving consent that they would not receive under the status quo, or
- being denied consent that they would otherwise receive under the status quo.

Further, while this risk could also be managed by increasing deadlines for all applications, this could increase assessment times for simple and low-risk transactions.

Accordingly we have not considered options that do not allow deadlines to be varied.

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79 That is, the commitment to reside pathway, the increased housing pathway, the incidental use pathway, and applications for exemption certificates.

80 If there were a proposal to decline an investment, this process would not be subject to the statutory deadlines.

81 Section 21(9) of the Investment Canada Act.

Table 22: Assessment against the reform criteria of options to introduce statutory deadlines

	Option 1 – 45-working-day deadline with an ability to extend	Option 2 – tailored deadlines with an ability to extend
Manages the risk of overseas investment to New Zealanders' wellbeing	***Neutral*** Time limits may reduce the ability to manage risks at margin, if a failure to make a decision by the deadline leads to an application being deemed to have received consent. This is mitigated by the ability to extend timeframes. Residual risks could be addressed through additional resourcing and process improvements within the OIO.	
Supports overseas investment in productive assets	***Moderately positive*** Commitment to faster processing signals an openness to foreign investment. The reduced risk of idle capital and alignment with overseas regimes are also expected to better support investment. Would also reduce delay costs for almost all applications (some bright-line tests may take longer as there is a risk that decision makers will work to the statutory deadline rather than seek to complete applications as quickly as possible). For applications subject to extension, the costs would be no higher than the status quo. Uncertain effect on application costs – this depends on whether the OIO must increase resourcing to comply with deadlines, which could offset savings. Risk of complex applications being declined if decision makers are unable to assess them adequately before the deadline. This is mitigated by the ability to extend timeframes by agreement with overseas persons.	***Strongly positive*** Commitment to faster processing signals an openness to foreign investment. The reduced risk of idle capital and the alignment with overseas regimes are also expected to better support investment. Would also reduce delay costs for almost all applications. For applications subject to extension, the costs would be no higher than the status quo. Uncertain effect on application costs – this depends on whether the OIO must increase resourcing to comply with deadlines, which could offset savings. Risk of complex applications being declined if decision makers are unable to assess them adequately before the deadline. This is mitigated by the ability to extend timeframes by agreement with overseas persons.
Delivers more predictable, transparent and timely outcomes	***Moderately positive*** Improves predictability and transparency, although some overseas persons may agree to vary timeframes if they think there is a risk their applications could otherwise be declined.	***Moderately/strongly positive*** Improves predictability and transparency, although some overseas persons may agree to vary timeframes if they think there is a risk their applications could otherwise be declined. Variety of deadlines is more complex.

The Government would like your views

The Government would like your views on whether this document has accurately identified the problems, options for reform, and the effects of the options, and whether you have any alternative ideas. Please see page 18 for the full list of questions.

The Government would also like your views on the following questions:

- What do you consider to be appropriate timeframes and why?
- Do you agree that consent should be deemed granted if no decision is made within the prescribed time period and, if so, why do you think that?

Sub-options: When should timeframes commence?

258. For both options there are three ways of determining when deadlines start and finish:

- ***Sub-Option A:*** The timeline would start as soon as an application was received. The decision maker would always be entitled to seek additional information if the application received were incomplete; however, it would not alter the timeline,
- ***Sub-Option B:*** The OIO would have a specified period (for example, 15 working days)[82] to determine whether additional information was required. If a determination were made within this period, the timeframe would not start until this was provided. The decision maker would still be entitled to seek additional information at a later stage; however, it would not affect the deadline. This is consistent with the Canadian regime,[83] and
- ***Sub-Option C:*** The timeframe would commence when an application was received, but be paused if additional information were required (from either the overseas person or other government agencies). This is broadly consistent with the French regime.

259. These sub-options are assessed against the reform criteria in Table 23. The assessment assumes that statutory timelines would be adopted (rather than comparing options to the status quo).

[82] Under Option 2, this time limit would be tailored to the relevant application type.

[83] Section 18(3) of the Investment Canada Act.

Table 23: Assessment against the reform criteria of sub-options for statutory deadlines

	Sub-Option A – time limits start once applications are lodged	Sub-Option B – requests for information subsequent to lodgement only affect timeframes if made within 15 days	Sub-Option C – subsequent requests for information always pause the timeline
Manages the risk of overseas investment to New Zealanders' wellbeing	***Strongly negative*** Lack of ability to extend timeframes to gather information reduces the ability to manage risks. This is particularly the case given the 'automatic' granting of consent if a timeline is not met.	***Neutral/moderately negative*** Limited ability to extend timeframes to gather information reduces the ability to manage risks. Risks mitigated by allowing up to half the total decision-making period (depending on type) to determine whether additional information is required.	***Strongly positive*** Ongoing ability to request information without effects on timelines mitigates risks.
Supports overseas investment in productive assets	***Strongly positive*** Investors have a significant degree of certainty from the moment applications are lodged. Faster processing significantly reduces costs. There is a risk that the OIO would require an increase in resourcing to comply with timeframes, resulting in increased fees that offset savings. Applications will need to be of a higher quality when lodged than currently. This would increase costs.	***Moderately/strongly positive*** After 15 days investors have a high degree of certainty about the application process. This is slightly offset by the risks of delay while additional information is sought. Applications will need to be of a higher quality when lodged than currently. This would increase costs.	***Moderately/strongly negative*** Ongoing requests for information could undermine the goal of statutory deadlines and result in no improvement relative to the status quo.
Delivers more predictable, transparent and timely outcomes	***Strongly positive*** Much more timely outcomes. Process is transparent from the time applications are lodged.	***Moderately/strongly positive*** More timely outcomes. Fully transparent process after 15 days.	***Moderately/strongly negative*** No transparency about process. Not clear that outcomes would be more timely than the status quo.

The Government would like your views

The Government would like your views on whether this document has accurately identified the problem, options for reform, and the effects of the options, and whether you have any alternative ideas. Please see page 18 for the full list of questions.

Appendix A: Terms of Reference

The Associate Minister of Finance, the Honourable David Parker, has requested that the Treasury lead a review of the Overseas Investment Act 2005 (the Act) and the associated Overseas Investment Regulations 2005. This review is to build on the Government's recent amendments to the Act to rationalise the screening regime for forestry assets and certain other profits à prendre and generally require overseas persons to obtain consent to acquire residential land.

Purpose

The review's aim, having regard to the Act's purpose "that it is a privilege for overseas persons to own or control sensitive New Zealand assets", is to:

- enable the Government to effectively manage overseas investment, while
- ensuring that the Act operates efficiently and effectively, and
- supporting overseas investment in productive assets.

Context and rationale

Open capital markets and foreign direct investment can offer a number of economic advantages, including enhanced productivity, greater competition, and stronger and more diverse international relationships. However, they can also present risks and may conflict with both our cultural identity and the view held by some New Zealanders that sensitive New Zealand assets should generally be owned and controlled by New Zealanders.

New Zealand has a number of pieces of legislation in place to mitigate such risks, including the Act. Consistent with the Act's purpose (Section 3) ("that it is a privilege for overseas persons to own or control sensitive New Zealand assets"), the Act provides Ministers with a mechanism to screen investments by overseas persons in sensitive New Zealand assets to ensure that these investments are of benefit to New Zealand.

While the Act is effective in screening investments, there is a perception among some domestic and international stakeholders (particularly the Organisation for Economic Co-Operation and Development) that it is overly restrictive and operates too slowly (particularly in relation to non-controversial transactions). For example, critiques of the Act include that:

- the application process is too complex and that both the criteria for consent and the conditions imposed after receiving consent are more onerous than necessary,
  - the level of discretion in the Act both creates unnecessary uncertainty for investors and for decision makers and can result in significant delays in decision making,
  - the Act could do more to attract investment to productive sectors of the economy, and
  - the Act is not clear enough on the grounds for which a prospective investment in sensitive New Zealand assets would be declined.

Negative perceptions may reduce New Zealand's attractiveness as a foreign investment destination, with potential costs for economic strength and resilience. Given that there was nearly $5 billion in new foreign investment between July 2016 and June 2017 and that processing times for consent applications have considerably reduced over the last 18 months, these risks do not appear to have materialised. However, they are worth monitoring and addressing in light of both: the significant stock of foreign investment in New Zealand ($103.9 billion as at 30 June 2017, including investment in property and other real estate)[84] and the fact that New Zealand receives proportionately lower levels of foreign direct investment than many other small advanced economies.[85]

There is also a counter view that the Act does not sufficiently protect New Zealand's national interest. The Act is much less developed than those in many comparable jurisdictions – including Australia and Canada – in relation to screening investments on a holistic basis to ensure that they are consistent with New Zealand's national interest. For example, under the criteria available under existing consent pathways New Zealand has limited ability to:

- screen investments in infrastructure assets with monopoly characteristics on competition grounds, or
- to consider the importance of New Zealand companies with international distribution systems to New Zealand's broader participation in global value chains.

Reviewing the Act will aim to ensure that it strikes the appropriate balance between the need for high-quality investments to be efficiently approved, against:

- the need to restrict investments that may be unproductive, unbeneficial to New Zealand, or otherwise inconsistent with New Zealand's national interest, and
- the view held by some stakeholders that New Zealanders should retain ownership and control of sensitive domestic assets and the Act's purpose "that it is a privilege for overseas persons to own or control New Zealand assets".

Objectives for the review

The review will seek to ensure that New Zealand's screening regime for overseas investment:

- provides a clear pathway for consent for investment that supports a productive, inclusive and sustainable economy and creates opportunities for regions and businesses to grow and connect internationally,
- provides appropriate protection against risks to New Zealand associated with the overseas ownership of sensitive assets, with particular consideration of whether New Zealand's national interest is sufficiently protected, and
- imposes compliance and administrative costs (as distinct from fees and other direct costs of applying for consent) that are proportionate to the risks associated with overseas investments.

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84 Stats NZ: Global New Zealand International trade, investment, and travel profile Year ended 30 June 2017.

85 Landfall strategy group: Foreign direct investment in small economies (August 2018).

Further, any proposed changes to the regime should:

- improve predictability and transparency around the process and decision making (by both Ministers, and where relevant, the Overseas Investment Office) wherever possible, and
- ensure that discretionary powers appropriately balance the need to both create certainty for investors while reserving the ability to decline investments that are not beneficial to New Zealand.

In working to achieve these objectives, the Act is to remain consistent with the Treaty of Waitangi obligations as well as our international obligations, including Free Trade Agreements and commitments at the World Trade Organisation.

Finally, if national interest considerations were to be more explicitly accounted for when screening investments following the conclusion of this review, the intention is that consent would only be refused on national interest grounds rarely, with the goal of supporting confidence in New Zealand as a foreign investment destination.

Scope

Consistent with the objectives listed above, the review will consider whether the following are appropriate:

- the definition of 'overseas persons' as it relates to bodies corporate,
- the factors underpinning the existing generic "benefits to New Zealand" test (including whether water extraction, Māori cultural values as they related to the physical and historical characteristics of the relevant sensitive land and tax residency should be among the positive and negative factors considered when assessing applications made under that test),
- the extent that any 'negative benefits' of a prospective investment can be considered under the "benefits to New Zealand" test and, if necessary, whether there needs to be additional legislative guidance on how 'benefits' and 'negative benefits' should be balanced under that test,
- the investor test, with particular regard to whether the requirements are appropriate and provide sufficient certainty to overseas persons,
- existing levels of Ministerial discretion, with particular regard to whether the appropriate balance is struck between:
  - creating certainty for overseas persons, and
  - allowing for adequate consideration of the implications of foreign direct investment on New Zealand's national interest (that is, consideration of the need for a 'national interest' test similar to those in place in Australia and Canada, and under consideration in the United Kingdom),
- the treatment of land adjoining other types of sensitive land (that is, land as described in Table 2 in Schedule 1 of the Act), and
- any minor technical amendments required to resolve unintended consequences associated with the implementation of the Phase One reforms.

Out of scope

This is not a 'first principles' review of the Act – whether the Act is required is out of scope.

Further, this review will not reconsider the Crown's right to make final decisions on consents for overseas investments in sensitive New Zealand assets, exercising its sovereignty under Article One of the Treaty of Waitangi.

The review will not revisit substantive issues associated with the recently passed Overseas Investment Amendment Act (for example, requiring purchases of residential land and forestry rights over sensitive land by overseas persons to be screened).

Constraints

The review is not intended to result in the screening of investments that are not currently screened (or those that will not be screened following the commencement of the Overseas Investment Amendment Act).

Only policies consistent with New Zealand's international obligations will be developed.

Process

Treasury will lead the review. It will be undertaken in two broad, concurrent, workstreams:

1. **a stronger OIA**, which will consider whether the Act adequately protects New Zealand's national interest, and
2. **a better and more efficient OIA**, under which all other issues within the scope of the review will be considered.

In conducting the review, Treasury will work collaboratively with other agencies and external stakeholders as appropriate. Key government agencies including the Overseas Investment Office, the Ministry of Foreign Affairs and Trade, the Ministry for Business, Innovation and Employment, New Zealand Trade and Enterprise, Te Puni Kōkiri, the Ministry for the Environment, the Office for Crown-Māori Partnership and the Department of Prime Minister and Cabinet. In addition to consultation within Government, Treasury will consult with users of the regime, Māori and iwi groups, and the general public throughout the review.

It is expected that the Government will commence consultation on options to amend the Act in the first quarter of 2019, with a view to legislating reforms by the middle of 2020.

Appendix B: Overseas jurisdictions' approaches to foreign investment screening

This section compares New Zealand's foreign investment screening regime with those of four comparable jurisdictions: Australia, Canada, the United States of America (US) and Japan.

There is no clear 'best practice' screening regime. Each jurisdiction operates a unique regime that reflects its citizens' values and principles.

A summary of these assessments is provided below. Additional detail is in Table 24.

Who is subject to screening?

This is the most consistent feature of the assessed screening regimes.

Each regime enables its government to review transactions (either pre- or post-completion) initiated by overseas persons and by non-natural persons controlled by overseas persons. Screening in each regime is generally tied to control; however, some focus on both who controls the assets and who owns them (for example, New Zealand and Canada).

What transactions are or can be subject to screening?

Investments in land

New Zealand's screening of sensitive land on the basis of area, rather than value, and inclusion of a range of land types, is unique among these jurisdictions.

The most similar regime in respect of land is Australia's, which requires all residential land and vacant commercial land to be screened before a transaction can be completed. Australia also requires investments in agricultural land to be screened, although generally only if an investor's cumulative holdings exceed $15 million (in New Zealand, each acquisition of at least five hectares of non-urban land requires consent).

Japan does not restrict foreign persons acquiring land. Canada only screens investments in land if they exceed a specific monetary threshold (C$1.5 billion for investors from countries with which Canada has free trade agreements).

The US does not restrict foreign investment in land unless the land is located at US ports or close to military installations or sensitive government facilities. This is consistent with the regime's focus on national security.

Investments in businesses and business assets

Each assessed regime allows its government to screen investments in domestic businesses and business assets. The thresholds for screening differ significantly.

New Zealand's regime is noticeable for its:

- relatively low screening threshold (generally $100 million, compared to AUD$1.1 billion for non-sensitive Australian businesses[86] and C$1.5 billion for Canadian businesses),
- lack of distinction between investments in different sectors. Canada, Australia and Japan impose different screening requirements on different types of business and different types of investor; for example, all investments in Australia's media sector must be screened and Canada imposes a low threshold for investments in cultural businesses, and
- inability to screen other investments in domestic businesses where they may pose national security risks or other risks of substantial harm. The US, Canada and Japan all have the ability to review transactions (pre- or post- completion) that raise such concerns.

How investments are screened

There are significant differences in how the assessed regimes screen investments – both in when screening is required, and in the requirements that must be met for a transaction to proceed/not be unwound.

New Zealand, Australia and Canada all generally require transactions to be screened before they can proceed. In contrast, while the scope of the US's, Japan's and Canada's national-security-focused screening mechanisms is wider than those of the other assessed regimes, consent is not normally required in these countries before a transaction can proceed.

Each regime empowers its government to unwind transactions that have not been pre-approved. This offsets some of the regulatory burden that such widely drawn regimes could impose.

In determining whether transactions will be approved, the regimes broadly apply two models: a benefit-focused model and a harm-focused model.

New Zealand and Canada (for transactions above the relevant screening thresholds) only allow consent to be granted to prospective investments assessed as being of likely benefit according to economic and cultural factors (and additional factors in New Zealand's case).

In contrast, the Australian, Japanese and US regimes only allow their governments to block transactions if they are likely to be 'harmful' in some way. Australia has broad discretion to block investments found to be "contrary to national interest", while Japan's regime is more targeted, with the government only able to block or unwind investments that pose risks to national security, the economy, public order or safety. The grounds for declining/unwinding transactions in the US are narrower still, limited to transactions found to be injurious to national security.

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86 Sensitive businesses include media; telecommunications; transport; defence and military related industries and activities; encryption and securities technologies and communications systems; and the extraction of uranium or plutonium; or the operation of nuclear facilities. Different thresholds apply to investments in such businesses.

Table 24: Comparison of foreign investment screening regimes

	New Zealand	Australia	Canada	US	Japan
Legislation	Overseas Investment Act 2005. Overseas Investment Regulations 2005.	Foreign Acquisitions and Takeovers Act 1975. Foreign Acquisitions and Takeovers Fees Impositions Act 2015. Foreign Acquisitions and Takeovers Regulations 2015.	Investment Canada Act 1985. Regulations Respecting Investment in Canada. National Security Review of Investments Regulations.	Section 721 of the Defense Protection Act of 1950 (as amended). The Committee on Foreign Investment in the United States (CFIUS) was established by Executive Order 11858 (as amended) and regulations at 31 C.F.R part 800. The CFIUS regime was recently amended by the Foreign Investment Risk Review Modernization Act of 2018.	Foreign Exchange Act. Foreign Trade Act.
Who is subject to screening?	All overseas persons are subject to screening. In general terms, that is: • an individual who is neither a New Zealand citizen nor ordinarily resident in New Zealand, • a body corporate that is incorporated outside New Zealand or is a 25% or more subsidiary of a body corporate incorporated outside New Zealand, or • any other entity (and including a partnership or trust) that is 25% or more beneficially owned or controlled by overseas persons.	Foreign persons are subject to screening under the Foreign Acquisitions and Takeovers Act. In general terms, a foreign person is: • an individual not ordinarily resident in Australia, • a corporation in which a person or two or more persons not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest (that is, at least 40%), • the trustee of a trust in which a person or two or more persons not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest, or • a foreign government.	Any individual or entity that is not a Canadian citizen or a permanent resident must notify the Canadian government or file an 'application for review' if they propose to establish a new or acquire an existing Canadian business. These requirements also apply to any entity not controlled or beneficially owned by Canadians.	All qualifying investments by 'foreign persons' are potentially subject to CFIUS review. A foreign person is: • any non-US national, non-US government or non-US entity, or • any entity over which control is exercised or exercisable by a non-US national, non-US government or non-US entity.	'Foreign investors' are subject to Japan's screening and notification requirements. Foreign investors are: • non-resident individuals, • corporations, partnerships, associations or other entities established under foreign jurisdictions or having their principal offices in foreign countries, • corporations established under Japanese law where the ratio of the sum of voting rights directly or indirectly held by those listed above is 50% or more, or • corporations, partnerships, associations or other entities in which the majority of either the officers or the representative officers are non-resident individuals.

	New Zealand	Australia	Canada	US	Japan
What transactions can be/are subjected to screening?	Consent is needed to acquire: • sensitive land (including but not limited to foreshore or seabed land, lakebeds, non-urban land and certain pieces of land adjoining other types of sensitive land), • significant business assets (generally assets of at least $100 million),[87] and • fishing quota. Consent is generally required to acquire or control 25% of the securities in an entity that has an interest in sensitive land, significant business assets or fishing quota. Consent is required to acquire an interest in an entity with an interest in sensitive land or fishing quota if the acquisition would result in that entity becoming an overseas person.	Australia has different thresholds for different types of asset and investor (for example, investors from free-trade-agreement partner countries are subject to a higher threshold than other investors). Investments by foreign persons from free-trade-agreement partner companies in sensitive businesses must be screened above an AUD$261 million threshold, and non-sensitive businesses above an AUD$1,134 million threshold. Investments by non-free-trade-agreement partners in businesses are all subject to an AUD$261 million screening threshold. Separate monetary thresholds also apply for investments in agribusiness, the media sector and different types of commercial land. All investments in residential land are screened. Investments by foreign government investors are always screened.	Any investment in a Canadian business can be screened on national security grounds. Different thresholds apply to determine whether an acquisition of a Canadian business by non-Canadians is required to undergo economic and/or cultural screening: • a C$1.5 billion threshold for nationals of a specified free trade party, • a C$1 billion threshold for nationals of World Trade Organization member states, and • generally C$5 million for another category of investor. Investments by state-owned enterprises of World Trade Organization members are subject to a C$416 million threshold. If a business being acquired is a 'cultural business' (broadly involving the publication, distribution or sale of books, films, videos or music), a C$5 million threshold applies for direct investments and a C$50 million threshold applies for indirect investments. Transactions in land are generally not screened.	The US has voluntary screening of transactions that could result in overseas entities gaining control of US businesses. It also has voluntary screening of certain real estate transactions, including property located at US ports or in close proximity to military installations or sensitive government facilities. Other types of real estate transaction are not screened. CFIUS can review transactions not voluntarily screened. Mandatory notification for all acquisitions of critical infrastructure or critical technology companies by foreign companies with 'substantial' foreign-government ownership. The Foreign Investment Risk Review Modernization Act will, upon commencement, expand the regime to include investments in real estate located in proximity to sensitive government facilities, and minority investments that might not provide control but do provide access to sensitive information or technology (such as dual-use technology).	Any foreign investor making inward direct investment must file either a prior notification or a post-closing report. Prior notification is required if the investment is: • in certain industries including: weapons, aircraft, rocket and nuclear material manufacture; and electricity, gas, communications and forestry, • by a national of a country that is not on the list of permitted countries, or • by Iran-related parties in a Japanese company engaging in nuclear-related business. If prior notification is required, the transaction cannot proceed until approval is granted. The government can still review transactions where only a post-closing report was required to be filed; however, the government must have evidence that the relevant investment was likely to cause substantial harm.

[87] Higher thresholds exist for investors from certain jurisdictions, consistent with New Zealand's international obligations.

	New Zealand	Australia	Canada	US	Japan
How is screening completed?	Tests vary depending on the type of asset being acquired: • ***significant business assets:*** An overseas person must satisfy the investor test (broadly a good character requirement), • ***sensitive land*** (that is not residential): An overseas person must generally satisfy the investor test and the benefit to New Zealand test.[88] The benefit to New Zealand test is against up to 21 economic, environmental, social and cultural factors to determine whether an investment is likely to benefit New Zealand. In respect of non-urban land greater than five hectares, the likely benefit must be substantial and identifiable, and • ***fisheries quota:*** Criteria under the Fisheries Act 1996 are similar to the requirements for purchases of sensitive land.	The Treasurer (or a delegate) can prevent a transaction proceeding if it is contrary to the 'national interest', or let it proceed only on the basis of conditions. The Treasurer can require an interest to be disposed. National interest is not defined but the government provides guidance on the types of factor considered when completing an assessment.	Investments in non-cultural businesses are assessed for their 'net benefits' to Canada. The assessments are against predominantly economic factors. The net benefits test is applied to investments in cultural businesses, with consideration given to their effects on promoting Canadian content, cultural participation, active citizenship and civic participation, and strengthening connections among Canadians. Both cultural and economic criteria apply if the business is of sufficient value to trigger an assessment under the 'economic' net benefits test. The Canadian government can review transactions on the grounds of national security. For investments not subject to either net benefits test, a review can only be on national security grounds.	CFIUS evaluates whether and to what extent transactions could impair national security. If a transaction could pose a risk to national security, CFIUS may impose conditions to address that risk. Only the President may suspend or prohibit the transaction, or unwind the transaction. The President may exercise this power if the following two findings are made: • there is credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair national security, and • other law does not, in the President's view, provide adequate and appropriate authority to protect national security.	Relevant ministers may order the suspension, amendment or disposal of an investment if it is likely to: • impair national security, • impede public order, • hamper the protection of public safety, or • have a significant adverse effect on the smooth management of the economy.

[88] Different requirements can apply to the purchase of sensitive land for forestry activities. A fuller description of New Zealand's consent requirements is included on pages 11-14.

Appendix C: Glossary

Term	Definition
Asset	A resource controlled by a person or enterprise (an 'investor'), or group of investors, from which future economic benefits are expected to flow to the investor.
Associate	In the Overseas Investment Act, a person (A) is an associate of another person (B) in relation to an overseas investment or any other matter if: • A is controlled by B or is subject to B's direction, • A is B's agent, trustee or representative, or acts in any way on behalf of B, or is subject to B's direction, control or influence, in relation to the overseas investment or the other matter, • A acts jointly or in concert with B in relation to the overseas investment or the other matter, • A participates in the overseas investment or the other matter as a consequence of any arrangement or understanding with B, or • A would come within any of the paragraphs above if the reference to B in any of those paragraphs were instead a reference to another associate of B. Also, if A is an associate of B, B is an associate of A. Under the Act, an associate of an overseas person also requires consent to acquire sensitive assets.
Beneficial ownership	A beneficial owner is a person who has specific property rights associated with an asset (such as the right to receive the income that flows from an asset) even though the legal title of the asset belongs to another person. An example is the beneficiary of a trust.
Bodies corporate	Organisations with their own legal identities, separate from their members, owners and governing bodies. They include, but are not limited to, companies registered under the Companies Act 1993.
Bright-line rule (or bright-line test)	A clearly defined rule or standard, composed of objective factors, that leaves little or no room for varying interpretations or judgements on how it should be applied. The purpose of a bright-line rule is to produce predictable and consistent results in its application.
Capital	Wealth in the form of money or other assets owned by a person or enterprise or available for a purpose, such as buying assets.
CFIUS	The Committee on Foreign Investment in the United States. An interagency committee authorised to review certain transactions involving foreign investment in the United States.
Class (of securities)	A body corporate (or other entity) may have a number of different instruments conferring a degree of ownership and/or control of that entity on the security holder. In such cases, each type of instrument constitutes a 'class' of security. For example, ordinary shares could be one class of security in an entity, and preference shares another.

Term	Definition
Class exemption	An exemption for a class of persons or transactions from consent requirements under the Overseas Investment Act. For example, foreign governments can acquire residential land for diplomatic premises without consent.
Classes (of land)	In the context of this document, the different types of sensitive land that exist in the Overseas Investment Act – for example, residential land is a separate class of land from non-urban land.
Consent	In the context of this document, approval for an overseas person to acquire an interest in a sensitive New Zealand asset under the Overseas Investment Act.
Control threshold	In the context of this reform, an investor's cumulative stake in a class of securities issued by another entity. The thresholds used (25, 50, 75 and 90 per cent) reflect the fact that holding that percentage of another entity grants the investor an additional ability to control that entity's operation (relative to their prior holding).
Counterfactual	In the context of this document, what is likely to happen if an overseas investment does not proceed. The counterfactual is used to determine whether a proposed investment is likely to be of benefit to New Zealand. The scenario where the overseas investment does proceed is compared to a scenario where the overseas investment does not proceed (the counterfactual).
Decision maker	The Minister, unless delegated to the Overseas Investment Office.
Dual-use technology	Technology with both civilian and military applications.
Financial/Physical capital	The things that make up a country's physical and financial assets (such as houses, roads, buildings, hospitals, factories, equipment and vehicles) and have a direct role in supporting incomes and material living conditions. It is one of the four capitals underpinning the Living Standards Framework.
Fishing quota	A category of sensitive asset under the Overseas Investment Act. It includes interests in a provisional catch history, quota or annual catch entitlement under the Fisheries Act 1996.
Foreign direct investment	An investment in the form of a controlling ownership of a business in one country by an entity based in another country.
Foreign Investment Risk Review Modernization Act	A piece of legislation passed in the United States in 2018 with the objective of closing perceived gaps in its foreign investment review regime particularly related to access to sensitive information and technology held by US businesses.
Forestry rights	A type of interest in land that gives rights to 'establish, maintain and harvest' a crop of trees on land, or to 'maintain and harvest' a crop of trees on land. For the purposes of the Act, the term 'forestry rights' also includes profits à prendre that relate to taking timber from a forest. Forestry rights can also include associated rights to access the land and to construct buildings and other facilities on the land.
Four capitals	The natural capital, human capital, social capital and financial/physical capital that underpin the New Zealand Treasury's Living Standards Framework.

Term	Definition
Freehold	A freehold estate in land is the strongest form of interest in land that a private investor can hold, and is commonly thought of as outright ownership of land. The owner of a freehold estate can grant a lease or mortgage over the land, for example.
GDP	Gross domestic product. A measure of the value of economic production in the economy.
Greenfield investment	A type of investment where capital is used to create a new physical facility in a location where there are currently no facilities.
Human capital	The things that enable people to participate fully in work, study and recreation, and in society more broadly (that is, people's skills, knowledge and physical and mental health). It is one of the four capitals underpinning the Living Standards Framework.
Interest in land	A person with an interest in land has a set of property rights in relation to a defined area of land, which give them a degree of control over that land. Freehold estates, leasehold interests, profits à prendre, forestry rights and mortgages (charges) are all different types of 'interest in land'.
Investor	Someone who has invested their money in (bought an interest in) an asset.
IWC	Individual with control. The individual(s) who has an ownership or control interest in an ROP of 25 per cent or more, the member or members of the ROP's governing body, or the individual or body of individuals who the Minister considers has this control of the ROP.
Lessee	A person who holds the lease of an asset, sometimes called a tenant.
Lessor	A person who grants the lease of an asset, sometimes called a landlord.
Living Standards Framework	A framework developed by the New Zealand Treasury, drawing on analysis completed by the OECD, to help analyse and measure the effects of government policies on intergenerational wellbeing. The framework is centred on understanding the effects of policy change on the 'four capitals' – natural capital, human capital, social capital and financial/physical capital.
Minister	Under the Act, either the Minister of Finance alone, or the Minister of Finance with the Minister for Land Information or the Minister of Fisheries, makes decisions. For simplicity, this document refers to just the 'Minister'. The Ministers may delegate their responsibility for decision making under the Act to the Overseas Investment Office.
Ministerial Directive Letter	A letter from the Minister that sets out directions the OIO must follow. It covers things like the Government's general policy approach to overseas investment in sensitive assets.
Natural capital	All aspects of the natural environment needed to support life and human activity. Natural capital includes land, soil, water, plants and animals, as well as minerals and energy resources. It is one of the four capitals underpinning the Living Standards Framework.
Natural person	An individual human being.

Term	Definition
New Zealand asset	An asset located in New Zealand.
Non-natural person	An entity that has its own legal personality but is not an individual human being (for example, a body corporate).
OECD	The Organisation for Economic Co-operation and Development. An international organisation with a mission to promote policies that will improve economic and social wellbeing around the world.
OIO	Overseas Investment Office. The agency responsible for assessing applications for consent to acquire sensitive New Zealand assets.
Ordinarily resident in New Zealand	In respect of sensitive assets other than residential land, a person is ordinarily resident in New Zealand if they: • hold a residence class visa under the Immigration Act 2009, and • either are: – domiciled in New Zealand, or – residing in New Zealand with the intention of residing here indefinitely, and have done for the immediately preceding 12 months. In respect of residential land, a person is ordinarily resident in New Zealand if they: • hold a residence class visa under the Immigration Act 2009, • have been living in New Zealand for at least the immediately preceding 12 months, • are tax resident in New Zealand, and • have been present in New Zealand for 183 days or more in total in the immediately preceding 12 months.
Overseas person	A natural or non-natural person that generally requires consent to acquire a sensitive asset. In general terms, an overseas person is: • an individual who is neither a New Zealand citizen nor ordinarily resident in New Zealand, • a body corporate that is incorporated outside New Zealand or is a 25 per cent or more subsidiary of a body corporate incorporated outside New Zealand, or • a body corporate or another entity (such as a partnership or trust) that is 25 per cent or more beneficially owned or controlled by overseas persons.
Portfolio investor	An entity that obtains a significant minority interest (that is, generally less than 10 per cent) in a body corporate, investment fund or individual project but that has no, or a limited, ability to influence any material control over that entity. As it has no controlling interest and long-term returns are generally the priority, its investments are deemed passive investments.
Profit à prendre	A type of interest in land that confers a right to take part of another's land. Things that are part of the land, and capable of being owned, may be the subject of a profit à prendre. Examples of profits à prendre are rights to cut and remove timber or flax and remove parts of the soil.

Term	Definition
Residence class visa	A visa granted under the Immigration Act 2009 that allows individuals to live, work and study in New Zealand permanently. It includes family visa categories such as partner visas, Skilled Migrant visas and Residence from Work visas.
ROP	Relevant overseas person. The person making an overseas investment, as determined by the decision maker, irrespective of whether they are an overseas person or an 'associate' of an overseas person. It also includes any associates of the person making the investment.
Securities	In this document, 'security' has the same meaning as in the Act. In general, a security is a fungible financial instrument that holds some type of monetary value. It generally represents an ownership or control position in an entity (for example, as shares in a body corporate).
Sensitive asset	A New Zealand asset that broadly includes sensitive land (such as residential land), significant business assets (generally those worth at least $100 million) and fishing quota. Overseas persons generally require consent under the Overseas Investment Act to acquire interests in these assets.
Social capital	The norms and values that underpin society. It includes trust, the rule of law, the Crown-Māori relationship, cultural identity and the connections between people and communities. It is one of the four capitals underpinning the Living Standards Framework.
Substantial holding	An interest in a class of securities equal to at least five per cent of the total number of that class of securities. For example, if a class of securities has 100 securities, owning five securities in that class would be a 'substantial holding'.
Tipping point	In the context of this reform, a transaction that results in a person becoming an 'overseas person' for the purposes of the Overseas Investment Act.
Wāhi tapu	A sacred place to Māori.
Wāhi tūpuna	A place important to Māori for its ancestral significance and associated cultural and traditional values.
World Trade Organization	An intergovernmental organisation that is concerned with the regulation of international trade between nations.