Overseas Investment Act Reform Phase Two: Questions and Answers

This document outlines questions and answers on the changes being made as part of the second phase of reform to the Overseas Investment Act 2005 (the Act).

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Strengthening how the Act manages risk

How will New Zealand's national interests be protected?

The Act currently provides the Government with limited ability to block transactions that are contrary to New Zealand's national security or other core national interests. This is the case for transactions ordinarily screened under the Act, as well as transactions in other strategically important assets that are currently not subject to review.

Two new powers are being introduced to ensure New Zealand's national interest can be protected. These will apply to all overseas investors, irrespective of where the investment is from:

National interest test

A national interest test, similar to that which underpins Australia's foreign investment screening regime, will serve as a 'backstop' tool to manage significant risks associated with transactions already screened under the Act. It will be used rarely and only where necessary to protect New Zealand's core national interests.

Applying the test means that Ministers can consider the potential risks of a transaction to New Zealand's national interest when deciding whether or not to grant consent. If a transaction is determined to be contrary to the national interest, consent may be declined, or conditions imposed to mitigate any risks.

This test will always apply to investments that warrant greater scrutiny:

- where a foreign government or its associates would hold a 10 per cent or greater interest in the asset,
- investments that are found to present national security risks, and
- investments in certain specified strategically important industries and high-risk critical national infrastructure. That is:
    - significant ports and airports
    - electricity generation and distribution businesses
    - water infrastructure (broadly, drinking water, waste water, storm water networks, and irrigation schemes)
    - telecommunications infrastructure
    - media entities that have an impact on New Zealand's media plurality
    - entities with access to, or control over, dual-use or military technology
    - critical direct suppliers to the New Zealand Defence Force, Government Communications Security Bureau and the New Zealand Security Intelligence Service, and

- systemically-important financial institutions and market infrastructure (for example, payments systems).

In rare cases, the Government could apply the national interest test to other investments that pose material risks. This would require the agreement of a senior Minister and, if a decision was taken to apply the test, investors would be notified as soon as possible.

Power to call in transactions involving strategically important assets

To manage risks associated with transactions in strategically important assets not currently subject to screening, the Government will introduce a new national security and public order call in power. This will enable transactions involving strategically important industries and high-risk critical national infrastructure that the national interest test will always apply to, with the exclusion of irrigation schemes, and the addition of transactions that grant access to sensitive data (for example, New Zealanders' sensitive personal information), to be called in for screening. Those found to pose risks to national security or public order can then be blocked, have conditions imposed, or where relevant, be required to be unwound.

Because this power will apply to transactions not ordinarily subject to screening, there will be new notification requirements. It will be mandatory to notify the government of transactions involving military or dual-use technology, or critical direct suppliers to defence or security services, and receive clearance prior to the transaction proceeding.

For other transactions in scope of the power, investors can choose to notify the government if they wish. To incentivise notification, the government cannot take action in the future regarding transactions that are notified and are found to not pose any risk (unless the investor provides a notification that is incomplete or inaccurate, or breaches an undertaking or condition of notification).

What steps is the Government taking to protect farmland?

Farmland is of significant economic and cultural importance to New Zealand. For this reason, the Ministerial Directive Letter already requires the benefits from overseas investments in rural land to show greater benefit to New Zealand, by adding something substantially new or creating additional value to our economy.

The Government has agreed to embed the current requirements in the Ministerial Directive Letter, as they apply to farm land, into the Act itself. By embedding these requirements, the Government is ensuring that future governments will not be able to change them without Parliament's consent.

How are the powers of the Overseas Investment Office (OIO) being strengthened so it can more effectively take action against non-compliant investors?

Stronger enforcement powers will improve the ability of the OIO to take action against investors who do not comply with the Act. Changes include:

- Enabling the OIO to accept enforceable undertakings from investors who have breached the Act. Undertakings would be directly enforceable in court.

- Increasing and splitting fixed civil penalty levels depending on whether an investor is a corporate or individual. The current maximum fixed civil penalty is $300,000. The level for individuals will be increased to a maximum of $500,000. The level for corporates will be increased to a maximum of $10 million.
- Making explicit the power of the OIO to seek injunctive relief – in particular, that urgent orders may be sought from the courts which require an investor to take (or not take) certain steps.

What changes are being made to ensure Māori cultural values are taken into account?

Currently, the Act allows decision makers to consider whether applications include adequate mechanisms for protecting or enhancing historic heritage, which includes sites of significance to Māori (such as wāhi tapu). A significant number of stakeholders considered that the Act should do more to recognise Māori cultural values when assessing applications for consent.

As a result, the Act will make it explicit that an investor's plans to protect wāhi tūpuna, wāhi tapu areas and Māori reservations, and support access across land for the purposes of stewardship of historic heritage or a natural resource, can be favourably taken into account when making decisions on consent.

Simplifying the regime and cutting red tape

How is the Government making it simpler for productive investments?

By removing unnecessary red tape we are making it easier to invest by:

- Ensuring the investor test focuses on material risks: investors will be required to provide less information about low level risks
- Simplifying the benefits test
- Imposing timeframes on decision making which will give investors certainty
- Removing screening requirements for transactions that pose little to no risk (for example, leases under ten years and transactions involving companies that are majority owned and controlled by New Zealanders)

How is the investor test being simplified?

The investor test must generally be satisfied to purchase sensitive New Zealand assets. It assesses an investor's character and capability to best ensure that their investment will benefit New Zealand.

Currently, the investor test requires investors to provide a large amount of information, which is costly and time-consuming for both investors and the OIO. It also tests investors we are not concerned about (such as New Zealanders, and those who have previously passed the test). At the same time, the test does not directly apply to corporate entities.

The investor test will be simplified to better target material risks that may be posed by investors. This should reduce the amount of information that investors need to provide, without compromising the government's ability to protect New Zealanders.

Key changes include replacing the good character test with factors that decision makers may take into account:

- convictions for offences in which the overseas person has been sentenced to imprisonment for a term of five years or more, or, at any time in the preceding ten years has been convicted of an offence for which they have been sentenced to imprisonment for a term of twelve months or more,
- civil contraventions punished by pecuniary penalties, or enforceable undertakings entered into, within the last 10 years,
- allegations (of the same level of offending or contravention), where formal proceedings have commenced.

Compliance costs will be further reduced in two important ways. New Zealanders will no longer have to satisfy the test at all, and repeat investors will only have to satisfy the test once (unless there has been a significant change in their circumstances).

Will corporate character be assessed?

Currently corporate character is considered only where there are offences or contraventions by entities in which an individual investor has a more than 25 per cent ownership or control interest. However, this does not always allow the government to consider the character of the right entities, or to do so in the most straightforward way.

As a result of this review, decision makers will be able to explicitly consider offences and contraventions by, and allegations against, the corporate entity with substantive control over the investment.

How will the benefits test be simplified?

The benefit to New Zealand test is a requirement for consent for investments in sensitive land and (in a slightly modified form) fishing quota. It aims to ensure that investments in these assets will benefit New Zealand. However, the test is quite complex and highly theoretical which increases costs for investors and the OIO. Changes to the benefits test include:

- replacing the 21 different factors with fewer, broader factors that encompass the range of benefits that can currently be recognised,
- clarifying that only positive impacts may be considered under each factor (with the exception of extraction of water for water bottling where both the positive and negative impacts of such investments on water quality and sustainability may be considered),
- removing the narrow requirement for benefits in non-urban land over five hectares to be 'substantial and identifiable', and replacing it with a proportionate approach where the benefits to obtain an interest in any land must be proportional to the land's sensitivity and the interest being acquired in it (as noted above, the changes will also embed the current requirement for overseas investments in farm land to demonstrate a substantial point of difference); and

- removing the theoretical nature of the test, by requiring benefits to be measured relative to the current state of the sensitive land and the activity on it.

The benefits test will also make explicit that an investor's plans to protect wāhi tūpuna, wāhi tapu areas and Māori reservations, and support access to land for the purposes of stewardship of historic heritage or a natural resource, can be taken into account when making decisions on consent.

How will water bottling investments be screened?

Where an application to acquire sensitive land involves extracting water for water bottling, the changes will enable decision makers to consider both the positive and negative impacts of such investments on water quality and sustainability, as part of the benefits test.

This will provide a new mechanism, in addition to the Resource Management Act 1991, for considering the environmental effects of bulk water extraction.

During public consultation, some submitters suggested making water a new class of sensitive asset subject to screening under the Act. This option has not been adopted as it would raise issues of consistency with New Zealand's international obligations.

The Government is still considering the issue of a royalty on exports of bottled water. This work is progressing separately from Overseas Investment Act reform.

What are the new timeframes for decision making?

Decision makers are not currently subject to any statutory timeframes for reviewing applications made under the Act. This is out of step with global best practice. Investor feedback was that the most significant problem with the Act is uncertain and lengthy timeframes to process applications.

As a result of this review, timeframes will be introduced across the Act and tailored to each type of application, reflecting the different levels of complexity that apply to the purchase of different asset types (for example, an investment in a significant business asset will have a different timeframe to investments in sensitive land). Specific timeframes will be determined in coming months and will be set out in regulations.

The OIO will have an initial period for reviewing an application (and determine whether further information is required) before accepting it. It will also be able to extend a timeframe once, either for a prescribed period or an alternate period that is agreed with the applicant.

What transactions are being removed from the screening requirements?

There are some cases where screening is unnecessary and the compliance costs are disproportionate to the (minimal) risks being managed. Recognising this, the following types of transactions will no longer be screened:

- Leases and other less than freehold interests over sensitive land of less than 10 years (excluding leases over residential land, where the three year limit will continue to apply)
- Transactions that do not materially impact on the ownership or control of sensitive assets, such as small increases in an existing shareholding, and

- The acquisition of all land listed in Table 2 of Schedule 1 of the Act, with the exception of land adjoining the foreshore, lakebed, conservation land and certain regional parks, and some land significant to Māori.

How will the Act deal with majority New Zealand owned and controlled companies?

The Act currently screens a range of fundamentally New Zealand entities, despite these not being the intended targets of the Act. To better focus the Act on transactions that matter, the Government will:

- Remove KiwiSaver funds and listed entities that are majority owned and wholly controlled by New Zealanders from the Act; and
- Allow non-listed entities and managed investment schemes that are majority owned and wholly controlled by New Zealanders, do not have significant foreign government backing, and have a record of compliance with New Zealand's and foreign laws, to apply for an exemption from the Act.