Hon Grant Robertson
MP for Wellington Central
Deputy Prime Minister
Minister of Finance
Minister for Infrastructure
Minister for Sport and Recreation
Minister for Racing

24 November 2021

Gaye Searancke
Chief Executive
Land Information New Zealand
Private Box 5501
WELLINGTON 6145

Dear Ms Searancke

Ministerial Directive Letter

1. This Ministerial Directive Letter is made pursuant to section 34 of the Overseas Investment Act 2005 (the Act). It directs you, as the Regulator, on:
    a. the Government's general policy approach to overseas investment;
    b. the terms of conditions of consent;
    c. monitoring conditions of consent;
    d. other matters relating to the Regulator's functions, powers and duties, including:
        i. particulars on the implementation of the Benefits to New Zealand test and investor test,
        ii. statutory time frames, the fees review and exemptions,
        iii. the national interest test, national security and public order call-in power, and
        iv. the level of monitoring by the Regulator of call in transactions that are not notified.

2. The Minister of Finance, Minister for Oceans and Fisheries, and Minister for Land Information intend from time to time to delegate powers and functions to the Regulator by separate instrument.

3. The terms used in this letter have the meaning given to them in the Act, unless otherwise specified.

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4. References to the Act and the Regulations in this letter refer to the Overseas Investment Act 2005 and the Overseas Investment Regulations 2005 (respectively) on and from 24 November 2021 (being the date this letter comes into effect), including any amendments after that date.

5. References to sections or regulations refer to sections of the Act or regulations in the Regulations unless provided otherwise.

Government policy towards overseas investment

6. New Zealand needs productive overseas investment. Advantages include better access to markets, technology and capital, and, as a result, a more productive economy. International evidence suggests that it can help domestic firms to adopt up-to-date technologies and processes, transfer new expertise and skills into the country being invested in, access distribution networks and markets that would otherwise be unavailable, and participate in global value chains.

7. However, overseas control or ownership of sensitive assets can result in some risk (such as opportunities for espionage, sabotage, or data theft). This can run contrary to the view that there is inherent value in New Zealand ownership of our most sensitive assets.

8. The Overseas Investment Amendment Act 2018, Overseas Investment (Urgent Measures) Amendment Act 2020, and Overseas Investment Amendment Act 2021 balance these competing tensions by ensuring that New Zealand attracts productive investment, while also ensuring the government has the tools to manage risks associated with that investment.

9. The statutory regime is calibrated to reflect this balance by providing more oversight and discretion in areas we see as posing the most risk (for example, investments automatically subject to the national interest test), and a more proportionate approach to the vast majority of transactions that will support New Zealanders' living standards and wellbeing (for example, investments in non-strategically important businesses).

10. The Government expects regulatory efforts to be allocated to ensure we are concentrating our limited resources on those transactions most likely to pose risks. Accordingly, we expect resources to be focused on transactions involving farm land, posing national security, public order, or other national interest risks, and proportionately less on others. This expectation is also reflected in the relevant statutory time frames.

Investor Test

11. The new investor test, which came into force on 22 March 2021, is simplified and more targeted than the previous test. It narrows the scope so that only serious matters can be considered, does not require repeat investors to satisfy the test for each investment they make, and allows investors to submit an application under the standalone test, in advance of their application. [1]

Changes in scope

12. The changes which have been in force for almost six months now, that narrowed the matters that can be considered under the investor test, have resulted in meaningful time savings by ensuring that the test focuses on significant risks. We expect that this test will continue to become more efficient as it has time to embed.

Repeat and standalone test

13. The standalone investor test means that an investor, or group of investors, can apply to be assessed under the investor test separate from a consent application. This provides greater flexibility to investors, particularly in terms of timing. Some investors may wish to be approved ahead of a consent application. For example, if the investment is likely to be time-sensitive once the substantive application is submitted or having already met the investor test gives them an advantage. Investors may also want to check that they meet the investor test before committing to a full application process.

14. Repeat investors are able to go through a streamlined 'repeat investor test' process when making new investments.[2] This will reduce compliance costs by ensuring that the test only needs to be carried out in full once, insofar as the information remains the same. As with the standalone test, it will allow more timely considerations of applications.

15. Investors are required to complete a statutory declaration when lodging an application that relies on repeat or standalone investor test. This declaration must verify whether there has been any change in the extent to which the investor test factors are established since the test was satisfied. In order to ensure these changes allow more timely consideration of applications, I expect this statutory declaration to be generally held at face value – that is, to avoid investigations to verify this information, unless there are valid reasons to do so.

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[1] Section 29A(1) outlines that a person may apply at any time for an assessment of whether the person meets the investor test. This test is referred to in this letter as the 'standalone investor test'.

[2] Sections 29A(2) to (5) outline the requirements that apply to a person if the investor test has to be met in respect of particular overseas investment, and a person has previously met the investor test. This test is referred to in this letter as the 'repeat investor test'.

Benefit to New Zealand test

General approach

16. Consistent with the Government's objective of streamlining the consent process for low risk investments, the statutory regime has simplified the benefit to New Zealand test by narrowing the number of factors, clarifying that the test is positively framed, and better providing for consideration of Māori cultural values. It also now expressly requires the benefits offered to be proportionate. Reducing the number of factors is not intended to narrow the types of benefits that can be considered, but is intended to ensure a more holistic approach is taken to determining whether the test is satisfied – both by prospective investors in their applications and by the Regulator in its assessment.

17. Investors considered that the Act did not appropriately recognise the benefit of market liquidity. Investors need confidence in their ability to realise investments and a lack of confidence may have served as a barrier to investors – foreign and domestic – moving capital into what they considered to be more productive domestic opportunities, such as build-to-rent developments.

18. The Act now makes explicit that the "reduced risk of illiquid assets" can be considered under the benefit to New Zealand test. This means that an overseas person acquiring an asset would benefit New Zealand by ensuring there is a purchaser for assets that might otherwise be stranded. For example, it may apply where an overseas person is purchasing an existing build-to-rent development, and that purchase would better ensure the asset remains liquid.

19. This consideration is more likely to be relevant to large assets that cannot be sold in parts, or assets that require specialisation to own, control or operate. These assets are less likely to have prospective New Zealand purchasers so risks of illiquidity will be heightened.

20. I consider it important to minimise the number of stranded assets. This benefit will do that as well as increasing market liquidity and, among other things, support greater appetite for international capital investment in New Zealand.

Farm land

21. Farm land has a special importance to New Zealand. It has significant economic and cultural value. It is central to our economy, and our farmers are among the world's most capable. This means it is a special privilege for overseas persons to own or control farm land. In 2017, the Government issued a Ministerial directive letter, which included a rural land directive raising the bar for overseas investments in rural land. The new farm land test in the Act replaces that previous directive.

22. The definition of farm land in the Act is necessarily broad. As a result, there will be instances where land that is not productive as farm land is captured within this definition. Restricting investments in that land is not our intention. The Act allows decision-makers to apply the ordinary benefits test if the land in question is not productive for farming, and is likely to be promptly used for commercial, industrial, or large residential developments.[3] For example, it may not be appropriate to apply the test to land used for temporary grazing that is not otherwise suitable, or used, for agricultural purposes.

Ensuring that farm land is advertised to New Zealanders

23. The Act requires farm land to be advertised for sale on the open market before the transaction is entered into, and before consent can be given to an overseas person to obtain an interest in it.[4] Recognising that there might be good reasons not to advertise in some cases, the Act also allows the decision-maker to exempt investments from the requirement where it is necessary, appropriate or desirable to do so.[5]

24. It is not possible to describe every instance where this exemption making power may be exercised, so the language of this power is intentionally broad. However, to aid swift advice and decision-making, I have included some examples of circumstances where I consider an exemption would be appropriate in the Annex (including what the appropriate exemption would be).

Intention to reside in New Zealand indefinitely

25. Under section 16(1)(c)(i) of the Act, overseas persons intending to reside in New Zealand indefinitely are not required to show that their investment in sensitive land is likely to benefit New Zealand. This supports migrants in the process of moving to New Zealand to make New Zealand their home and make a positive contribution to society.

26. An intention to reside in New Zealand indefinitely must involve a definite plan and accompanying actions. In determining whether a person is intending to reside indefinitely, the Regulator must consider any active steps that have been taken by the investor to actually reside in New Zealand.

27. In order to meet the intention to reside in New Zealand criterion in section 16(1)(c)(i), the Government considers the overseas person will generally:

    a. hold a residence class visa or an entrepreneur work visa, and

[3] Section 16A(1D)(c).

[4] Section 16(1)(f).

[5] Section 20.

b. show actions and plans, with supporting evidence, consistent with an intent to reside in New Zealand within 12 months.

28. The Regulator may impose as a condition of consent a time limit within which the overseas person must move to New Zealand and become ordinarily resident. The Government would generally expect the overseas person to move to New Zealand within 12 months from the date of consent and become ordinarily resident within 2 years[6] from the date of consent.

Time frames for decisions

29. New statutory time frames have been introduced for application decisions under the Act, which are specified in the Regulations. This brings New Zealand into line with other jurisdictions and provides greater certainty for investors. The time frames are ambitious and will require assessments to be completed more quickly than they previously would. The time frames will therefore provide a meaningful improvement to investors and enhance New Zealand's attractiveness to high quality foreign investment. If it becomes apparent after a reasonable amount of time that time frames are not working as intended, it may be appropriate to review them.

30. The time frames reflect the relative levels of analysis that I expect for each test under the new regime, and the overarching intent around appropriately prioritising effort. The Government presumes that, without extraordinary evidence to the contrary, all transactions other than those involving farm land, strategically important businesses, investment by non-New Zealand government investors, or those that are otherwise subject to the national interest test are lower risk and should have relatively lower resources dedicated to processing them.

31. I acknowledge that it may be difficult for the Regulator to meet these time frames in all instances during the transitional 12 month bedding-in period, given the Regulator is operationalising significant changes to the Act at the same time as time frames commence. I expect that performance will improve and that, beyond that time, statutory time frames will be consistently met.

32. For applications requiring Ministerial decisions, I expect you to provide timely advice to the relevant Minister so we can make decisions within the allotted 20 working day time frame.

[6] A longer period may be considered for migrants holding an entrepreneur work visa.

Applications where the investor has met the standalone investor test

33. We have not included a separate statutory time frame for applications where the investor test has already been satisfied, either through the repeat or standalone test. This reflects advice that a uniform discount on time frames across all application types, which is the approach taken for fees, is not possible, given the investor test would normally be completed in parallel to other work.

34. I still expect that the majority of the applications for appropriate pathways where the investor test has been satisfied and the investor has declared that no changes or very minor changes have occurred, will be assessed within shorter time frames. For example, investments involving significant business assets would only require the statutory declaration in regard to the investor test criteria so they should be able to be assessed more expeditiously.

35. In order to ensure this is occurring, I expect that the Regulator will monitor time frames on applications where the investor test has been satisfied and report on it as part of the annual reporting on compliance with time frames.

Unilateral extensions to the time frames

36. There will be instances when the time frames are insufficient and will be extended in certain circumstances.[7] While the regulations provide for a 30-working day extension in these circumstances, I expect that applications be assessed within shorter time frames should the full 30 working days not be required. I also expect the Regulator to monitor how often extensions are occurring to better understand applicants' engagement with the regime.

37. The Regulator often needs to collect additional information before consent can be granted and it is important that the Regulator is not unfairly penalised for any undue delays on behalf of the applicant. The Regulations provide that the overall time frame is automatically paused, post the initial assessment period, where the Regulator requests or requires further information from an applicant and a reasonable deadline set by the Regulator is not met. I expect the Regulator to monitor how often and for how long time frames are paused, both to ensure that the Regulator is not setting unreasonable time frames for applicants to respond within and to better understand applicants' engagement with the regime.

38. I expect the Regulator to report, through their Ministers, to Cabinet on performance against the time frames every 12 months in addition to requirements to report on timeframes in its annual report.

[7] Clause 7 of Schedule 5 of the Regulations.

Fresh or seawater areas

39. The Act and Regulations have changed the process for offering fresh and seawater interests to the Crown. These changes include a requirement for the Crown to notify the owner of its decision on acquisition within twelve months of the water areas acquisition notice being registered or provided. In practice, I expect these notifications to occur within six months, except in cases which are unusually complex. To allow the Government to monitor when extensions occur, I expect that you notify the Minister for Land Information whenever this six-month time frame is being exceeded. I also expect you to give reasonable notice to owners of any extensions.

Setting and reviewing fees

40. The Act provides that regulations can prescribe fees and charges for the purpose of meeting (or assisting in meeting) costs of Ministers and the Regulator in exercising functions and powers, performing duties and generally providing services under the Act.[8] It also provides that fees can be set at a level which recovers the true cost of assessing an application by:[9]

    a. clarifying that the government can set fees to ensure that under- or overcollections can be distributed among fee payers on a rolling four year basis,
    b. requiring the Minister to commence a fees review at least once every four years, and
    c. confirming that any existing deficit for the Regulator can be recouped through fees that are set after commencement of these changes, to the extent that the deficit arose in the preceding four financial years.

41. Where you are assisting with future fees reviews, consistent with the Government's Cost Recovery Policy and the Auditor-General's advice, I do not expect cost recovery from investors that cannot be reasonably ascribed to processing that investor's application, including necessary overhead expenses (other than as a consequence of reasonable under-collections across a four year basis).

Exemptions

42. The Act defines 'overseas person' in a way that results in some entities and managed investment schemes that are majority owned or funded by New Zealanders and have a strong connection with New Zealand, being required to obtain consent.

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[8] Section 61.

[9] Section 61(1)(e).

43. The Act permits exemptions for persons, transactions, rights, interests or assets that the Minister considers to be majority owned and substantively controlled by New Zealanders.[10] The decision-maker may grant individual exemptions to applicants that satisfy this threshold.[11] This aligns with the Act's purpose, as it is clear that the degree of New Zealand ownership and control is what determines whether an entity is an overseas person, not other matters such as New Zealand employees or having headquarters in New Zealand.

44. I consider that such exemptions should generally be granted to non-listed bodies corporate, managed investment schemes (MIS) and limited partnerships, where they meet the criteria specified in the Annex, unless good reason exists not to.

Variations

45. The Annex outlines the criteria for revocation or variation of conditions of consent for persons who are no longer considered overseas persons under the Act.

The national interest test

46. The national interest test is a 'backstop' tool and consistent with this, it is the Government's view that the test should only be applied on a case-by-case basis, rarely and only where necessary to protect New Zealand's national interests. The starting point is that investment is in New Zealand's national interest. As such, the regulator should only advise that a transaction should be escalated to a national interest assessment in the scenarios outlined in the Annex.

Regulator's advice about whether a transaction is in the national interest

47. When providing advice on a national interest assessment, the Regulator must:
    a. be informed by the Guidance Note: Foreign Investment Policy and National Interest Guidance (June 2021) published on The Treasury website, and
    b. reflect consultation and input from relevant partner agencies.[12]

The national security and public order call-in power notification

Initial assessments of notifications should be carried out quickly to identify significant risks

48. In recognition of the potential impact of the call-in power regime on businesses and investors, low-risk transaction should be identified quickly and allowed to

[10] Section 61B(c)(viii).

[11] Section 61D.

[12] Such as those agencies listed in section 126 of the Act.

proceed promptly. To facilitate this, I expect you to assess a notification in two steps within the 55-working day statutory time frame:

a. an initial risk assessment within 15 working days, where you consider if a transaction could pose a significant risk to New Zealand's national security or public order. Those that could not pose a significant risk will be issued with a direction order allowing them to proceed, and

b. a risk and benefit assessment is undertaken for those transactions that could pose a significant risk and this assessment is referred to the Minister. The assessment should be provided promptly so the Minister can make a final decision on what action to take (if any) within the remainder of the 55-day statutory time frame.

49. When assessing and providing advice on the risks and benefits of a transaction, the Regulator must:

a. be informed by the Guidance Note: Foreign Investment Policy and National Interest Guidance (June 2021) published on The Treasury website, and

b. reflect consultation and input from relevant partner agencies.

50. The Regulations allow extensions to be granted to the 55-working day time frame. Extensions should only be granted if a transaction has significant complexity, the applicant operating in good faith is unable to meet the Regulator's requests in a timely manner, or there are other exceptional circumstances (for example, the discovery of significant new information late in the assessment process).

Scanning of non-notified transactions that could pose significant risks

51. The Government can investigate any non-notified call-in transactions and impose conditions on, or order disposal of them, where necessary to manage significant national security or public order risks.

52. I recognise the call-in power is a new regulatory function for you to administer and monitor. I expect that over time you will adjust your approach to scanning for non-notified transactions that may pose significant national security or public order risks. This new regulatory function has now been in place for six months, and you should report back to me within six additional months from the date of this letter on your approach for identifying non-notified transactions that could pose significant national security or public order risks.

Operation of the Overseas Investment Office

53. The Government seeks to ensure that the process of granting or refusing consent is robust and generates high quality outcomes, while also being efficient to ensure the regime does not unduly restrict productive investment.

Consent conditions, monitoring and enforcement

54. Monitoring and enforcement of compliance with the consent requirements of the Act, and of compliance with conditions imposed on consents, maintains public confidence in the integrity of the regime.

55. The Government expects the Regulator to monitor the conditions imposed in a reasonable and proportionate approach (recognising it may be appropriate to impose a different time period to monitor some conditions).

56. This will assist in maintaining confidence on the overseas investment regime. It also ensures fair treatment for those who comply with the rules by ensuring those who break the rules are held to account and that others are deterred from doing so.

Other general matters relating to the Regulator's functions, powers or duties

57. Along with the other directions in this letter, I also expect you, as the Regulator, to:

    a. provide recommendations to the relevant Minister or Ministers,

    b. perform your functions within the statutory time frames set out,

    c. via your website resource, provide a summary of the overseas investment regime, information on how to prepare and submit an application for consent, and specific details on your processes and time frames,

    d. via your website resource, continue to publish decisions made under the Act,

    e. keep applicants informed of the progress being made with their applications, and

    f. compile and keep records useful for the making available of statistics and public information on, and compliance with, any additional Government performance expectations.

Revocation of previous letters

58. Subject to paragraphs 59 and 60 below, I revoke all previous directives under section 34 in force at the date of this letter (the Revoked Directives), with effect from 24 November 2021.

Date letter takes effect

59. This letter will take effect on 24 November 2021, and applies in relation to any transaction, application or other matter, where provisions in the Act or the Regulations as they read on or after that date apply.

60. In other cases, where an earlier version of the provisions in the Act or Regulations apply under the transitional arrangements in Schedule 1AA of the Act or Schedule 1AA of the Regulations, then the Revoked Directives continue to apply to that transaction, application or other matter.

Yours sincerely

Hon Grant Robertson
Minister of Finance

Annex

Farm land advertising exemption (refer to paragraph 23 of the letter)

1. The following is non-exhaustive list of examples of the circumstances where an applicant may be eligible for an exemption from the farm land advertising requirement, under section 20 of the Act:

    a. when there is substantial compliance (for example, where the advertising does not meet all of the requirements but nonetheless achieves the purpose of advertising),

    b. for future advertising (for example, where an investor seeks consent to acquire selected properties in the future should they be put up for sale – advertising occurs after consent), and

    c. when there is only one natural buyer (for example, a boundary adjustment or landlocked land).

Exemptions (refer to paragraph 42 of the letter)

Non-listed bodies corporate

2. In order to be eligible for an exemption from consent requirements, the Government considers a domestically incorporated non-listed body corporate will generally:

    a. not be majority owned by overseas persons. That is, be less than 50 per cent owned by overseas persons,

    b. not be substantively controlled by overseas persons. That is, 25 per cent or less of the entity's total securities are cumulatively controlled by overseas persons, each of whom hold 10 per cent or more of the entity's total securities, and

    c. not be open to access or control by a foreign government. That is, no foreign government (or its associates) holds 10 per cent or more of the entity's total securities.

Managed Investment Schemes (MIS)

3. In order to be eligible for an exemption from consent requirements, the Government considers a MIS will generally:

    a. not be majority owned by overseas persons. That is, less than 50 per cent of the value of the managed investment products in the MIS are invested on behalf of overseas persons,

b. not be substantively controlled by overseas persons. That is, 25 per cent or less of the managed investment products in the MIS that entitle holders to vote are invested on behalf of overseas persons, each of whom have 10 per cent or less of those products[13], and

c. not be open to access or control by a foreign government. That is, no foreign government (or its associates) holds 10 per cent or more of value of the managed investment products in the MIS.

Limited partnerships

4. In order to be eligible for an exemption from consent requirements, the Government considers a limited partnership will generally:

   a. not be majority owned by overseas persons. That is, less than 50 per cent of the limited partnership interest is held by overseas persons,

   b. not be substantively controlled by overseas persons. That is, 25 per cent or less of the general partner is cumulatively controlled by overseas persons that each hold a 10 per cent or less of the interests in the general partner, and

   c. not be open to access or control by a foreign government. That is, no foreign government (or its associates) holds 10 per cent or more of the partnership interest.

Other matters for consideration

5. In addition to the specified criteria, in determining whether to grant an exemption to these kinds of entities, the Government would expect the Regulator to consider:

   a. the entities' suitability to own or control New Zealand assets (in accordance with how character is assessed under investor test in the Act), and

   b. the degree of access or control foreign governments (or their associates) hold in the entity.

6. The Government would expect the exemption to depend on compliance with conditions being maintained, including the condition that the investor remain not unsuitable to own or control the assets.

[13] A MIS that has an overseas person as manager or trustee should not be considered to have substantive control for the purpose of this directive.

Revocation or variation of conditions of consent for persons who are no longer considered overseas persons under the Act (refer to paragraph 45 of the letter)

7. The Act provides that a condition of consent can be revoked by the relevant Minister or Ministers or be varied or added to by the relevant Minister or Ministers with the agreement of the consent holder.[14]

8. Clause 39(2) of Schedule 1AA of the Act, as introduced by the Overseas Investment Amendment Act 2021, provides that relevant Ministers may revoke a condition of a consent that the Act required to be imposed. This relates to a person who ceased to be an overseas person on commencement of new section 7 of the Act (section 5 of the 2021 Amendment Act) and who applies to the Regulator under section 27 of the Act for a variation of a consent granted to them while they were considered an overseas person under the Act.

9. I generally expect you, as the Regulator, when processing such applications, to revoke the conditions of those consents unless good reason exists not to.

10. I expect you to exercise your discretion having regard for, amongst other things:
    a. the purpose of the Act, and
    b. the Government's view that some investors are no longer considered overseas persons under the Act and therefore their ownership of sensitive New Zealand assets is unlikely to pose risks to New Zealand.

National interest test (refer to paragraph 46 of the letter)

11. The Regulator should only recommend that a transaction is a transaction of national interest under section 20B if the proposed investment:
    a. could pose risks to New Zealand's national security or public order,
    b. would grant an investor significant market power within an industry or result in vertical integration of a supply chain,
    c. has foreign government or associated involvement that was below the more than 25 per cent ownership or control interest threshold for automatic application of the national interest test, but granted that government (and/or its associates) disproportionate levels of access to or control of sensitive New Zealand assets,[15]
    d. would have outcomes that were significantly inconsistent with or would hinder the delivery of other Government objectives,
    e. raises significant Treaty of Waitangi issues, or
    f. relates to a site of national significance (e.g. significant historic heritage)

[14] Section 27.

[15] Disproportionate access or control is defined in section 6(10) of the Act.

TE TAI ŌHANGA
THE TREASURY

Guidance Note

Foreign Investment Policy and National Interest Guidance

June 2021

New Zealand Government

The Treasury URL at June 2021 for this document is https://treasury.govt.nz/publications/guide/foreign-investment-policy-and-national-interest-guidance.

New Zealand's foreign investment policy

The New Zealand government welcomes sustainable, productive and inclusive overseas investment. Overseas investment supports job creation, the creation and adoption of new technologies, increases human capital, and grants New Zealand more diverse international connections, including access to global distribution networks and markets. Without foreign investment, New Zealanders' living standards would be lower.

At the same time, the Government recognises that foreign investment can pose risks. Foreign investment can take ownership and control of economic activity out of New Zealand and high levels of foreign ownership of sensitive New Zealand assets can conflict with a view that New Zealanders should own or control those assets. It can also, in extreme cases, present opportunities to undermine our national security.

The Overseas Investment Act 2005 (the Act) is New Zealand's principal tool for regulating foreign investment. It seeks to balance the need to support high-quality investment, while ensuring that the government has tools to manage risks associated with foreign investment. The Act does so by providing an enduring framework for screening foreign investments in:

- sensitive assets to help ensure that they benefit New Zealand and are not contrary to New Zealand's national interest, and
- certain strategically important businesses and business assets to help ensure that they do not pose significant risks to New Zealand's national security or public order.

This information is general in nature and is not a substitute for legal advice. Foreign investors should ensure that they understand New Zealand's foreign investment screening regime and ensure they comply with the law, or risk the imposition of significant penalties.

How the Overseas Investment Act 2005 operates

The Act requires overseas persons[1] to get consent before acquiring sensitive land,[2] significant business assets[3] or fishing quota. This requirement reflects the Act's purpose: that it is a privilege for overseas persons to own sensitive New Zealand assets.

The test that the overseas person must satisfy to obtain consent depends on the type of sensitive asset being acquired. In general terms, if:

- *Significant business assets* are being acquired, the overseas person must satisfy the investor test, which focuses on the characteristics of the overseas person.
- *Sensitive land* is being acquired, the overseas person must satisfy the investor test and the benefit to New Zealand test, which requires the overseas person to deliver certain benefits to New Zealand, unless:
  - *Residential land* is being acquired: then there are a number of tests that largely focus on the land's use. For example, a person with a residence class visa can get consent to acquire residential land (that is not sensitive for any reasons other than it being residential) if they commit to becoming a tax resident, spending the majority of each year in New Zealand, and using the property as their primary residence, or
  - *Forestry activities* will occur on the sensitive land: then the overseas person must satisfy the investor test and one of two streamlined benefits tests or the general benefits test.
- *Fishing quota* is being acquired, the overseas person must satisfy the investor test and a national interest test that is similar to the benefits test but has some elements specific to fisheries.

From 7 June 2021, investments in *strategically important businesses and business assets*, where consent would not normally be required (for example, because the business is worth less than $100 million), may be subject to review under the national security and public order call-in power. These are referred to as 'call-in transactions'.

The national security and public order call-in power – expected to be rarely used – allows the government to block, impose conditions on, or order disposal of call-in transactions that pose a significant risk to New Zealand's national security or public order. Additional information on this power is provided below.

The Overseas Investment Office (OIO) is the Act's regulator. It makes decisions on some applications and advises decision-making Ministers on others.

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1 Broadly speaking, non-New Zealand citizens and residents, and bodies corporate, trusts and other unincorporated entities that are more than 25 owned or controlled by overseas persons.

2 This includes non-urban land over five hectares, residential land and lifestyle land, and land adjoining sensitive areas such as the foreshore.

3 Broadly speaking, this applies to securities, businesses and assets valued at $100 million, or higher amounts where the investor is from a country with which New Zealand has a relevant free trade agreement.

The national interest test

The national interest test is a 'backstop' tool to manage significant risks associated with transactions that ordinarily require screening under the Act (except for call-in transactions). It will be used rarely and only where necessary to protect New Zealand's core national interests. The test's, and the Government's, starting point is that investment is in New Zealand's national interest.

Applying the test means that the Minister responsible for the Act (ordinarily the Minister of Finance) can consider the potential risks of a transaction to New Zealand's national interest when deciding whether 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 more than 25 per cent 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,
  - systemically-important financial institutions and market infrastructure (for example, payments systems), and
  - any other category of strategically important business assets prescribed in the Overseas Investment Regulations.

  Additional detail on what constitutes strategically important business assets can be found in the Overseas Investment Regulations 2005.

In rare cases, the Government could apply the national interest test to other investments that require consent and pose material risks. This would be at the discretion of the Minister responsible for the Act and, if a decision was taken to apply the test, investors would be notified as soon as possible. Potential factors that could trigger escalation to the national interest test include:

- foreign government or associated involvement that was below the 25 per cent threshold, but granted that government (and/or its associates) disproportionate levels of access or control to sensitive New Zealand assets[4]
- investments that would grant an investor significant market power within an industry or result in vertical integration of a supply chain, and
- potential inconsistency with Government objectives, for example environmental or economic objectives.

How the national interest test is applied

The national interest, and what would be contrary to it, is not defined in the Act. Instead, the Act grants the Minister responsible for the Act broad discretion to decide on a case-by-case basis whether a prospective investment would be contrary to the national interest. This has significant advantages over a more rigid test, that, for example focussed on investments in certain assets or asset classes. In particular, it:

- allows New Zealand's interests to be protected, without establishing a framework that would likely result in valuable investments being declined, and
- ensures that the Overseas Investment Act is an enduring piece of legislation that can easily respond to changes in the global risk environment, community concerns about foreign investment, and government priorities.

In applying the national interest test, the Government considers a range of factors, the relative importance of which can vary depending on the nature, and likely impact, of the investment. For example:

- Investments in large businesses, businesses that have significant market share, or businesses that hold unique assets or operate in particularly sensitive areas of the economy (for example, dual-use or military technology, the health sector, and other critical national infrastructures) may raise more national interest concerns than investments in other types of businesses.
- Investments that enhance economic prosperity by, for example, increasing New Zealand's productivity, bringing in new technologies, or creating jobs, are less likely to be contrary to New Zealand's national interest.

4 Disproportionate access to, or control, can include: access to non-public information, membership or observer rights on the board, the power to control board composition and any involvement other than through the exercise of ordinary voting rights in the target entity's decision-making.

Across all investments, however, there are a number of factors that are generally considered when determining whether an investment is contrary to New Zealand's national interest:

- *National security, public order and international relations:* The Government considers the extent to which investments pose risks to New Zealand's national security, public order, or international relations. This is informed by advice from the New Zealand Security Intelligence Service, Government Communications Security Bureau, with public order advice coming from a range of agencies where relevant (for example, the Ministry of Culture and Heritage in respect of transactions in the media sector). Advice on international relations is provided by the Ministry of Foreign Affairs and Trade.

- *Market structure:* Diverse ownership within and across sectors supports competition, economic growth, and equal access to goods and services. In assessing a prospective investment, the Government therefore considers whether an investment may grant the investor:

  - access to significant economic rents through, for example, the acquisition of an entity with significant market share in one business segment or ownership of a vertical supply chain, or

  - the ability to effectively influence other businesses or the New Zealand government through, for example, gaining control of the domestic or global supply of a product or service.

  This assessment is entirely separate to any prospective investigation of any transaction by the Commerce Commission, which enforces competition laws and has regulatory responsibilities in a number of specific sectors. This reflects the Act's specific purpose and objectives.

- *Economic and social impact*: The Government considers an investment's likely impact on the New Zealand economy and society, and the extent to which any benefits to New Zealand are commensurate with the sensitivity of the asset being acquired. The benefit to New Zealand test, which provides a formal framework for this kind of assessment in respect of sensitive land, serves as a guide for the types of matters the Government is likely to consider when considering the economic and social impact of investments in business assets.

  Additional detail on the benefit to New Zealand test can be found here on the Land Information New Zealand website https://www.linz.govt.nz/overseas-investment.

- *Alignment with New Zealand's values and interests, and broader policy settings:* The Government will consider the extent to which an investment supports broader Government priorities and policy settings and New Zealand's values. This includes considering an investment's alignment with the Government's economic plan, such as whether it will support thriving and sustainable regions or New Zealand's transition to a clean, green and carbon neutral economy.

- *Character of the investor:* The investor test is the government's primary tool for determining an overseas person's suitability to invest in New Zealand. However, that test is carefully calibrated to minimise that test's burden on the average investor and therefore is focussed on the types of risks most likely to be relevant to most prospective investors. The national interest test grants the Government broader discretion, where necessary, to assess an investor's character and determine whether they are likely to comply with New Zealand's laws, including conditions imposed under the Act, or whether they have any characteristics otherwise rendering them unsuitable to invest in New Zealand (for example, are subject to international sanctions).

Assessing foreign government investors

Foreign government investors and their associates can pose, in rare cases, more significant risks than other types of investors. This is because these investors may be pursuing broader policy or strategic (as opposed to purely commercial) objectives through their investments that may not align with New Zealand's national interest. For this reason:

- all investments ordinarily screened under the Act that would result in a foreign government or their associates holding a more than 25 per cent interest in sensitive New Zealand assets are always[5] subject to the national interest test, and
- foreign government involvement at lower levels, but where that investor has disproportionate access or control to sensitive New Zealand assets, may be a factor that triggers the discretionary application of the national interest test.

This does not reflect a view that all foreign government or state-linked investments pose material risks. Only that they have particular characteristics that justify additional scrutiny, consistent with the operation of foreign investment screening regimes in comparable jurisdictions.

In assessing whether a foreign government investor poses risks to New Zealand's national interest, in addition to the matters described above, the Government will generally consider:

- the extent to which the investor operates on an arm's length and commercial basis from the relevant government (entities operating at arm's length from the relevant foreign government are likely to pose fewer risks),
- the investor's governance arrangements and prospective governance arrangements for the relevant investment,
- the existence of any other shareholders or partners in the investment,
- whether the target entity will be, or will remain, listed on a New Zealand financial market (additional regulations that apply to listed entities mean that investments in listed entities are generally less likely to pose significant risks),
- the extent to which the investment would grant the relevant government control over, or access to, the underlying asset (for example, investments with no control rights are less likely to pose risks than those that grant a foreign government significant control of strategically important business assets), and
- the share of the entity that would remain owned by non-associated investors if the transaction was to proceed (transactions where non-associated investors will retain a significant degree of control are less likely to pose national interest concerns).

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5 Unless the foreign government investor is exempted from this under s 20AA of the Act.

The national security and public order call-in power

The national security and public order call-in power empowers the Government to manage significant national security and public order risks posed by foreign investments in certain strategically important assets not ordinarily subject to screening. It differs from the general consent frameworks that exist in the Act in that the onus is on the Government to demonstrate that a transaction poses significant risk rather than investors to demonstrate that it does not

Scope of the national security and public order call-in power

The call-in power will apply to investments in broadly the same categories of strategically important businesses as the national interest test will always apply to, with three exceptions. The call-in power will:

- **apply** to investments in entities that develop, produce, maintain or otherwise have access to sensitive data,[6] recognising that access to this data can empower foreign actors to exert leverage over New Zealanders and/or the New Zealand government

- **not apply** to investments in irrigation schemes. This reflects that investments in these assets are unlikely to pose national security or public order risks, but could give rise to broader national interest concerns, and

- **not apply** to any other category of strategically important business specified in regulations as relevant to the national interest test. That is, regulations cannot expand the types of investments that will be subject to the call-in power.

Recognising that the existence of any national security and public order risks is not always correlated to investment size, the call-in power will apply to any transaction to acquire an interest in relevant strategically important businesses (that is, it has a $0 and 0 per cent threshold). There are three exceptions to this:

- investments that result in an investor holding less than 10 per cent of a publicly listed entity's shares, unless the investment grants disproportionate access to, or control of, that entity (for example, the right to appoint a board member)

- investments in media entities, where the threshold for screening is obtaining a greater than 25 per cent interest. This is consistent with the screening threshold that applies to indirect investments in sensitive assets under the Overseas Investment Act more generally, and

- for investments in assets or property, acquisitions that would make the buyer a strategically important business in their own right (for example, significant electricity generation capacity or large volumes of sensitive information).

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6 The definition of sensitive data is refined in the Overseas Investment Regulations. It broadly includes genetic, biometric, health, sexual orientation and behaviour, and financial information about individuals as well as government data relevant to national security and public order.

Notifying transactions in scope of the national security and public order call-in power

To support the Government's ability to manage any significant national security or public order risks, investors:

- must notify the government of any transactions involving dual-use and military technology, and critical direct suppliers to the military and intelligence community prior to them being entered into, and
- may notify the government of any other call-in transaction before the transaction is entered into or up to six months afterwards.

The Government will review all notifications to determine whether transactions pose a significant risk to national security or public order. Transactions that do not pose any significant risks will receive a 'direction order' (essentially a 'no action' notice) that permits the transaction to proceed and prevents the government taking action in respect of that investment in the future unless, for example, the direction order is obtained in reliance on false or misleading information or the investor breaches conditions of the direction order (including automatic conditions imposed by statute). For investments that do present significant risks, the Minister responsible for the Act is empowered to impose conditions on, block, or order disposal, to manage them.

The Government retains the right to investigate any non-notified call-in transactions and to impose conditions on, or order disposal of them, where necessary to manage significant national security or public order risks. This investigation can occur at any time irrespective of how long ago the transaction occurred. Given this, the Government recommends that investors entering into transactions that do not require mandatory notification seek legal advice on the costs and benefits of notification and strongly consider notifying the government of transactions where any of the potential risk factors identified in the section below are present.

The application of the national security and public order call-in power

As in the operation of the national interest test and for the same reasons, the Minister responsible for the Act has discretion to consider transactions under the call-in power on a case-by-case basis and determine what action – if any – is appropriate.

Unlike the national interest test, however, the scope of what the Minister can consider when assessing transactions under the call-in power is limited to:

- risks to New Zealand's national security and public order posed by the transaction, and
- any benefits likely to result from the transaction.[7]

[7] Consistent with the national interest test, the benefit to New Zealand test provides a guide for the types of matters the Government is likely to consider when determining the likely benefits associated with a transaction.

While the Act does not define what constitutes New Zealand's national security or public order, the following non-exhaustive list of factors are likely to inform an assessment of whether significant risks are present.

- the nature of the investor (eg, state or private)
- the level of control granted by the proposed investment and any impacts that may arise from such control, and
- whether the proposed investment is likely to grant the investor access to strategically important businesses or their assets."

If significant risks are present, before determining what action – if any – should be taken to manage them, these risks will be considered against the scale of the benefits likely to arise, and the extent to which any risks can be managed through conditions. This reflects the backstop nature of the call-in power and the Government's intention to use it to intervene in transactions rarely and only where necessary.