Challenges and opportunities:

New Zealand's new overseas investment regime

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Late last year, the Overseas Investment Amendment Act 2018 came into force, significantly shaking up the investment climate for overseas investors in New Zealand's residential property market. *NZ Lawyer* spoke to leading experts at Kensington Swan to find out the pros and cons and what it all means

THE OVERSEAS Investment Act 2005 regulates the acquisition of 'sensitive land' and significant business assets by overseas persons. The original act is broad in scope, but the Overseas Investment Amendment Act 2018 targets two precise policy objectives of the Labour-New Zealand First coalition government.

Now "virtually impossible" for overseas investors to acquire residential property

Kensington Swan partner Matthew Ockleston notes that part of the impetus for the new regime restricting access to overseas investors who wish to acquire residential property came from "a housing crisis, prominently in Auckland, where house prices were growing far too quickly for the government's liking, and a perception – which may or may not be borne out by the facts – that absentee overseas investors were buying suburban houses that Kiwi

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couples could no longer buy. What it seeks to do essentially is to make residential land 'sensitive' for the purposes of the act – which means you need consent for it – but then to make it extremely difficult to get that consent. It makes it virtually impossible for an overseas person to acquire residential land in New Zealand to live in themselves or rent out. That was the policy intent coming in, and we'd say the act has been pretty faithful to that intent."

To acquire 'sensitive land' under the act, overseas investors must meet a 'benefit to New Zealand test'. But according to Kensington Swan partner Chris Parke, the kinds of benefits required by the test are not likely to flow out of residential property acquisition.

"That test includes things like increasing export receipts, increasing job opportunities and protection of environmental factors on the land – all the kinds of things which it would be impossible to demonstrate if you were simply acquiring residential property," Parke says.

It's important to note that there are exemptions for overseas investors from Australia and Singapore, due to pre-existing trade agreements. But that still leaves a lot of potential big buyers from the United States or China left out in the cold.

According to the team at Kensington Swan, the new regime is widely perceived to have had a dampening effect on the residential property market. As Ockleston puts it: "Whether it's coincidence or cause-and-effect, it's pretty clear that the Auckland property market has gone flat."

Challenges of the new regime

Ockleston points to the challenge of the regime's 'bright line test' for categorising a property as either residential or non-residential. "That's a pretty blunt instrument to measure it. So there are areas of uncertainty about where properties might fall … when you have a commercial use for a ground-floor property in an apartment block, is that commercial land or residential land?" If it's the latter, then overseas persons would need consent.

There are exemptions – other pathways to consent. But inevitably, they throw up new definitional challenges and will require much more legal work for uncertain outcomes.

"Overseas investors who wish to buy an interest in residential land need to find a pathway to get consent for things like incidental use, or buying a big block of undeveloped residential land and turning it into multiple houses, which would further a policy objective," Ockleston says.

"There's quite a lot of working your way through complex definitions – that's one of the biggest challenges, I think."

The effect on high net-worth New Zealanders

Kensington Swan partner Henry Brandts-Giesen believes that a big problem with the new regime is its blanket approach. More expensive homes – those that typically attract overseas investors, perhaps new residents or those wishing to eventually become New Zealand residents – will now have a much

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harder time finding buyers.

"There has been no provision for those properties such as you would see under equivalent regimes in parts of Europe, where high-end properties may remain on the open market, but the purchase of other properties is more regulated and contingent on residency."

Ockleston seconds this insight. "That aspect has been completely missed in the legislation. There's no value threshold. Properties which are $1m or $2m exist in a completely different market to the $300k–$600k market, which was hotter than anything, and where young Kiwis were being turned away. So there's New Zealanders sitting on top of properties that were only ever destined for an overseas billionaire, and that market has completely collapsed – so they and their bankers will be very unhappy."

Brandts-Giesen adds that although the public-policy reasons behind the legislation are sound, "the way it's been executed has left something to be desired".

"It's a bit unfortunate, because there were other ways in which the government could have achieved similar objectives. In certain other countries, qualifying purchaser and/or property regimes, registers of beneficial ownership, stamp duties, and non-resident landlord taxes have worked quite well – whereas what we have here is just a blanket ban."

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Is it likely that problems with the act will be ironed out?

Although there are ongoing consultations with regard to reform of the Overseas Investment Act, they don't touch on the residential land components. Kensington Swan's partners believe there will be little appetite in the electorate to demand reform of provisions that affect non-New Zealanders, even if there are knock-on effects for New Zealanders, too.

"I'm not sure that the opposition party would propose to reverse this – I think tweak it and perhaps put a value threshold in," Ockleston says.

"But there isn't a history, outside perhaps employment legislation, of governments wildly reversing each other. There might be softening of some rough edges, but I expect, by and large, the regime to endure."

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Kensington Swan on overseas acquisition of NZ forestry rights

The Overseas Investment Amendment Act 2018 also changed the climate for forestry rights in New Zealand for overseas investors. *NZ Lawyer* spoke to leading experts at Kensington Swan for details

PREVIOUSLY, UNDER the Overseas Investment Act 2005, overseas investors didn't need consent from the Overseas Investment Office [OIO] to acquire forestry rights, according to Sonya Carter, senior associate at Kensington Swan. Under the new regime, consent is required if an overseas investor seeks to obtain forestry rights that, together with other forestry rights acquired during the same calendar year, exceed 1,000 hectares. But, Carter says, the act has also created new pathways to consent, particularly where the acquisition would further the government's environmental policy goals.

Kensington Swan partner Chris Parke elaborates: "One of the government's big pushes through the election was to plant a billion trees, and particularly to invest in the regions. So there was a recognition that investment in forestry requires investment and capital from offshore as well."

The Amendment Act provides for a forestry test as an alternative to the 'benefit to New Zealand test'.

"The new regime would permit an investor to buy a bit of land that they're going to establish into a forestry, provided you're going to use the land principally for forestry, and that there's no residential land involved – other than to the extent that it's minor and ancillary," Parke explains.

"There are a couple of other criteria: you have to commit to replanting the crop post-harvest, and you have to commit to maintaining prior consent conditions that existed under the old regime if put in place when it was acquired."

The old regime made acquiring an interest in forestry land an unnecessarily expensive and potentially protracted affair for overseas investors.

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> Joy Wang, Kensington Swan

"The application fees to the OIO itself are in the vicinity of $40k–$50k. And following that, the cost of preparing the application can be well in excess of that again," Parke says.

"Unlike other countries, there's no statutory timeframe in which consent must be given or declined. There's uncertainty in terms of timeframe and outcomes. Some of the more difficult applications are taking more than 12 months to get a decision on, whether or not they were successful. So the new pathway gives more certainty in the forestry space to overseas investors."

'Standing consents' for forestry and residential land

Kensington Swan solicitor Joy Wang highlights the helpful introduction of the concept of 'standing consent' in the new regime, which applies to both residential and forestry acquisitions. "What it does is, before you enter into a transaction or transactions, you can go to the OIO and make a submission about what your plans or proposals are and apply for a standing consent that will apply to future acquisitions or transactions."

This addition will hopefully streamline investment since individual consents won't have to be applied for each time, provided that agreed criteria continue to be met. "For example, in terms of forestry, you have to ensure that the land is in fact used for forestry," Wang says.

Parke says this puts overseas investors on a more equal footing, because vendors previously would have had to factor in an additional cost to overseas investors in terms of protracted timeframes and uncertainty over their approval, when compared with domestic investors.

As Wang puts it: "Getting that standing consent is potentially quite beneficial to sophisticated investors, or investors who invest in forestry regularly."