

New Zealand completes 'marathon' overseas investment reform

June 11, 2021

The Overseas Investment Amendment Act 2021 (**Amendment Act**) received Royal Assent on Monday, 24 May 2021. The Amendment Act finalises the last round of the recent changes to the Overseas Investment Act 2005 (**Act**). Many of its provisions will take effect from 5 July 2021, albeit the implementation of certain changes will take place in 6 to 12 months. We set out a summary of the main elements of the Amendment Act and our thoughts on what this means for overseas investors with potential transactions in the pipeline.

In short, these changes will remove the need for consent from the Overseas Investment Office (**OIO**) for lower risk transactions, have a better management system for higher risk transactions and assets of significance to New Zealanders, and will simplify application requirements for overseas investors.

During the transition period, the date of receipt by the OIO of a consent application determines whether the new rules apply to that application, regardless of the date of entry of the transaction. In other words, subject to certain exceptions such as the farmland advertising rules, if an application is received before 5 July, then the existing rules apply (namely, the rules not changed by the Amendment Act). If an application is received on or after 5 July, the new rules apply.

Further, the COVID-19 Emergency Notification Regime (**ENR**) has been replaced with the permanent national security and public order (**NSPO**) notification regime from 7 June 2021.

National Security and Public Order Notification Regime (NSPONR)

The ENR was introduced in June 2020 in response to the COVID-19 pandemic to protect New Zealand businesses that had become vulnerable to 'below value' acquisitions. The ENR required overseas persons to notify the OIO of all investments in a New Zealand entity that were not subject to OIO consent under the Act but under which they intended to (a) acquire more than 25% ownership or control interest, (b) increase existing more than 25% ownership or control interest to more than 50% or 75%, or (c) acquire 100% ownership or control interest, or (d) acquire its NZ property of any value that effectively amounts to a change in control of the business.

Notably, the ENR had a zero value threshold. This thus resulted in almost every overseas acquisition involving a New Zealand target business being required to notify the OIO and receive a direction order from the relevant Minister before proceeding.

The Government has discontinued the ENR and replaced it with the NSPONR from 7 June 2021 because New Zealand's economic conditions no longer necessitate such a level of national interest protection. Should its conditions change in the future due to COVID-19, other global pandemic or national emergency, the Amendment Act empowers the Government to reinstate the ENR. This follows that any transactions entered into before 7 June would still be

subject to the ENR (irrespective of when the transaction would be notified to the OIO), whereas transactions entered into on or after 7 June would have the NSPONR applied.

The NSPONR is a 'call-in' regime.

Call-in Powers

The call-in powers have become effective once the NSPONR has come into force on 7 June. The powers allow the government to review investments in strategically important businesses (**SIBs**) that are not subject to consent under the Act. This includes an acquisition by an overseas person of any interest (zero percent ownership threshold unless where certain exceptions apply or the investor has an existing interest where the consent threshold must be crossed) in a SIB or certain types of property that would be used in carrying on a SIB.

Investors must notify the OIO of such a transaction prior to its being given effect if it relates to a SIB that is involved in research, development, production or maintenance of certain military or dual-use technology, or a critical direct supplier (published or unpublished) to the New Zealand Defence Force (**NZDF**), the Government Communications Security Bureau (**GCSB**), or the New Zealand Security Intelligence Services (**SIS**).

In all other cases, notification is voluntary. Investors may choose to notify the OIO of their investments in any of the following SIBs that are engaged in:

- airports or ports
- development, production, maintenance of, or which otherwise have access to, sensitive information relating to the supply of services to the NZDF, GCSB, SIS, the Department of the Prime Minister and Cabinet or the Ministry of Foreign Affairs and Trade, or data sets of sensitive information to 30,000 or more individuals
- drinking, storm or wastewater infrastructure
- electricity aggregation, distribution, generation or metering
- financial institutions or financial markets infrastructure
- media businesses with significant impact
- telecommunications infrastructure or services

Voluntary notifications can be made either before or up to 6 months after the transactions take effect. Investors who notify the OIO voluntarily may obtain 'safe harbour' from later government intervention if the OIO finds that the proposed investments do not pose significant risks to NZ's NSPO. This means once the OIO has made such a decision on a voluntarily notified transaction, they will not revisit the same unless there is a good reason to do so, for instance, if the OIO learns that the notification contains false or misleading information. Those who choose not to notify may be called in for scrutiny at any later point, which may result in the OIO's blocking or imposing conditions on their transactions or ordering the disposal of the assets in question should such investments be found to pose significant risks to NZ's NSPO.

The statutory timeframes for assessments are:

- 15 working days for an initial assessment; and
- 40 days plus a potential extra 30 days' extension should the transaction require full assessment.

Benefits Assessment

Currently an overseas person must show that his investment in sensitive land is likely to result in a benefit to New Zealand before the OIO consent will be granted. It includes 21 specific factors to be considered, and the bar for what is a 'benefit' to New Zealand is set rather high.

The new rules will change the test to 7 broad factors, and the test will shift to a 'before and after' comparison of the current state of the assets against the current 'with or without' counterfactual analysis of what is likely to occur with the assets. The test will also be proportional, and specific timeframes will be set out for each consent application pathway.

Farmland

Where an overseas investment includes land which is or includes farmland, the new rules require that the level of benefit to New Zealand that will result from the sale is increased, including the economic benefits and participation factors.

The land must also be advertised for sale in New Zealand prior to the entry of an agreement to sell the land. The farmland advertising rules that apply will depend on the date of entry of the transaction, rather than the date of receipt by the OIO of the consent application. Transactions entered into on or after the new rules come into force later this year will be subject to the new rules. These new rules are likely to come into force in November or December 2021. Until that time the existing farmland advertising rules apply.

There are exceptions to these rules where the land is not productive farming land or where the land is likely to be used for developments.

Incremental Investments

Currently overseas persons are required to obtain consent before they are allowed to increase their interest in a sensitive asset beyond 25%, irrespective of whether the increase will change the degree of effective control or the size of the increase.

Under the new rules, overseas investors will no longer have to obtain consent for incremental ownership increases except where the incremental increase results in an overseas investor meeting or exceeding the 25%, 50%, 75% or 100% ownership or control threshold of significant business assets or sensitive land.

National Interest Test

The Overseas Investment (Urgent Measures) Amendment Act 2020 allowed the Government to impose conditions on or block a transaction where it would be contrary to New Zealand's national interest. While this was aimed at preventing foreign governments from controlling significant assets in New Zealand, the test as it currently stands mandatorily captures transactions and investors that have no bearing on international security, including passive foreign government investors such as pension funds. The test also aggregates foreign government interests even when they are unrelated (e.g. governments from multiple countries).

The Amendment Act narrows the scope of the test, so it will only mandatorily apply where a single foreign government holds more than 25% ownership or control interest in an investor that wants to acquire significant business assets or

sensitive land. The Minister may also exempt passive foreign government investors from the automatic application of this test. A revised set of overseas investment regulations (**Regulations**) which is being prepared will cover, amongst others, the criteria for this exemption.

Overseas Persons

The Amendment Act clarifies that limited partnerships are (and the circumstances in which they are) included in the definitions of 'overseas persons'. On the other hand, investors will no longer be defined as an 'overseas person' where they are:

- certain widely-held bodies corporate that are both NZ-incorporated and NZ-listed; or
- NZ-listed managed investment schemes that are 50% or more invested on behalf of New Zealanders, and where at least 25% of its products invested on behalf of overseas persons are widely held.

Other changes

- Lease transactions in non-residential sensitive land that are less than 10 years (including any rights of renewal) will no longer need consent. Where leases are for residential land the consent threshold remains a term of 3 years or more.
- Consents will no longer be required for certain categories of sensitive land that is only caught because it adjoins sensitive land such as low level reserves.
- Repeat investors who have passed the new investor test that was introduced in March 2021 will not need to satisfy the investor test each time they apply for consent (provided there are no substantial changes to the individuals with control or entities involved, that would make the investor unsuitable to own sensitive New Zealand assets, since the last time they obtained consent).
- Overseas investors may apply at any time to complete a standalone assessment of the new investor test in preparation for future transactions. This pre-screened process will in principle benefit investors who are new to this market to partake in tender or bidding processes.
- Applicants will be required to provide tax information for Inland Revenue monitoring and compliance when applying for consent to acquire significant business assets.
- Each consent application pathway will be given statutory timeframes for decision making.

Our View

These changes to the overseas investment regime are generally positive and will benefit investment in New Zealand. There are fewer restrictions for overseas investment, but New Zealand's national security interests are secured. It will hopefully be faster and easier for investors to receive consents to invest in New Zealand which may provide a much-needed boost to our economy. The burden of reviewing applications on the OIO will, to an extent, be alleviated, allowing the OIO to focus on transactions which give rise to genuine concern to our national security.

This Amendment Act brings the reform of the overseas investment regime to a close, but there are several developments which are still to take place. To name a few, the Regulations are being prepared and will develop layers

of detail. The OIO's fees review is ongoing, and is expected to more than double fees for some complex consent applications. The streamlined forestry regime introduced in October 2018 is under review by the Treasury to ascertain whether it is achieving its original policy intent.

Seek assistance

Overseas investors should seek legal advice to ascertain whether consents or notifications are required for their intended transactions. Please feel free to contact a member of our team to discuss how these changes may affect your investments or for assistance with your consent application or notification.

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