

The new overseas investment landscape – the Overseas Investment Amendment Act 2018

On 22 August 2018, royal assent was given to the Overseas Investment Amendment Bill, amending the Overseas Investment Act 2005 ("the Act").

Passage of the Bill

It has taken longer than anticipated but the Amendment Act has been given Royal Assent. The Amendment Bill was introduced on 14 December 2017, and 213 submissions were received and considered by the Select Committee.

There have been three supplementary order papers which have seen the size and complexity of the Amendment Act grow. The Amendment Act was originally touted as restricting the ability for overseas persons to purchase residential properties, thereby making it easier for New Zealanders to purchase their own homes. Whether it will have the desired effect remains to be seen.

The Amendment Act comes into force on 22 October 2018 unless brought into force earlier by Order in Council. However, provisions relating to exemptions for large apartment buildings apply from 5 September 2018. There are savings provisions for transactions entered into before the Amendment Act's commencement.

Overseas person

An "overseas person" (**OP**) requires Overseas Investment Office consent (**OIO consent**) to purchase "sensitive land". An OP is:

- (a) a corporate entity with 25% or more ownership or control in the hands of persons who meet the requirements of (e) or (f), or is incorporated outside New Zealand;
- (b) a partnership, unincorporated joint venture or other unincorporated body where 25% or more of partners/members are OP, or OP have a beneficial interest in or entitlement to 25% or more of the assets, or an OP has control over 25% or more of the voting power;
- (c) a trust where 25% or more of the governing body or those with the right to control the composition of the governing body or control the trust deed are OP, or where an OP has a beneficial interests in or entitlement to 25% of more of the trust's property;
- (d) a unit trust where the manager or trustees or both are OP, or an OP has a beneficial interest or entitlement to 25% of more of the unit trust's property;
- (e) not a New Zealand citizen;
- (f) not "ordinarily resident in New Zealand". A person is only "ordinarily resident in New Zealand":
 - (i) If the person is purchasing residential land, it:
 - (A) holds a New Zealand residence class visa;
 - (B) has been residing in New Zealand for at least the immediately prior 12 months;
 - (C) is a tax resident in New Zealand; and
 - (D) has been present in New Zealand for 183 days or more in the immediately preceding 12 months;
 - (ii) If the person is purchasing non-residential land, it:
 - (A) holds a New Zealand residence class visa; and
 - (B) is domiciled in New Zealand or is residing in New Zealand with the intention of residing here indefinitely (and has done for the immediately preceding 12 months).

The new overseas investment landscape – the Overseas Investment Amendment Act 2018

Sensitive land

Sensitive land includes, various types of land, including residential land (being land which is rated "residential" or "lifestyle" on the district valuation roll), non-urban land over 5 hectares, land which has frontage to foreshore and seabed, land on certain islands and land which has certain special characteristics.

Tests

Now, to obtain OIO consent for investment in sensitive land, all of the following tests must be satisfied (unless a specific exemption applies), and if required, satisfied on an ongoing basis for a specified period. Conditions will be imposed in each OIO consent to ensure ongoing compliance with the required tests.

- (a) the "investor test" (except in certain circumstances where the application is under the commitment to reside in New Zealand test only, or, the increased housing test only);
- (b) if the land is residential land (which is not sensitive for other reasons), then either the "benefit to New Zealand test" or at least one of:
 - a. the "commitment to reside in New Zealand" test;
 - b. the "increased housing" test;
 - c. the "non-residential use" test;
 - d. the "incidental residential use" test;
- (c) if the land is sensitive, but not residential land:
 - a. the OP (or the individual(s) with control of it) is a New Zealand citizen, "ordinarily resident in New Zealand", or intending to reside in New Zealand indefinitely; or
 - b. the "benefit to New Zealand" test;

- (d) if the land is residential land and also sensitive for other reasons:
 - a. the "commitment to reside in New Zealand" test; or
 - b. the "benefit to New Zealand" test.

Investor test

To satisfy this test, the OP (or the individual(s) with control of it) must:

- (a) have relevant business experience relating to the investment in the land;
- (b) have demonstrated financial commitment to the investment;
- (c) be of good character; and
- (d) not be ineligible for a visa or entry permission to NZ under the Immigration Act 2009.

Commitment to reside in New Zealand test

This test is met if the OP (or each individual with control of it):

- (a) is a New Zealand citizen, ordinarily resident in New Zealand, holds a residence class visa, or is exempted by regulations;
- (b) intends (and signs a declaration confirming) to be present in New Zealand for at least 183 days per 12 month period, beginning on the date of the consent; and
- (c) becomes and remain a tax resident in New Zealand.

The new overseas investment landscape – the Overseas Investment Amendment Act 2018

Anyone granted consent under this test who is not a New Zealand citizen or ordinarily resident in New Zealand must reside in the property as their main home and satisfy (b) and (c) until:

- (a) they become a New Zealand citizen or ordinarily resident in New Zealand; or
- (b) they dispose of their interest in the land.

Increased housing test

This test is met if the investment will, or is likely to result in one or more of the following on residential land:

- (a) an increase in the number of residential dwellings on the land;
- (b) construction of a long-term accommodation facility, or an increase in the number of dwellings in a long term accommodation facility (such as a rest home); or
- (c) development works to support either of the above, and the following will or are likely to occur:
- (d) the OP will dispose of the property within the period specified by the OIO consent; and
- (e) while the OP owns the property, the OP and various related parties do not occupy the property.

Non-residential use test

This test is met if the residential land will, or is likely to:

- (a) be used for non-residential purposes in the ordinary course of business of the OP (or the business of another party for whom the OP controls the property); and
- (b) not be used or held for future residential use by the OP.

Incidental residential use test

This test is met where the residential land will, or is likely to be:

- (a) used for residential purposes but only in support of the ordinary business (which is not using land for residential purposes) of the OP (or the business of another party for whom the OP controls the property); and
- (b) acquired in the ordinary course of business of the OP.

In considering whether the test is met, the Ministers may consider all or any of the following:

- (a) if there are any reasonable alternatives to the purchase of the residential land;
- (b) the proximity of the residential land to the place of business;
- (c) whether the proposed use of the residential land is as staff accommodation for the relevant business;
- (d) any other factors they consider relevant.

Benefit to New Zealand test

This test is met if:

- (a) the investment will, or is likely to, benefit New Zealand, in terms of the list of "benefit factors" in the Act. Those benefit factors include:
 - (i) the creation or retention of jobs in New Zealand;
 - (ii) the introduction of new technology or business skills to New Zealand;
 - (iii) increased exports for New Zealand exporters;
 - (iv) increased processing of New Zealand's primary products;

The new overseas investment landscape – the Overseas Investment Amendment Act 2018

- (v) the extent to which New Zealanders will be able to participate in the investment; and
 - (vi) environmental protection and public access type outcomes.
- (b) where the land includes more than five hectares of non-urban land, the benefit will, or is likely to be, substantial and identifiable; and
- (c) where the land includes residential land, the conditions of the increased housing test are met.

Regulations may provide for separate "benefits to New Zealand" tests in relation to forestry activities.

Exemptions

The following exemptions are provided by the Act in respect of residential land that is not otherwise sensitive land. However, if an OP is purchasing land under an exemption from someone who acquired the land under an OIO consent, then the OP may be treated as being subject to any conditions of the original OIO consent. The Minister may also, after considering the relevant provisions, grant an individual exemption. This will provide greater flexibility under the Act.

Periodic leases: OIO consent is not required for a lease of residential land (including a residential tenancy under the Residential Tenancies Act 1986 (RTA)) which is terminable at will by either the landlord or the tenant, and offers no certainty of term for 3 years or more (including any rights of renewal).

Residential tenancy less than 5 years: OIO consent is not required for a residential tenancy for a term of less than 5 years, where the relevant land is residential but not otherwise sensitive. This applies to both fixed and periodic tenancies under the RTA.

Large developments: Developers of multi-story apartment buildings of 20 or more residential units (whether building a new building or increasing the number

of apartments in an existing building by 20 or more) may apply for an exemption permitting the developer to sell a specified percentage of the residential units to OP "off the plans", without requiring them to obtain OIO consent or to on-sell the units. Such OPs may not occupy the units themselves. The percentage of units per development that could be sold under this provision will be set by new regulations. An initial starting point of 60% is anticipated.

Where an OP has applied for consent to purchase residential land under the increased housing or benefit to New Zealand test to build or invest in developments of 20 or more units (whether building a new building or increasing the number of units in an existing building by 20 or more), the Ministers may decide not to require the on-sale of the units within a specified period (or at all), provided all new dwellings in the development are maintained as rental properties, a shared equity development, or sold under a rent to buy model. The owner may not occupy the units.

Hotel units: OPs may purchase units in hotels with 20 or more units on residential (but not otherwise sensitive) land without OIO consent, provided they enter into a lease-back arrangement with the hotel developer or operator. When the leaseback arrangement ends, the OP must either enter a new leaseback or dispose of the property within 12 months. The OP may not occupy a unit for more than 30 days per year.

Exemption for network companies providing essential services: Residential land may be acquired without OIO consent by OPs providing essential services such as electricity, gas, and telecommunications, where the land is used for the provision of that service.

Existing Resource Management Act 1991 requirements: An OP of "residential land" does not require OIO consent if such purchase is required to satisfy a condition of resource consent or district plan that applied before the amended Act comes into force.

The new overseas investment landscape – the Overseas Investment Amendment Act 2018

Indirect minority interests: Ministers may decide not to require on-sale of the land within a specified period (or at all) where the OIO application is for the acquisition by an OP of an indirect minority interest in rights or securities of a sensitive landowner.

Maori freehold land: OIO consent is not required for the purchase of Maori freehold land where OP is a member of the preferred class of alienees under Te Ture Whenua Maori Act 1993.

Regulations: Regulations may be passed under the Act exempting certain entities or classes of entity. The purposes of such exemptions are (among other things) to:

- (a) provide flexibility where compliance is impractical, inefficient, or unduly burdensome;
- (b) allow for exemptions that are minor technical;
- (c) relationship property reasons;
- (d) provision of network utility services; and
- (e) compliance with requirements under the Resource Management Act 1991 and to support businesses not principally using the land for residential purposes.

Australians and Singaporeans: It has been announced the Australian and Singaporean permanent residents and citizens will be exempt from the requirement for OIO consent in relation to residential land (but not other sensitive land). However, the mechanism which creates this exemption, and the exact details of it, have not yet been provided. We anticipate it will be by regulation.

Standing consents

The amended Act provides for a "standing" OIO consent to purchases of residential (but not otherwise sensitive) land to be granted. This will allow an OP to be granted OIO consent for multiple future transactions. Applications for such standing consents must be made under one of the commitment to reside in New Zealand, increased housing, non-residential use or incidental residential use

tests. The OIO may impose a "use-by" date for standing consents. Standing OIO consents are also available in relation to forestry applications.

Compliance statement by OP

An OP acquiring a freehold interest or any other interest for 3 years or more in residential land must provide their lawyer with a statement as to whether the transaction requires consent under the Act. A lawyer may not transfer the property without such a statement, or if they have reasonable grounds to doubt the accuracy of the statement. A lawyer must take reasonable steps to retain the statement for at least 7 years.

Profits-à-prendre

Profits-à-prendre (**Profits**) are rights to take something (e.g. minerals) from land, and are commonly used in agricultural, viticultural and mining industries. Before the Bill, OIO consent was not required for the grant of a Profit over sensitive land. Now, the rules for Profits can be summarised as follows:

- (a) a Profit is exempt from the requirement for OIO consent unless it is a "regulated profit-à-prendre";
- (b) "regulated profit-à-prendre" means:
 - (i) a forestry right; or
 - (ii) any other Profit, if the area of land covered by the profit is/will be used exclusively/principally for the purposes of the profit.

However, it does not include a Profit consisting only of rights to take any mineral or any class of Profit exempted by regulations.

There are also exemptions available, in certain circumstances, for Profits that are less than 5 hectares in area.

The new overseas investment landscape – the Overseas Investment Amendment Act 2018

Forestry rights

As noted above, forestry rights are no longer exempted interests and therefore consent under the Act will be required for an OP to acquire a forestry right. However, the Amendment Act contemplates that regulations may be issued which provide that the benefit to New Zealand test may be satisfied for forestry investments if the requirements set out in these regulations are, or likely to be, met. We understand new regulations are currently being finalised and should be available soon. We will be commenting on these once they are issued, as they should set out the promised streamlined consenting approach for forestry transactions. The Amendment Act is otherwise generally consistent in terms of how it approaches forestry rights with the March 2018 SOP, which we detailed in our article of 9 April 2018 (see link [here](#)).

Do you want to know more?

If you have any questions about the Amendment Act, please contact our specialist [Property](#) or [Overseas Investment](#) team.

A copy of the Amendment Act can be found [here](#).