

Upcoming changes to the Overseas Investment Act 2005

In 2019, the Government signalled changes to the overseas investment regime to be introduced in 2020. However in response to the economic circumstances created by COVID-19, the Government split the changes to the Overseas Investment Act 2005 (Act) into two separate Bills.

The Overseas Investment (Urgent Measures) Amendment Act 2020 (**Urgent Measures Act**), came into force on 16 June 2020. The Urgent Measures Act introduced a number of changes, with the most notable being the temporary notification requirement for a large range of transactions not previously captured by the Act.

The second piece of legislation, the Overseas Investment Amendment Bill (No. 3) (**No. 3 Bill**) is currently at the Select Committee stage, and is expected to come into force early next year. The No.3 Bill will make a number of changes to the Act aimed at simplifying the overseas investment regime.

Below is a refresher on the temporary notification requirement, and a summary of the key changes proposed under the No. 3 Bill:

Temporary notification requirement under the Urgent Measures Act

Under the temporary notification regime, overseas investors must notify the OIO of any transaction that is not normally subject to OIO approval where that transaction:

- grants an overseas investor control of more than 25% of an existing business;

- increases an existing level of control up to or beyond a 50%, 75% or 100% threshold; or
- is an investment that effectively results in the overseas investor acquiring more than 25% of the value of the vendor's business assets.

This applies regardless of the dollar value of a transaction, meaning a large number of transactions are now captured by this notification requirement. Notification is made through a short online application process, and does not require payment. Most transactions are then granted approval to proceed within 10 working days of notification.

We recommend investors should make agreements conditional upon approval under this temporary notification requirement.

Signalled changes under the No.3 Bill

Rural land

Under the current Act, rural land must be offered to New Zealanders before it can be sold to an overseas investor. This is done through a requirement for the vendor to advertise rural land for a minimum of 21 days before selling to an overseas investor. At present, the rural land advertising can be undertaken after a conditional agreement has been signed with an overseas investor (the agreement being conditional upon the vendor completing the advertising and not electing to sell to a New Zealander).

The proposed No. 3 Bill changes this requirement by requiring a vendor to advertise rural land before it can even enter into an agreement to sell with an overseas investor.

Advertising requirements will also be made more explicit.

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Benefit to New Zealand test

The existing twenty one factor benefits to New Zealand test will be replaced with fewer and broader factors.

Notable changes are:

- the counterfactual test will be changed to a before and after investment test;
 - the "substantial and identifiable" benefit requirement to purchase rural land over five hectares will be removed. Instead a proportionate approach will be introduced, where the benefit must be proportionate to the sensitivity of the land and the nature of the overseas investment;
 - the current Ministerial directive letter for overseas investment in rural land will be entrenched in the Act. This means that investment in rural land must show a substantial level of benefit to New Zealand under the new before and after test. This creates an even higher standard for overseas investment in farm land; and
 - overseas investment in water bottling enterprises will now require increased consideration of the impact on water quality and sustainability when conducted on sensitive land.
- removing the current factors of business experience and acumen;
 - introducing capability factors, such as whether an individual is prohibited from directorship under the Companies Act 1993;
 - removing the factor of financial commitment to overseas investment; and
 - introducing new factors to consider tax evasion, abusive tax positions and outstanding unpaid tax of \$5 million or more.

Investor test

Under the proposed No. 3 Bill the existing investor test will be simplified. New Zealanders will be excluded from the new test, while overseas investors will only have to satisfy the test once, provided there has been no material change in circumstances. Other changes to the investor test are:

- replacing the "good character test" with factors relating to criminal offences, civil offences resulting in pecuniary penalty, and allegations where formal proceedings have commenced;

Leases

Leases and other "less than freehold interests" in sensitive land for under ten years (presently three years) will no longer be caught by the Act. This threshold will consider the total term of the interest – a lease of five years with a further five year right of renewal would be considered a ten year lease, and fall within this provision.

Fundamentally New Zealand entities

The definition of "overseas person" for New Zealand incorporated companies and New Zealand listed issuers has been changed. Currently, a New Zealand listed entity is considered an overseas person if 25% or more of the entities shares or 25% or more of voting power are foreign owned. Under the current regime, many companies that are majority owned and controlled by New Zealanders are considered overseas persons where overseas investments "tips" the company over the 25% threshold.

The No.3 Bill proposes to change this threshold. Under the new changes New Zealand listed entities will no longer be overseas persons if they are at least 50% New Zealand owned. However, OIO consent will still be required if overseas investors with more than 10% of shares can collectively control:

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- more than 50% of the composition of a governing body; or
- control the exercise of more than 25% of voting power.

We expect that many NZX listed companies with diverse shareholdings will no longer be caught by the Act. Ministers will also be able to exempt from the regime transactions, persons or interests that are considered fundamentally New Zealand owned.

Adjoining land

The types of adjoining land that can make a target parcel of land "sensitive" have been amended. Adjoining land will only be relevant where it is foreshore, lakebed, conservation land, specified regional parks or historically or culturally significant land. This means some land such as public parks will no longer be considered adjoining land. Lower-risk investments that are only sensitive because they are adjoin these types of land will also no longer be screened under the Act.

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