

A better targeted overseas investment regime completes the reform puzzle

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There has been a flurry of activity in connection with New Zealand's foreign investment regime. The Overseas Investment Amendment (No 3.) Bill (now Act) completed its third reading at the end of last week and received Royal Assent on 24 May. The Minister also announced yesterday (25 May) that the Emergency Notification Regime will be replaced on 7 June with the permanent call-in regime.

These changes have long been signalled (see our [previous update](#)). Buddle Findlay conveniently summarises the latest round of important changes to New Zealand's overseas investment regime, which will take effect on 5 July (with a couple of exceptions).

The Overseas Investment Amendment (No.3) Act 2021 (Amendment Act) represents the final piece in the puzzle of the Phase Two reforms that began in 2019. As outlined in our [previous update](#), the first round of the Phase Two reforms were rushed through in mid-2020 in response to the Covid-19 pandemic. The 2021 Amendment Act makes the balance of the reforms and is intended to narrow the scope of the regime to focus on areas of potential risk, while allowing high-quality productive investment to proceed more easily.

If you are an investor with potential investments in the pipeline, now is a good time to check how the new laws may affect your transactions.

Key changes for overseas investors from 5 July

- **Changes to the definition of 'overseas person':** The Amendment Act removes certain New Zealand listed issuers and managed investment schemes from the scope of the Act where they meet specified ownership and control thresholds. There is also a new definition specifically for limited partnerships (previously covered under the definition of bodies corporate).
- **Allowing incremental investments in securities to be made up to certain control limits:** The Amendment Act removes the consent requirement for investors who make only additional incremental investments that do not result in material change in ownership or control. Previously, the Act required overseas persons to obtain consent before increasing an already consented-to holding, regardless of the size of the increase or resulting change in effective control. The Amendment Act will allow increases to existing investments without consent, requiring consent only if an ownership or control limit is crossed (either 25, 50, 75, or 100 percent).
- **Narrowing categories of sensitive land:** It will remain the case that transactions involving qualifying interests in sensitive land will require consent. However, the Amendment Act makes permanent the previous, temporary changes under the Urgent Measures Act that narrowed the categories of land that is sensitive only by reason of what it adjoins.
- **Interests in nonresidential sensitive land:** The screening threshold for leases and other interests in land that is sensitive (but not residential) increases from 3 years to 10 years (including any rights of renewal) under the Act.
- **Embedding a more stringent approach to investments in farm land:** The Act includes more stringent requirements for the application of the 'benefit to New Zealand' test to farm land. These considerations were included in a 2017 Ministerial Directive letter but will now be embedded into the legislation.
- **Narrowing the application of the national interest test:** As outlined in our [previous update](#), the 2020 amendments introduced a 'national interest' assessment for certain consent applications, allowing the Government to decline consent for particular transactions if they are considered contrary to New Zealand's national interest. The 2021 Amendment Act recognises that the national interest test inadvertently applied to investments that did not pose significant risk to New Zealand, including both active and passive investments. Specifically, the Amendment Act increases the threshold for the application of the test from 10 to 25 per cent ownership or control by a single foreign government in an investor that is seeking consent under the Act, and provides for exemptions of passive foreign government investors such as pension funds. These amendments realign the application of the national interest test with the policy intent.

Other changes

The Amendment Act also contains amendments that will come into effect at a later date, including:

- **No post-agreement advertising:** Under the current law, farm land advertising may occur after a sale and purchase agreement has been entered into with an overseas person, albeit that the vendor must have the ability to exit without penalty to accept an alternative offer from a New Zealander. Changes that will be implemented by the Amendment Act mean that the farm land advertising requirement (under which farm land must be advertised on the open market for a period of time before an overseas person can acquire it) must now be conducted before a sale and purchase agreement with an overseas person is entered into. These changes will come into force on the date appointed by the Governor-General, if an Order in Council is made, or otherwise on 25 November this year (ie 6 months after Royal Assent).
- **Changing the benefit to New Zealand test from a 'with and without' counterfactual analysis to a 'before and after' analysis.** Currently, the test requires an assessment of the benefit brought by the proposed investment against the benefits that would arise if the investment was made by an adequately funded alternative New Zealand purchaser. This approach has long been criticised as too complex and highly theoretical. The 'with or without' test led to analysis that was divorced from reality, particularly where no adequately funded alternative New Zealand purchaser existed. The new 'before and after' analysis will provide a clearer and more straightforward analysis by comparing the investment to the status quo. This change will come into force on the date appointed by the Governor-General, if an Order in Council is made, or otherwise on 25 May 2022 (ie 1 year after Royal Assent).

The end of the emergency notification regime

The temporary notification regime brought in as part of the government's Covid-19 response will be replaced with a narrower national security and public order call-in power on 7 June 2021. This call-in power will allow the government to review transactions that are not currently subject to screening, but which may affect national security and public order (NSPO transactions, ie transactions involving strategically important businesses and high-risk critical national infrastructure).

The Overseas Investment Office has **advised** that transitional arrangements for both emergency notification regime and NSPO notifications are based on the date the transaction takes place, not when the notification is made to the Office. In other words:

- If a transaction is entered into before 7 June 2021, the temporary emergency notification regime applies
- If a transaction is entered into on or after 7 June 2021, the NSPO notification regime applies.

Other changes – and a missed opportunity

The proportionality approach to assessing benefits

In our view, the Amendment Act missed an opportunity to fully address the complexity of the benefit to New Zealand test. The Amendments introduce into legislation a proportionality requirement whereby the benefits of the overseas investment must be proportional to the interest acquired and the sensitivity of the land.

The Overseas Investment Office has applied a proportionality approach for a number of years, and it is a straightforward analysis when considering transactions that differ because of, for example, the nature of the interest to be acquired (freehold, compared with a relatively short term leasehold interest). A proportional approach in this context is a good way to balance the desire to protect New Zealand's sensitive assets with the desire to encourage high quality overseas investment.

However, uncertainty remains when there are few differentiating features. For example, does an investment in 100 hectares of farm land require ten times the number of full-time equivalent employees than an investment in 10 hectares of farm land, or is some other number required? Looking ahead, we hope that guidance for investors and vendors will be published to provide greater certainty.

Application fee changes

Earlier this year, the Overseas Investment Office consulted on proposed fee increases for consent applications, in some cases more than tripling the fee. Final decisions on application fees are yet to be announced, but given the potential for such significant increases, if you have a transaction in the pipeline it would be worth assessing how these changes could affect you and the timing of any consent application.

Seek advice

The Office has also published **guidance** on the changes. However, specialist advice should be sought to determine whether consent or notification is required for a particular investment. If you would like any further information about the changes, or assistance with an application, please contact a member of our team.

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