

PRACTICE BRIEFING

Guide for lawyers advising overseas persons investing in New Zealand assets

INTRODUCTION

Before investment in significant New Zealand business assets, or the acquisition of certain types of New Zealand land, or fishing quota, overseas persons and entities may need consent under the Overseas Investment Act 2005 (Act). The Act recognises that it is a privilege for overseas investors to own sensitive land in New Zealand or to make significant investments in New Zealand businesses by requiring them to get consent before giving effect to a transaction. It requires the Overseas Investment Office (OIO) to assess whether New Zealand would benefit from the proposed overseas investment.

This Practice Briefing is intended to assist practitioners to identify whether their clients may need to obtain overseas investment consent before acquiring New Zealand land or business assets. For information on fishing quota, see the Fisheries Act 1996.

WHO IS AN OVERSEAS PERSON?

‘Overseas person’ means all individuals who are not New Zealand citizens nor ordinarily resident in New Zealand. Foreign nationals who hold a residence class visa must have lived in New Zealand for at least 12 months and show an intention to reside in New Zealand indefinitely before they cease to be an overseas person under the Act.

‘Overseas person’ may also mean companies, trusts, partnerships and other corporate entities as defined in s(7)(2) of the Act. For example, a company will be an ‘overseas person’ if 25% or more of the company is owned or controlled by individuals or companies who are overseas persons.

Associates of overseas persons are also subject to the Act, including New Zealand citizens and those people who ordinarily reside here (refer to the definition of an associate in section 8 of the Act). For instance, an overseas person cannot avoid the requirements of the Act by directing New Zealand business partners to acquire sensitive land or significant business assets on their behalf. Care is also needed where a person buys property with the intention to nominate an overseas person.

The OIO will 'look behind' trusts and other business arrangements to understand who has ultimate beneficial ownership or control of an investment.

An overseas person with a New Zealand spouse can purchase sensitive land without consent, provided that the land will be "relationship property" as defined by the Property (Relationships) Act 1976.

OVERSEAS INVESTMENTS IN SENSITIVE LAND

Overseas persons will require consent under the Act before they can acquire interests in sensitive land. The interest could be a legal or equitable interest and includes a leasehold interest over three years.

What is sensitive land?

Sensitive land is defined in Schedule 1, Part 1 of the Act.

For example, sensitive land includes:

- » Non-urban land (rural), over 5 hectares in area
- » Foreshore and seabed
- » Land over 0.4 hectares that is held for conservation purposes under the Conservation Act 1987
- » Land over 0.2 hectares that adjoins the foreshore
- » Land over 0.4 hectares that adjoins a lake, park or certain reserves, and
- » Land on some islands for example Arapawa Island, Great Barrier Island

The above list is not exhaustive. You should refer to Schedule 1 of the Act for a full list of the land that is subject to the Act.

The Overseas Investment Amendment Bill has introduced changes to the OIO to restrict foreign buyers of residential property. The definition of sensitive land under the Act has been extended to include residential and lifestyle land. As of 18 August 2018, these changes have now been passed by Parliament and the new law commences on October 22, 2018. People who hold New Zealand residence-class visas, but don't live here will be able to apply to the OIO for consent to buy a home. Those who hold temporary visas, such as visitor, student, working holiday, or work visas, generally won't be able to buy.

Land sensitivity certificates

Applicants and their advisors should conduct a careful examination of the survey plan of the land to be acquired, and all adjoining parcels, to assess whether that land is sensitive land under the Act. The OIO recommends that overseas investors engage an accredited land expert to undertake the assessment. You can find out more on the OIO website about getting an accredited supplier to provide a sensitive land certificate: www.linz.govt.nz/regulatory/overseas-investment/what-you-need-do-if-you-are-selling-new-zealand-assets-overseas-investors/sensitive-land#land.

OVERSEAS INVESTMENTS IN SIGNIFICANT NEW ZEALAND BUSINESS ASSETS

Overseas persons and companies may require consent before investing in significant business assets in New Zealand. An overseas investment in significant business assets includes three key types of transaction:

1. The acquisition of rights to or interests in a company (or other corporate entity eg. a trust or limited partnership) with New Zealand assets, if, as a result of the overseas investment, that company will be 25% or more overseas owned or controlled. If the value of the investment, or the value of the New Zealand business assets (including assets of the target's 25% or more subsidiaries), exceeds NZD \$100 million, an overseas investor will require consent. (Note that a higher threshold applies for Australian investors.)
2. The establishment of a business in New Zealand (which is carried on for more than 90 days in a year). If the total amount expected to be spent in establishing the business exceeds NZD \$100 million, consent to acquire significant business assets will be required.
3. Acquiring property (including goodwill and other intangible assets) that is used in carrying on business in New Zealand, if that investment exceeds NZD \$100 million (whether in one transaction or a series of related transactions).

Even if an overseas person's investment in business assets is less than NZD \$100 million, consent will be required if the investment includes ownership or control of sensitive land.

CONSENT IS REQUIRED BEFORE AN OVERSEAS PERSON ACQUIRES ANY RIGHTS IN SENSITIVE ASSETS

Any agreement for sale and purchase of sensitive land, or to acquire an interest in business assets, should be made conditional upon the overseas person successfully obtaining overseas investment consent. The agreement must also allow enough time for consent to be obtained.

You can find out more about how to apply for consent and what is required to be included in a consent application from the OIO website: www.linz.govt.nz/regulatory/overseas-investment/applying-for-consent-purchase-new-zealand-assets

WHAT CAN HAPPEN IF CONSENT IS NOT OBTAINED?

Failure to get consent can lead to an investor having to sell their interest or having a transaction cancelled. There may also be criminal consequences (up to a year in prison or a fine of \$300,000) or civil penalties, which could lead to any profit being stripped.

CONCLUSION

The process for overseas investors wanting to invest in New Zealand can be a complex and time-consuming process and the consequences for the investor who fails to gain consent can be serious. The further restrictions recently introduced may create a surge in inquiries on the types of issues addressed in this briefing.

NEW ZEALAND LAW SOCIETY

Law Society Building
26 Waring Taylor Street
WELLINGTON 6011

PO Box 5041
Lambton Quay
WELLINGTON 6145

(04) 472 7837

Information in the Practice Briefing series is provided by the Law Society as a service to members. This briefing is intended to provide guidance and information on best practices. Some of the information and requirements may change over time and should be checked before any action is taken.

September 2018