

## Foreign Investment in New Zealand – NZ Government Approval Process

Set out below is a summary of the consent process under the Overseas Investment Act 2005 (**Act**). The Act regulates investments by “overseas persons” in “significant business assets” and “sensitive land” in New Zealand. The Government regulator responsible for assessing applications for consent is the Overseas Investment Office (**OIO**) and some investments in sensitive land also require the consent of Government Ministers.

### When is consent required?

1. An investment by an overseas person requires consent if it will result in an overseas investment in:
  - 1.1 sensitive land; or
  - 1.2 an overseas investment in significant business assets (where the price paid or the total asset value exceeds NZD \$100M). There is a higher threshold for non-government Australian investors.
2. An overseas investment in sensitive land includes the acquisition of shares in a company if that company owns or controls sensitive land and, as a result of the acquisition, the overseas person ends up with a 25% or more ownership or control interest in that company. It also includes leasing land for a term of more than three years.
3. The starting point for determining whether land is sensitive is based on the type and size of the land. In general terms, land is sensitive if it is located in a non-urban area and is of a size that is 5 hectares or more. Other smaller areas of land could be classified as sensitive due to their inclusion of, or proximity to, waterways, parks, conservation areas, islands, or areas of historic significance.
4. Sensitive land applications require additional information over and above that required for applications to invest in significant business assets. So, applications to invest in sensitive land take longer to prepare and to process and cost more in terms of OIO application fees and other costs.
5. Any acquisition documents must include a condition precedent relating to the requirement for consent to be obtained. Likely timeframes for consent are set out later in this letter but we generally recommend allowing at least 8 weeks for consent to be granted for investments in significant business assets and 18 weeks for investments in sensitive land.
6. Consent is required even if the assets or land are already owned by overseas investors.

### Process of obtaining consent

7. The first step in the consent process is to obtain a land certificate from a Land Information New Zealand Accredited Supplier certifying as to whether or not the land is sensitive and whether or not the land contains any additional features which may put it into the category of being “special” sensitive land. This certificate must be filed with the consent application whether or not the land is special.

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8. Land is special if it includes the foreshore, the seabed, a riverbed or a lakebed. It is important to identify this at an early stage, as any special sensitive land must first be offered to the Crown for acquisition before it can be sold to an overseas person, subject to certain exceptions. There is a general exception where the investment does not involve a direct purchase of land by an overseas person (eg. 50% of the shares in a company which owns sensitive land).
  9. The second step is to determine whether the land constitutes “farm land”, because there is a requirement under the Act for the vendor to market farm land in New Zealand for 20 working days before being able to sell it to an overseas person. If it is farm land then consideration will also need to be given to whether an exemption from the farm land advertising regime is available.
  10. The third step is to prepare a consent application. We typically start by providing the overseas person with a detailed information checklist of the information required for an application and allow 10-15 working days to collate the information required.
  11. Whether an investment involves significant business assets or sensitive land, the same initial information is required to demonstrate that the:
    - 11.1 investor has business experience and acumen relevant to the investment;
    - 11.2 investor is financially committed to the investment; and
    - 11.3 the individuals in control of the investment (usually the board) are of good character.
  2. If the investment involves sensitive land, then the information above is required, plus the application must include a detailed business plan and build a story around the benefits to New Zealand that the overseas investment will, or is likely to, bring. These benefits make up the core of an application for sensitive land and careful thought needs to be put into this aspect to ensure a successful outcome. There are 21 relevant factors including a range of economic, non-economic and strategic factors. Economic factors carry the most weight. These can include the likelihood of creating or retaining jobs for New Zealanders, the introduction of new technology or business skills, increased export receipts for New Zealand exporters, added market competition, additional capital investment for development purposes and increased processing of New Zealand’s primary products. Not all of these factors have to be made out, but where sensitive land is involved **the benefits to New Zealand often have to be shown to be substantial and identifiable.**
  12. When assessing the claimed benefits of an investment in sensitive land, the OIO will assess those benefits against the benefits that would arise in a counterfactual scenario. The counterfactual scenario is the scenario which would likely occur if the overseas investment was not made. That means that, as part of its assessment, the OIO must take into account what is likely to happen both with and without the particular overseas investment that it is being asked to approve. Often input from the vendor will be needed to assist in determining the counterfactual.
  13. It is important to note that it will often not be sufficient for an overseas investor to state that their business plan is to operate the land or business on a business-as-usual basis. This is unlikely to meet the requirements of demonstrating a benefit to New Zealand.

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14. Finally, statutory declarations as to good character and also as to the truth and correctness of the application must be prepared. These declarations are required from the persons who will ultimately control the investment (usually the directors). The OIO has a broad discretion to decide who it believes is in control and to request declarations from those persons.
  15. In some cases reports from consultants may be required to support an application for consent. One example would be a report from an environmental consultant on the existence of areas significant flora, fauna and wildlife habitats on a property and the management practises required to protect and enhance those areas.

### **Timeframes**

16. Once the application is ready to be filed it is submitted to the OIO in Wellington for an initial assessment. This takes up to 5 working days, following which the OIO will either accept the application for formal processing or ask for further information.
17. Once accepted for formal processing the timeframe for consent is typically:
  - 17.1 30 working days for significant business asset acquisitions;
  - 17.2 50 working days for most types of sensitive land acquisitions; and
  - 17.3 70 working days or more for large or complex land acquisitions.
3. It is common for the OIO to ask for further information as it works through the application and the OIO will always “stop the clock” until such information is provided. It is important to respond to any request for information quickly.
18. Following formal processing and provided the OIO is comfortable that the statutory criteria have been met, a draft set of consent conditions will be issued. Once the conditions are agreed the OIO will send the application to the government Ministers for final approval (if required). Generally ministerial approval is not required for significant business asset investments or for less significant sensitive land investments (for example, entering into a lease). This final ministerial approval process typically takes a further 10-15 working days.

### **Consent conditions**

19. The conditions of consent are usually fairly standard and are designed to ensure that the overseas investor carries through with its investment plan and makes a reasonable effort to do the things it said it would do in the application. A three year reporting condition is usually imposed, which helps the OIO to monitor progress.
20. Conditions relating to continuing good character are always imposed. The OIO must also be notified of any disposal, even if the land or asset is going back into NZ ownership.

**Fees**

21. The OIO currently charges an application fee of between NZD \$19,524.44 and NZD \$22,489 (inclusive of GST) for sensitive land applications. The fee for significant business asset applications is NZD \$13,186.67. This is payable when the application is submitted and is non-refundable (whether or not consent is granted).
22. The cost of obtaining the land certificate is usually in the vicinity of NZD \$1,500 plus GST, but this depends on the size and nature of the land involved.
23. Our fees for the legal work involved depend on the nature of the investment. A fee estimate will be provided on request.

For further information please contact Melissa Clark in the first instance.

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