



TE TAI ŌHANGA  
THE TREASURY

# Guidance Note

## Foreign Investment Policy and National Interest Guidance

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The Treasury URL at June 2021 for this document is <https://treasury.govt.nz/publications/guide/foreign-investment-policy-and-national-interest-guidance>.

# New Zealand's foreign investment policy

The New Zealand government welcomes sustainable, productive and inclusive overseas investment. Overseas investment supports job creation, the creation and adoption of new technologies, increases human capital, and grants New Zealand more diverse international connections, including access to global distribution networks and markets. Without foreign investment, New Zealanders' living standards would be lower.

At the same time, the Government recognises that foreign investment can pose risks. Foreign investment can take ownership and control of economic activity out of New Zealand and high levels of foreign ownership of sensitive New Zealand assets can conflict with a view that New Zealanders should own or control those assets. It can also, in extreme cases, present opportunities to undermine our national security.

The Overseas Investment Act 2005 (the Act) is New Zealand's principal tool for regulating foreign investment. It seeks to balance the need to support high-quality investment, while ensuring that the government has tools to manage risks associated with foreign investment. The Act does so by providing an enduring framework for screening foreign investments in:

- sensitive assets to help ensure that they benefit New Zealand and are not contrary to New Zealand's national interest, and
- certain strategically important businesses and business assets to help ensure that they do not pose significant risks to New Zealand's national security or public order.

This information is general in nature and is not a substitute for legal advice. Foreign investors should ensure that they understand New Zealand's foreign investment screening regime and ensure they comply with the law, or risk the imposition of significant penalties.

# How the Overseas Investment Act 2005 operates

The Act requires overseas persons<sup>1</sup> to get consent before acquiring sensitive land,<sup>2</sup> significant business assets<sup>3</sup> or fishing quota. This requirement reflects the Act's purpose: that it is a privilege for overseas persons to own sensitive New Zealand assets.

The test that the overseas person must satisfy to obtain consent depends on the type of sensitive asset being acquired. In general terms, if:

- *Significant business assets* are being acquired, the overseas person must satisfy the investor test, which focuses on the characteristics of the overseas person.
- *Sensitive land* is being acquired, the overseas person must satisfy the investor test and the benefit to New Zealand test, which requires the overseas person to deliver certain benefits to New Zealand, unless:
  - *Residential land* is being acquired: then there are a number of tests that largely focus on the land's use. For example, a person with a residence class visa can get consent to acquire residential land (that is not sensitive for any reasons other than it being residential) if they commit to becoming a tax resident, spending the majority of each year in New Zealand, and using the property as their primary residence, or
  - *Forestry activities* will occur on the sensitive land: then the overseas person must satisfy the investor test and one of two streamlined benefits tests or the general benefits test.
- *Fishing quota* is being acquired, the overseas person must satisfy the investor test and a national interest test that is similar to the benefits test but has some elements specific to fisheries.

From 7 June 2021, investments in *strategically important businesses and business assets*, where consent would not normally be required (for example, because the business is worth less than \$100 million), may be subject to review under the national security and public order call-in power. These are referred to as 'call-in transactions'.

The national security and public order call-in power – expected to be rarely used – allows the government to block, impose conditions on, or order disposal of call-in transactions that pose a significant risk to New Zealand's national security or public order. Additional information on this power is provided below.

The Overseas Investment Office (OIO) is the Act's regulator. It makes decisions on some applications and advises decision-making Ministers on others.

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1 Broadly speaking, non-New Zealand citizens and residents, and bodies corporate, trusts and other unincorporated entities that are more than 25 owned or controlled by overseas persons.

2 This includes non-urban land over five hectares, residential land and lifestyle land, and land adjoining sensitive areas such as the foreshore.

3 Broadly speaking, this applies to securities, businesses and assets valued at \$100 million, or higher amounts where the investor is from a country with which New Zealand has a relevant free trade agreement.

# The national interest test

The national interest test is a 'backstop' tool to manage significant risks associated with transactions that ordinarily require screening under the Act (except for call-in transactions). It will be used rarely and only where necessary to protect New Zealand's core national interests. The test's, and the Government's, starting point is that investment is in New Zealand's national interest.

Applying the test means that the Minister responsible for the Act (ordinarily the Minister of Finance) can consider the potential risks of a transaction to New Zealand's national interest when deciding whether to grant consent. If a transaction is determined to be contrary to the national interest, consent may be declined, or conditions imposed to mitigate any risks.

This test will always apply to investments that warrant greater scrutiny:

- where a foreign government or its associates would hold a more than 25 per cent interest in the asset
- investments that are found to present national security risks, and
- investments in certain specified strategically important industries and high-risk critical national infrastructure. That is:
  - significant ports and airports
  - electricity generation and distribution businesses
  - water infrastructure (broadly, drinking water, waste water, storm water networks and irrigation schemes)
  - telecommunications infrastructure
  - media entities that have an impact on New Zealand's media plurality
  - entities with access to, or control over, dual-use or military technology
  - critical direct suppliers to the New Zealand Defence Force, Government Communications Security Bureau and the New Zealand Security Intelligence Service,
  - systemically-important financial institutions and market infrastructure (for example, payments systems), and
  - any other category of strategically important business assets prescribed in the Overseas Investment Regulations.

Additional detail on what constitutes strategically important business assets can be found in the Overseas Investment Regulations 2005.

In rare cases, the Government could apply the national interest test to other investments that require consent and pose material risks. This would be at the discretion of the Minister responsible for the Act and, if a decision was taken to apply the test, investors would be notified as soon as possible. Potential factors that could trigger escalation to the national interest test include:

- foreign government or associated involvement that was below the 25 per cent threshold, but granted that government (and/or its associates) disproportionate levels of access or control to sensitive New Zealand assets<sup>4</sup>
- investments that would grant an investor significant market power within an industry or result in vertical integration of a supply chain, and
- potential inconsistency with Government objectives, for example environmental or economic objectives.

## How the national interest test is applied

The national interest, and what would be contrary to it, is not defined in the Act. Instead, the Act grants the Minister responsible for the Act broad discretion to decide on a case-by-case basis whether a prospective investment would be contrary to the national interest. This has significant advantages over a more rigid test, that, for example focussed on investments in certain assets or asset classes. In particular, it:

- allows New Zealand's interests to be protected, without establishing a framework that would likely result in valuable investments being declined, and
- ensures that the Overseas Investment Act is an enduring piece of legislation that can easily respond to changes in the global risk environment, community concerns about foreign investment, and government priorities.

In applying the national interest test, the Government considers a range of factors, the relative importance of which can vary depending on the nature, and likely impact, of the investment. For example:

- Investments in large businesses, businesses that have significant market share, or businesses that hold unique assets or operate in particularly sensitive areas of the economy (for example, dual-use or military technology, the health sector, and other critical national infrastructures) may raise more national interest concerns than investments in other types of businesses.
- Investments that enhance economic prosperity by, for example, increasing New Zealand's productivity, bringing in new technologies, or creating jobs, are less likely to be contrary to New Zealand's national interest.

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4 Disproportionate access to, or control, can include: access to non-public information, membership or observer rights on the board, the power to control board composition and any involvement other than through the exercise of ordinary voting rights in the target entity's decision-making.

Across all investments, however, there are a number of factors that are generally considered when determining whether an investment is contrary to New Zealand's national interest:

- *National security, public order and international relations:* The Government considers the extent to which investments pose risks to New Zealand's national security, public order, or international relations. This is informed by advice from the New Zealand Security Intelligence Service, Government Communications Security Bureau, with public order advice coming from a range of agencies where relevant (for example, the Ministry of Culture and Heritage in respect of transactions in the media sector). Advice on international relations is provided by the Ministry of Foreign Affairs and Trade.
- *Market structure:* Diverse ownership within and across sectors supports competition, economic growth, and equal access to goods and services. In assessing a prospective investment, the Government therefore considers whether an investment may grant the investor:
  - access to significant economic rents through, for example, the acquisition of an entity with significant market share in one business segment or ownership of a vertical supply chain, or
  - the ability to effectively influence other businesses or the New Zealand government through, for example, gaining control of the domestic or global supply of a product or service.

This assessment is entirely separate to any prospective investigation of any transaction by the Commerce Commission, which enforces competition laws and has regulatory responsibilities in a number of specific sectors. This reflects the Act's specific purpose and objectives.

- *Economic and social impact:* The Government considers an investment's likely impact on the New Zealand economy and society, and the extent to which any benefits to New Zealand are commensurate with the sensitivity of the asset being acquired. The benefit to New Zealand test, which provides a formal framework for this kind of assessment in respect of sensitive land, serves as a guide for the types of matters the Government is likely to consider when considering the economic and social impact of investments in business assets.

Additional detail on the benefit to New Zealand test can be found here on the Land Information New Zealand website <https://www.linz.govt.nz/overseas-investment>.

- *Alignment with New Zealand's values and interests, and broader policy settings:* The Government will consider the extent to which an investment supports broader Government priorities and policy settings and New Zealand's values. This includes considering an investment's alignment with the Government's economic plan, such as whether it will support thriving and sustainable regions or New Zealand's transition to a clean, green and carbon neutral economy.
- *Character of the investor:* The investor test is the government's primary tool for determining an overseas person's suitability to invest in New Zealand. However, that test is carefully calibrated to minimise that test's burden on the average investor and therefore is focused on the types of risks most likely to be relevant to most prospective investors. The national interest test grants the Government broader discretion, where necessary, to assess an investor's character and determine whether they are likely to comply with New Zealand's laws, including conditions imposed under the Act, or whether they have any characteristics otherwise rendering them unsuitable to invest in New Zealand (for example, are subject to international sanctions).

## Assessing foreign government investors

Foreign government investors and their associates can pose, in rare cases, more significant risks than other types of investors. This is because these investors may be pursuing broader policy or strategic (as opposed to purely commercial) objectives through their investments that may not align with New Zealand's national interest. For this reason:

- all investments ordinarily screened under the Act that would result in a foreign government or their associates holding a more than 25 per cent interest in sensitive New Zealand assets are always<sup>5</sup> subject to the national interest test, and
- foreign government involvement at lower levels, but where that investor has disproportionate access or control to sensitive New Zealand assets, may be a factor that triggers the discretionary application of the national interest test.

This does not reflect a view that all foreign government or state-linked investments pose material risks. Only that they have particular characteristics that justify additional scrutiny, consistent with the operation of foreign investment screening regimes in comparable jurisdictions.

In assessing whether a foreign government investor poses risks to New Zealand's national interest, in addition to the matters described above, the Government will generally consider:

- the extent to which the investor operates on an arm's length and commercial basis from the relevant government (entities operating at arm's length from the relevant foreign government are likely to pose fewer risks),
- the investor's governance arrangements and prospective governance arrangements for the relevant investment,
- the existence of any other shareholders or partners in the investment,
- whether the target entity will be, or will remain, listed on a New Zealand financial market (additional regulations that apply to listed entities mean that investments in listed entities are generally less likely to pose significant risks),
- the extent to which the investment would grant the relevant government control over, or access to, the underlying asset (for example, investments with no control rights are less likely to pose risks than those that grant a foreign government significant control of strategically important business assets), and
- the share of the entity that would remain owned by non-associated investors if the transaction was to proceed (transactions where non-associated investors will retain a significant degree of control are less likely to pose national interest concerns).

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<sup>5</sup> Unless the foreign government investor is exempted from this under s 20AA of the Act.

## The national security and public order call-in power

The national security and public order call-in power empowers the Government to manage significant national security and public order risks posed by foreign investments in certain strategically important assets not ordinarily subject to screening. It differs from the general consent frameworks that exist in the Act in that the onus is on the Government to demonstrate that a transaction poses significant risk rather than investors to demonstrate that it does not.

### Scope of the national security and public order call-in power

The call-in power will apply to investments in broadly the same categories of strategically important businesses as the national interest test will always apply to, with three exceptions. The call-in power will:

- **apply** to investments in entities that develop, produce, maintain or otherwise have access to sensitive data,<sup>6</sup> recognising that access to this data can empower foreign actors to exert leverage over New Zealanders and/or the New Zealand government
- **not apply** to investments in irrigation schemes. This reflects that investments in these assets are unlikely to pose national security or public order risks, but could give rise to broader national interest concerns, and
- **not apply** to any other category of strategically important business specified in regulations as relevant to the national interest test. That is, regulations cannot expand the types of investments that will be subject to the call-in power.

Recognising that the existence of any national security and public order risks is not always correlated to investment size, the call-in power will apply to any transaction to acquire an interest in relevant strategically important businesses (that is, it has a \$0 and 0 per cent threshold). There are three exceptions to this:

- investments that result in an investor holding less than 10 per cent of a publicly listed entity's shares, unless the investment grants disproportionate access to, or control of, that entity (for example, the right to appoint a board member)
- investments in media entities, where the threshold for screening is obtaining a greater than 25 per cent interest. This is consistent with the screening threshold that applies to indirect investments in sensitive assets under the Overseas Investment Act more generally, and
- for investments in assets or property, acquisitions that would make the buyer a strategically important business in their own right (for example, significant electricity generation capacity or large volumes of sensitive information).

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<sup>6</sup> The definition of sensitive data is refined in the Overseas Investment Regulations. It broadly includes genetic, biometric, health, sexual orientation and behaviour, and financial information about individuals as well as government data relevant to national security and public order.

## **Notifying transactions in scope of the national security and public order call-in power**

To support the Government's ability to manage any significant national security or public order risks, investors:

- must notify the government of any transactions involving dual-use and military technology, and critical direct suppliers to the military and intelligence community prior to them being entered into, and
- may notify the government of any other call-in transaction before the transaction is entered into or up to six months afterwards.

The Government will review all notifications to determine whether transactions pose a significant risk to national security or public order. Transactions that do not pose any significant risks will receive a 'direction order' (essentially a 'no action' notice) that permits the transaction to proceed and prevents the government taking action in respect of that investment in the future unless, for example, the direction order is obtained in reliance on false or misleading information or the investor breaches conditions of the direction order (including automatic conditions imposed by statute). For investments that do present significant risks, the Minister responsible for the Act is empowered to impose conditions on, block, or order disposal, to manage them.

The Government retains the right to investigate any non-notified call-in transactions and to impose conditions on, or order disposal of them, where necessary to manage significant national security or public order risks. This investigation can occur at any time irrespective of how long ago the transaction occurred. Given this, the Government recommends that investors entering into transactions that do not require mandatory notification seek legal advice on the costs and benefits of notification and strongly consider notifying the government of transactions where any of the potential risk factors identified in the section below are present.

### **The application of the national security and public order call-in power**

As in the operation of the national interest test and for the same reasons, the Minister responsible for the Act has discretion to consider transactions under the call-in power on a case-by-case basis and determine what action – if any – is appropriate.

Unlike the national interest test, however, the scope of what the Minister can consider when assessing transactions under the call-in power is limited to:

- risks to New Zealand's national security and public order posed by the transaction, and
- any benefits likely to result from the transaction.<sup>7</sup>

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<sup>7</sup> Consistent with the national interest test, the benefit to New Zealand test provides a guide for the types of matters the Government is likely to consider when determining the likely benefits associated with a transaction.

While the Act does not define what constitutes New Zealand's national security or public order, the following non-exhaustive list of factors are likely to inform an assessment of whether significant risks are present.

- the nature of the investor (eg, state or private)
- the level of control granted by the proposed investment and any impacts that may arise from such control, and
- whether the proposed investment is likely to grant the investor access to strategically important businesses or their assets.”

If significant risks are present, before determining what action – if any – should be taken to manage them, these risks will be considered against the scale of the benefits likely to arise, and the extent to which any risks can be managed through conditions. This reflects the backstop nature of the call-in power and the Government's intention to use it to intervene in transactions rarely and only where necessary.

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