Hon Grant Robertson
MP for Wellington Central
Deputy Prime Minister
Minister of Finance
Minister for Infrastructure
Minister for Sport and Recreation
Minister for Racing

24 November 2021

Gaye Searancke
Chief Executive
Land Information New Zealand
Private Box 5501
WELLINGTON 6145

Dear Ms Searancke

Ministerial Directive Letter

1. This Ministerial Directive Letter is made pursuant to section 34 of the Overseas Investment Act 2005 (the Act). It directs you, as the Regulator, on:
    a. the Government's general policy approach to overseas investment;
    b. the terms of conditions of consent;
    c. monitoring conditions of consent;
    d. other matters relating to the Regulator's functions, powers and duties, including:
        i. particulars on the implementation of the Benefits to New Zealand test and investor test,
        ii. statutory time frames, the fees review and exemptions,
        iii. the national interest test, national security and public order call-in power, and
        iv. the level of monitoring by the Regulator of call in transactions that are not notified.

2. The Minister of Finance, Minister for Oceans and Fisheries, and Minister for Land Information intend from time to time to delegate powers and functions to the Regulator by separate instrument.

3. The terms used in this letter have the meaning given to them in the Act, unless otherwise specified.

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4. References to the Act and the Regulations in this letter refer to the Overseas Investment Act 2005 and the Overseas Investment Regulations 2005 (respectively) on and from 24 November 2021 (being the date this letter comes into effect), including any amendments after that date.

5. References to sections or regulations refer to sections of the Act or regulations in the Regulations unless provided otherwise.

Government policy towards overseas investment

6. New Zealand needs productive overseas investment. Advantages include better access to markets, technology and capital, and, as a result, a more productive economy. International evidence suggests that it can help domestic firms to adopt up-to-date technologies and processes, transfer new expertise and skills into the country being invested in, access distribution networks and markets that would otherwise be unavailable, and participate in global value chains.

7. However, overseas control or ownership of sensitive assets can result in some risk (such as opportunities for espionage, sabotage, or data theft). This can run contrary to the view that there is inherent value in New Zealand ownership of our most sensitive assets.

8. The Overseas Investment Amendment Act 2018, Overseas Investment (Urgent Measures) Amendment Act 2020, and Overseas Investment Amendment Act 2021 balance these competing tensions by ensuring that New Zealand attracts productive investment, while also ensuring the government has the tools to manage risks associated with that investment.

9. The statutory regime is calibrated to reflect this balance by providing more oversight and discretion in areas we see as posing the most risk (for example, investments automatically subject to the national interest test), and a more proportionate approach to the vast majority of transactions that will support New Zealanders' living standards and wellbeing (for example, investments in non-strategically important businesses).

10. The Government expects regulatory efforts to be allocated to ensure we are concentrating our limited resources on those transactions most likely to pose risks. Accordingly, we expect resources to be focused on transactions involving farm land, posing national security, public order, or other national interest risks, and proportionately less on others. This expectation is also reflected in the relevant statutory time frames.

Investor Test

11. The new investor test, which came into force on 22 March 2021, is simplified and more targeted than the previous test. It narrows the scope so that only serious matters can be considered, does not require repeat investors to satisfy the test for each investment they make, and allows investors to submit an application under the standalone test, in advance of their application. [1]

Changes in scope

12. The changes which have been in force for almost six months now, that narrowed the matters that can be considered under the investor test, have resulted in meaningful time savings by ensuring that the test focuses on significant risks. We expect that this test will continue to become more efficient as it has time to embed.

Repeat and standalone test

13. The standalone investor test means that an investor, or group of investors, can apply to be assessed under the investor test separate from a consent application. This provides greater flexibility to investors, particularly in terms of timing. Some investors may wish to be approved ahead of a consent application. For example, if the investment is likely to be time-sensitive once the substantive application is submitted or having already met the investor test gives them an advantage. Investors may also want to check that they meet the investor test before committing to a full application process.

14. Repeat investors are able to go through a streamlined 'repeat investor test' process when making new investments.[2] This will reduce compliance costs by ensuring that the test only needs to be carried out in full once, insofar as the information remains the same. As with the standalone test, it will allow more timely considerations of applications.

15. Investors are required to complete a statutory declaration when lodging an application that relies on repeat or standalone investor test. This declaration must verify whether there has been any change in the extent to which the investor test factors are established since the test was satisfied. In order to ensure these changes allow more timely consideration of applications, I expect this statutory declaration to be generally held at face value – that is, to avoid investigations to verify this information, unless there are valid reasons to do so.

[1] Section 29A(1) outlines that a person may apply at any time for an assessment of whether the person meets the investor test. This test is referred to in this letter as the 'standalone investor test'.

[2] Sections 29A(2) to (5) outline the requirements that apply to a person if the investor test has to be met in respect of particular overseas investment, and a person has previously met the investor test. This test is referred to in this letter as the 'repeat investor test'.

Benefit to New Zealand test

General approach

16. Consistent with the Government's objective of streamlining the consent process for low risk investments, the statutory regime has simplified the benefit to New Zealand test by narrowing the number of factors, clarifying that the test is positively framed, and better providing for consideration of Māori cultural values. It also now expressly requires the benefits offered to be proportionate. Reducing the number of factors is not intended to narrow the types of benefits that can be considered, but is intended to ensure a more holistic approach is taken to determining whether the test is satisfied – both by prospective investors in their applications and by the Regulator in its assessment.

17. Investors considered that the Act did not appropriately recognise the benefit of market liquidity. Investors need confidence in their ability to realise investments and a lack of confidence may have served as a barrier to investors – foreign and domestic – moving capital into what they considered to be more productive domestic opportunities, such as build-to-rent developments.

18. The Act now makes explicit that the "reduced risk of illiquid assets" can be considered under the benefit to New Zealand test. This means that an overseas person acquiring an asset would benefit New Zealand by ensuring there is a purchaser for assets that might otherwise be stranded. For example, it may apply where an overseas person is purchasing an existing build-to-rent development, and that purchase would better ensure the asset remains liquid.

19. This consideration is more likely to be relevant to large assets that cannot be sold in parts, or assets that require specialisation to own, control or operate. These assets are less likely to have prospective New Zealand purchasers so risks of illiquidity will be heightened.

20. I consider it important to minimise the number of stranded assets. This benefit will do that as well as increasing market liquidity and, among other things, support greater appetite for international capital investment in New Zealand.

Farm land

21. Farm land has a special importance to New Zealand. It has significant economic and cultural value. It is central to our economy, and our farmers are among the world's most capable. This means it is a special privilege for overseas persons to own or control farm land. In 2017, the Government issued a Ministerial directive letter, which included a rural land directive raising the bar for overseas investments in rural land. The new farm land test in the Act replaces that previous directive.

22. The definition of farm land in the Act is necessarily broad. As a result, there will be instances where land that is not productive as farm land is captured within this definition. Restricting investments in that land is not our intention. The Act allows decision-makers to apply the ordinary benefits test if the land in question is not productive for farming, and is likely to be promptly used for commercial, industrial, or large residential developments.[3] For example, it may not be appropriate to apply the test to land used for temporary grazing that is not otherwise suitable, or used, for agricultural purposes.

Ensuring that farm land is advertised to New Zealanders

23. The Act requires farm land to be advertised for sale on the open market before the transaction is entered into, and before consent can be given to an overseas person to obtain an interest in it.[4] Recognising that there might be good reasons not to advertise in some cases, the Act also allows the decision-maker to exempt investments from the requirement where it is necessary, appropriate or desirable to do so.[5]

24. It is not possible to describe every instance where this exemption making power may be exercised, so the language of this power is intentionally broad. However, to aid swift advice and decision-making, I have included some examples of circumstances where I consider an exemption would be appropriate in the Annex (including what the appropriate exemption would be).

Intention to reside in New Zealand indefinitely

25. Under section 16(1)(c)(i) of the Act, overseas persons intending to reside in New Zealand indefinitely are not required to show that their investment in sensitive land is likely to benefit New Zealand. This supports migrants in the process of moving to New Zealand to make New Zealand their home and make a positive contribution to society.

26. An intention to reside in New Zealand indefinitely must involve a definite plan and accompanying actions. In determining whether a person is intending to reside indefinitely, the Regulator must consider any active steps that have been taken by the investor to actually reside in New Zealand.

27. In order to meet the intention to reside in New Zealand criterion in section 16(1)(c)(i), the Government considers the overseas person will generally:

    a. hold a residence class visa or an entrepreneur work visa, and

[3] Section 16A(1D)(c).

[4] Section 16(1)(f).

[5] Section 20.

b. show actions and plans, with supporting evidence, consistent with an intent to reside in New Zealand within 12 months.

28. The Regulator may impose as a condition of consent a time limit within which the overseas person must move to New Zealand and become ordinarily resident. The Government would generally expect the overseas person to move to New Zealand within 12 months from the date of consent and become ordinarily resident within 2 years[6] from the date of consent.

Time frames for decisions

29. New statutory time frames have been introduced for application decisions under the Act, which are specified in the Regulations. This brings New Zealand into line with other jurisdictions and provides greater certainty for investors. The time frames are ambitious and will require assessments to be completed more quickly than they previously would. The time frames will therefore provide a meaningful improvement to investors and enhance New Zealand's attractiveness to high quality foreign investment. If it becomes apparent after a reasonable amount of time that time frames are not working as intended, it may be appropriate to review them.

30. The time frames reflect the relative levels of analysis that I expect for each test under the new regime, and the overarching intent around appropriately prioritising effort. The Government presumes that, without extraordinary evidence to the contrary, all transactions other than those involving farm land, strategically important businesses, investment by non-New Zealand government investors, or those that are otherwise subject to the national interest test are lower risk and should have relatively lower resources dedicated to processing them.

31. I acknowledge that it may be difficult for the Regulator to meet these time frames in all instances during the transitional 12 month bedding-in period, given the Regulator is operationalising significant changes to the Act at the same time as time frames commence. I expect that performance will improve and that, beyond that time, statutory time frames will be consistently met.

32. For applications requiring Ministerial decisions, I expect you to provide timely advice to the relevant Minister so we can make decisions within the allotted 20 working day time frame.

[6] A longer period may be considered for migrants holding an entrepreneur work visa.

Applications where the investor has met the standalone investor test

33. We have not included a separate statutory time frame for applications where the investor test has already been satisfied, either through the repeat or standalone test. This reflects advice that a uniform discount on time frames across all application types, which is the approach taken for fees, is not possible, given the investor test would normally be completed in parallel to other work.

34. I still expect that the majority of the applications for appropriate pathways where the investor test has been satisfied and the investor has declared that no changes or very minor changes have occurred, will be assessed within shorter time frames. For example, investments involving significant business assets would only require the statutory declaration in regard to the investor test criteria so they should be able to be assessed more expeditiously.

35. In order to ensure this is occurring, I expect that the Regulator will monitor time frames on applications where the investor test has been satisfied and report on it as part of the annual reporting on compliance with time frames.

Unilateral extensions to the time frames

36. There will be instances when the time frames are insufficient and will be extended in certain circumstances.[7] While the regulations provide for a 30-working day extension in these circumstances, I expect that applications be assessed within shorter time frames should the full 30 working days not be required. I also expect the Regulator to monitor how often extensions are occurring to better understand applicants' engagement with the regime.

37. The Regulator often needs to collect additional information before consent can be granted and it is important that the Regulator is not unfairly penalised for any undue delays on behalf of the applicant. The Regulations provide that the overall time frame is automatically paused, post the initial assessment period, where the Regulator requests or requires further information from an applicant and a reasonable deadline set by the Regulator is not met. I expect the Regulator to monitor how often and for how long time frames are paused, both to ensure that the Regulator is not setting unreasonable time frames for applicants to respond within and to better understand applicants' engagement with the regime.

38. I expect the Regulator to report, through their Ministers, to Cabinet on performance against the time frames every 12 months in addition to requirements to report on timeframes in its annual report.

[7] Clause 7 of Schedule 5 of the Regulations.

Fresh or seawater areas

39. The Act and Regulations have changed the process for offering fresh and seawater interests to the Crown. These changes include a requirement for the Crown to notify the owner of its decision on acquisition within twelve months of the water areas acquisition notice being registered or provided. In practice, I expect these notifications to occur within six months, except in cases which are unusually complex. To allow the Government to monitor when extensions occur, I expect that you notify the Minister for Land Information whenever this six-month time frame is being exceeded. I also expect you to give reasonable notice to owners of any extensions.

Setting and reviewing fees

40. The Act provides that regulations can prescribe fees and charges for the purpose of meeting (or assisting in meeting) costs of Ministers and the Regulator in exercising functions and powers, performing duties and generally providing services under the Act.[8] It also provides that fees can be set at a level which recovers the true cost of assessing an application by:[9]

    a. clarifying that the government can set fees to ensure that under- or overcollections can be distributed among fee payers on a rolling four year basis,
    b. requiring the Minister to commence a fees review at least once every four years, and
    c. confirming that any existing deficit for the Regulator can be recouped through fees that are set after commencement of these changes, to the extent that the deficit arose in the preceding four financial years.

41. Where you are assisting with future fees reviews, consistent with the Government's Cost Recovery Policy and the Auditor-General's advice, I do not expect cost recovery from investors that cannot be reasonably ascribed to processing that investor's application, including necessary overhead expenses (other than as a consequence of reasonable under-collections across a four year basis).

Exemptions

42. The Act defines 'overseas person' in a way that results in some entities and managed investment schemes that are majority owned or funded by New Zealanders and have a strong connection with New Zealand, being required to obtain consent.

[8] Section 61.

[9] Section 61(1)(e).

43. The Act permits exemptions for persons, transactions, rights, interests or assets that the Minister considers to be majority owned and substantively controlled by New Zealanders.[10] The decision-maker may grant individual exemptions to applicants that satisfy this threshold.[11] This aligns with the Act's purpose, as it is clear that the degree of New Zealand ownership and control is what determines whether an entity is an overseas person, not other matters such as New Zealand employees or having headquarters in New Zealand.

44. I consider that such exemptions should generally be granted to non-listed bodies corporate, managed investment schemes (MIS) and limited partnerships, where they meet the criteria specified in the Annex, unless good reason exists not to.

Variations

45. The Annex outlines the criteria for revocation or variation of conditions of consent for persons who are no longer considered overseas persons under the Act.

The national interest test

46. The national interest test is a 'backstop' tool and consistent with this, it is the Government's view that the test should only be applied on a case-by-case basis, rarely and only where necessary to protect New Zealand's national interests. The starting point is that investment is in New Zealand's national interest. As such, the regulator should only advise that a transaction should be escalated to a national interest assessment in the scenarios outlined in the Annex.

Regulator's advice about whether a transaction is in the national interest

47. When providing advice on a national interest assessment, the Regulator must:
    a. be informed by the Guidance Note: Foreign Investment Policy and National Interest Guidance (June 2021) published on The Treasury website, and
    b. reflect consultation and input from relevant partner agencies.[12]

The national security and public order call-in power notification

Initial assessments of notifications should be carried out quickly to identify significant risks

48. In recognition of the potential impact of the call-in power regime on businesses and investors, low-risk transaction should be identified quickly and allowed to

[10] Section 61B(c)(viii).

[11] Section 61D.

[12] Such as those agencies listed in section 126 of the Act.

proceed promptly. To facilitate this, I expect you to assess a notification in two steps within the 55-working day statutory time frame:

a. an initial risk assessment within 15 working days, where you consider if a transaction could pose a significant risk to New Zealand's national security or public order. Those that could not pose a significant risk will be issued with a direction order allowing them to proceed, and

b. a risk and benefit assessment is undertaken for those transactions that could pose a significant risk and this assessment is referred to the Minister. The assessment should be provided promptly so the Minister can make a final decision on what action to take (if any) within the remainder of the 55-day statutory time frame.

49. When assessing and providing advice on the risks and benefits of a transaction, the Regulator must:

a. be informed by the Guidance Note: Foreign Investment Policy and National Interest Guidance (June 2021) published on The Treasury website, and

b. reflect consultation and input from relevant partner agencies.

50. The Regulations allow extensions to be granted to the 55-working day time frame. Extensions should only be granted if a transaction has significant complexity, the applicant operating in good faith is unable to meet the Regulator's requests in a timely manner, or there are other exceptional circumstances (for example, the discovery of significant new information late in the assessment process).

Scanning of non-notified transactions that could pose significant risks

51. The Government can investigate any non-notified call-in transactions and impose conditions on, or order disposal of them, where necessary to manage significant national security or public order risks.

52. I recognise the call-in power is a new regulatory function for you to administer and monitor. I expect that over time you will adjust your approach to scanning for non-notified transactions that may pose significant national security or public order risks. This new regulatory function has now been in place for six months, and you should report back to me within six additional months from the date of this letter on your approach for identifying non-notified transactions that could pose significant national security or public order risks.

Operation of the Overseas Investment Office

53. The Government seeks to ensure that the process of granting or refusing consent is robust and generates high quality outcomes, while also being efficient to ensure the regime does not unduly restrict productive investment.

Consent conditions, monitoring and enforcement

54. Monitoring and enforcement of compliance with the consent requirements of the Act, and of compliance with conditions imposed on consents, maintains public confidence in the integrity of the regime.

55. The Government expects the Regulator to monitor the conditions imposed in a reasonable and proportionate approach (recognising it may be appropriate to impose a different time period to monitor some conditions).

56. This will assist in maintaining confidence on the overseas investment regime. It also ensures fair treatment for those who comply with the rules by ensuring those who break the rules are held to account and that others are deterred from doing so.

Other general matters relating to the Regulator's functions, powers or duties

57. Along with the other directions in this letter, I also expect you, as the Regulator, to:

    a. provide recommendations to the relevant Minister or Ministers,

    b. perform your functions within the statutory time frames set out,

    c. via your website resource, provide a summary of the overseas investment regime, information on how to prepare and submit an application for consent, and specific details on your processes and time frames,

    d. via your website resource, continue to publish decisions made under the Act,

    e. keep applicants informed of the progress being made with their applications, and

    f. compile and keep records useful for the making available of statistics and public information on, and compliance with, any additional Government performance expectations.

Revocation of previous letters

58. Subject to paragraphs 59 and 60 below, I revoke all previous directives under section 34 in force at the date of this letter (the Revoked Directives), with effect from 24 November 2021.

Date letter takes effect

59. This letter will take effect on 24 November 2021, and applies in relation to any transaction, application or other matter, where provisions in the Act or the Regulations as they read on or after that date apply.

60. In other cases, where an earlier version of the provisions in the Act or Regulations apply under the transitional arrangements in Schedule 1AA of the Act or Schedule 1AA of the Regulations, then the Revoked Directives continue to apply to that transaction, application or other matter.

Yours sincerely

Hon Grant Robertson
Minister of Finance

Annex

Farm land advertising exemption (refer to paragraph 23 of the letter)

1. The following is non-exhaustive list of examples of the circumstances where an applicant may be eligible for an exemption from the farm land advertising requirement, under section 20 of the Act:

    a. when there is substantial compliance (for example, where the advertising does not meet all of the requirements but nonetheless achieves the purpose of advertising),

    b. for future advertising (for example, where an investor seeks consent to acquire selected properties in the future should they be put up for sale – advertising occurs after consent), and

    c. when there is only one natural buyer (for example, a boundary adjustment or landlocked land).

Exemptions (refer to paragraph 42 of the letter)

Non-listed bodies corporate

2. In order to be eligible for an exemption from consent requirements, the Government considers a domestically incorporated non-listed body corporate will generally:

    a. not be majority owned by overseas persons. That is, be less than 50 per cent owned by overseas persons,

    b. not be substantively controlled by overseas persons. That is, 25 per cent or less of the entity's total securities are cumulatively controlled by overseas persons, each of whom hold 10 per cent or more of the entity's total securities, and

    c. not be open to access or control by a foreign government. That is, no foreign government (or its associates) holds 10 per cent or more of the entity's total securities.

Managed Investment Schemes (MIS)

3. In order to be eligible for an exemption from consent requirements, the Government considers a MIS will generally:

    a. not be majority owned by overseas persons. That is, less than 50 per cent of the value of the managed investment products in the MIS are invested on behalf of overseas persons,

b. not be substantively controlled by overseas persons. That is, 25 per cent or less of the managed investment products in the MIS that entitle holders to vote are invested on behalf of overseas persons, each of whom have 10 per cent or less of those products[13], and

c. not be open to access or control by a foreign government. That is, no foreign government (or its associates) holds 10 per cent or more of value of the managed investment products in the MIS.

Limited partnerships

4. In order to be eligible for an exemption from consent requirements, the Government considers a limited partnership will generally:

   a. not be majority owned by overseas persons. That is, less than 50 per cent of the limited partnership interest is held by overseas persons,

   b. not be substantively controlled by overseas persons. That is, 25 per cent or less of the general partner is cumulatively controlled by overseas persons that each hold a 10 per cent or less of the interests in the general partner, and

   c. not be open to access or control by a foreign government. That is, no foreign government (or its associates) holds 10 per cent or more of the partnership interest.

Other matters for consideration

5. In addition to the specified criteria, in determining whether to grant an exemption to these kinds of entities, the Government would expect the Regulator to consider:

   a. the entities' suitability to own or control New Zealand assets (in accordance with how character is assessed under investor test in the Act), and

   b. the degree of access or control foreign governments (or their associates) hold in the entity.

6. The Government would expect the exemption to depend on compliance with conditions being maintained, including the condition that the investor remain not unsuitable to own or control the assets.

[13] A MIS that has an overseas person as manager or trustee should not be considered to have substantive control for the purpose of this directive.

Revocation or variation of conditions of consent for persons who are no longer considered overseas persons under the Act (refer to paragraph 45 of the letter)

7. The Act provides that a condition of consent can be revoked by the relevant Minister or Ministers or be varied or added to by the relevant Minister or Ministers with the agreement of the consent holder.[14]

8. Clause 39(2) of Schedule 1AA of the Act, as introduced by the Overseas Investment Amendment Act 2021, provides that relevant Ministers may revoke a condition of a consent that the Act required to be imposed. This relates to a person who ceased to be an overseas person on commencement of new section 7 of the Act (section 5 of the 2021 Amendment Act) and who applies to the Regulator under section 27 of the Act for a variation of a consent granted to them while they were considered an overseas person under the Act.

9. I generally expect you, as the Regulator, when processing such applications, to revoke the conditions of those consents unless good reason exists not to.

10. I expect you to exercise your discretion having regard for, amongst other things:
    a. the purpose of the Act, and
    b. the Government's view that some investors are no longer considered overseas persons under the Act and therefore their ownership of sensitive New Zealand assets is unlikely to pose risks to New Zealand.

National interest test (refer to paragraph 46 of the letter)

11. The Regulator should only recommend that a transaction is a transaction of national interest under section 20B if the proposed investment:
    a. could pose risks to New Zealand's national security or public order,
    b. would grant an investor significant market power within an industry or result in vertical integration of a supply chain,
    c. has foreign government or associated involvement that was below the more than 25 per cent ownership or control interest threshold for automatic application of the national interest test, but granted that government (and/or its associates) disproportionate levels of access to or control of sensitive New Zealand assets,[15]
    d. would have outcomes that were significantly inconsistent with or would hinder the delivery of other Government objectives,
    e. raises significant Treaty of Waitangi issues, or
    f. relates to a site of national significance (e.g. significant historic heritage)

[14] Section 27.

[15] Disproportionate access or control is defined in section 6(10) of the Act.