

Hon Grant Robertson

MP for Wellington Central

Minister of Finance

Minister for Sport and Recreation

Minister Responsible for the Earthquake Commission

Associate Minister for Arts, Culture and Heritage



8 June 2020

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

Dear Ms Searancke

Supplementary Ministerial Directive Letter

1. This Ministerial Directive Letter is made pursuant to section 34 of the Overseas Investment Act 2005 and directs you, as regulator, on the Government's policy approach to the national interest test, emergency notification regime, and other changes from the Overseas Investment (Urgent Measures) Amendment Act 2020 (Urgent Measures Act).
2. This letter supplements the Ministerial Directive Letter of 28 November 2017, which remains in force.
3. References to the Act and the Regulations in this letter refer to the Overseas Investment Act 2005 and Overseas Investment Regulations 2005, including all amendments as at 16 June 2020.

National interest test and emergency notification regime

4. The Urgent Measures Act introduced a national interest test, a temporary emergency notification regime, and a 'call-in' notification regime. The 'call-in' regime will replace the emergency notification regime no later than two years from when the Urgent Measures Act receives Royal Assent.

When the regulator should advise that a transaction should be escalated to a national interest assessment under section 20B

5. 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.

6. As such, the regulator should only advise that a transaction should be escalated to a national interest assessment 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 10 per cent 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,² or
 - d. would have outcomes that were significantly inconsistent with or would hinder the delivery of other Government objectives.

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

7. 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 (May 2020) published on The Treasury website (and attached as an Appendix to this Letter), and
 - b. reflect consultation and input from relevant partner agencies.³

Revocation or variation of conditions of consent

8. Section 27 of 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.
9. Clause 16(2) of Schedule 1AA of the Act, as introduced by the Urgent Measures Act, specifically provides that investors who would be eligible to access a standing consent under clause 31 of Schedule 1AA can apply for previous consents to be varied. Clause 31 applies when certain investors are no longer to be treated as 'overseas persons' under the Act.
10. I generally expect you, as the regulator, when processing such applications, to revoke the conditions of those consents unless good reason exists not to.
11. I also expect you to treat applications under section 27 from investors whose consented transactions would have been eligible for another standing consent under Part 4 of Schedule 1AA of the Act, or otherwise would not have required consent under the Act as amended, in the same way.

² Disproportionate access or control is defined in section 53(4) of the Overseas Investment (Urgent Measures) Amendment Act 2020, which replaces section 82 of the Act.

³ Such as those agencies listed in section 126 of the Act.

12. I expect you to exercise your discretion having regard for, amongst other things:
 - a. the purpose of the Act,
 - b. the purpose of the Urgent Measures Act,
 - c. in the case of clause 31, Schedule 1AA, the Government's view that these investors are fundamentally New Zealand entities and therefore that their ownership of sensitive New Zealand assets is unlikely to pose risks to New Zealand, and
 - d. in the case of clauses 32 and 33, Schedule 1AA, the Government's view that investments in these sensitive New Zealand assets are unlikely to pose risks to New Zealand.

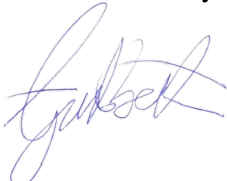
Timeframes for decisions under the emergency notification regime

13. In recognition of the potential impact of the emergency notification regime on businesses during these unprecedented times, the regulator and partner agencies will carry out the assessment of a transaction notified under section 85 and national interest assessment (if the transaction is called in) in no more than 40 working days, as set out in the Regulations, by:
 - a. providing decision-making Ministers with analysis and a report to enable a decision about whether to call in a transaction for closer inspection to be made within 10 working days of receipt of a complete and accurate notification, and
 - b. providing decision-making Ministers with analysis and a report to enable a decision about whether a transaction is contrary to the national interest within 30 working days of receipt of a complete and accurate notification.
14. The regulator has a delegated power to extend timeframes under regulation 69A(3) of the Overseas Investment Regulations. I expect 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).

Date letter takes effect

15. This letter is to take effect from 16 June 2020. For the avoidance of doubt, this directive letter does not amend any of the directions provided to you in the Directive Letter issued on 28 November 2017.

Yours sincerely



Hon Grant Robertson
Minister of Finance



Appendix

Guidance Note

Foreign Investment Policy and National Interest Guidance

May 2020

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The Treasury URL at May 2020 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. 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 consistent with New Zealand's national interest.

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 persons¹ to get consent before acquiring sensitive land,² significant business assets 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.

When the Overseas Investment (Urgent Measures) Amendment Bill enters into force, all investments in sensitive assets (excluding investments in residential but not otherwise sensitive land) are also potentially subject to review under the national interest test. This backstop test ensures that investments are in New Zealand's national interest, with the New Zealand government committed – where possible – to working with investors to ensure that the national interest is protected. It will always apply to investments in *strategically important business assets* and investments with a significant foreign government interest, but may also be applied to other transactions at the Minister's discretion. Additional information on this test is provided below.

No later than 12 months from when the Overseas Investment (Urgent Measures) Amendment Bill enters into force, investments in *strategically important 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'.

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.

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.

The national interest test

The national interest test is a ‘backstop’ tool to manage significant risks associated with transactions reviewed 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 10 per cent or greater 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.

In rare cases, the Government could apply the national interest test to other investments that 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 10 per cent threshold, but granted that government (and/or its associates) disproportionate levels of access or control to sensitive New Zealand assets,³
- 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.

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

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.

3 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. Any assessment of national security risks 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.
- *Competition:* Diverse ownership within and across sectors supports competition and economic growth. In assessing a prospective investment, the Government therefore considers whether an investment may grant the investor market power either within New Zealand (for example, significant market share in one business segment or ownership of a vertical supply chain) or globally (if, for example, an investment may allow an investor to control the 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 focussed 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 the conditions of the Act, or whether they have any characteristics otherwise rendering them unsuitable to invest in New Zealand (for example, are subject to international sanctions).

For the duration that the COVID-19 pandemic and its associated economic effects continue to have a significant impact in New Zealand, in applying the national interest test, the Government would also consider whether the target business is in financial distress. In addition to supporting their shareholders and employees, many New Zealand businesses support New Zealanders' wellbeing more broadly through, for example, their intellectual property, supply-chain linkages, or international connections. The foreign acquisition of such businesses at prices that deviate from their fundamental pre-COVID-19 valuations and risk the loss of these positive externalities may therefore not be consistent with New Zealand's national interest. Wherever possible the Government remains committed to such investments proceeding, with or without conditions, to ensure business viability.

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 10 per cent or greater interest in sensitive New Zealand assets are always 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).