



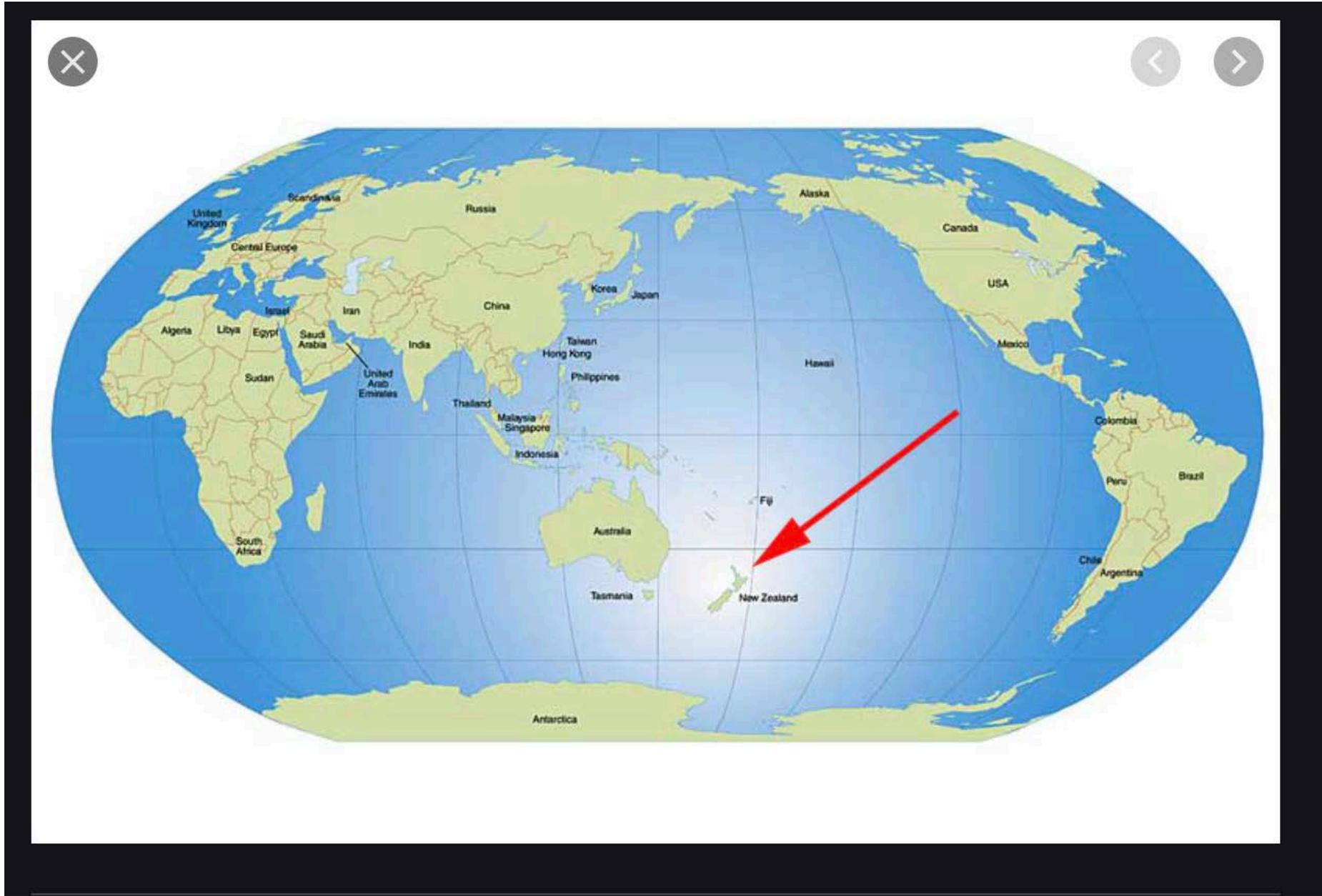
KILAW's 7th Annual International Conference

Session 1: Constitutional & Legal Challenges to Stimulate Investment

Dr Myra Williamson
Te Piringa – Faculty of Law



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New Zealand – general election 17 Oct

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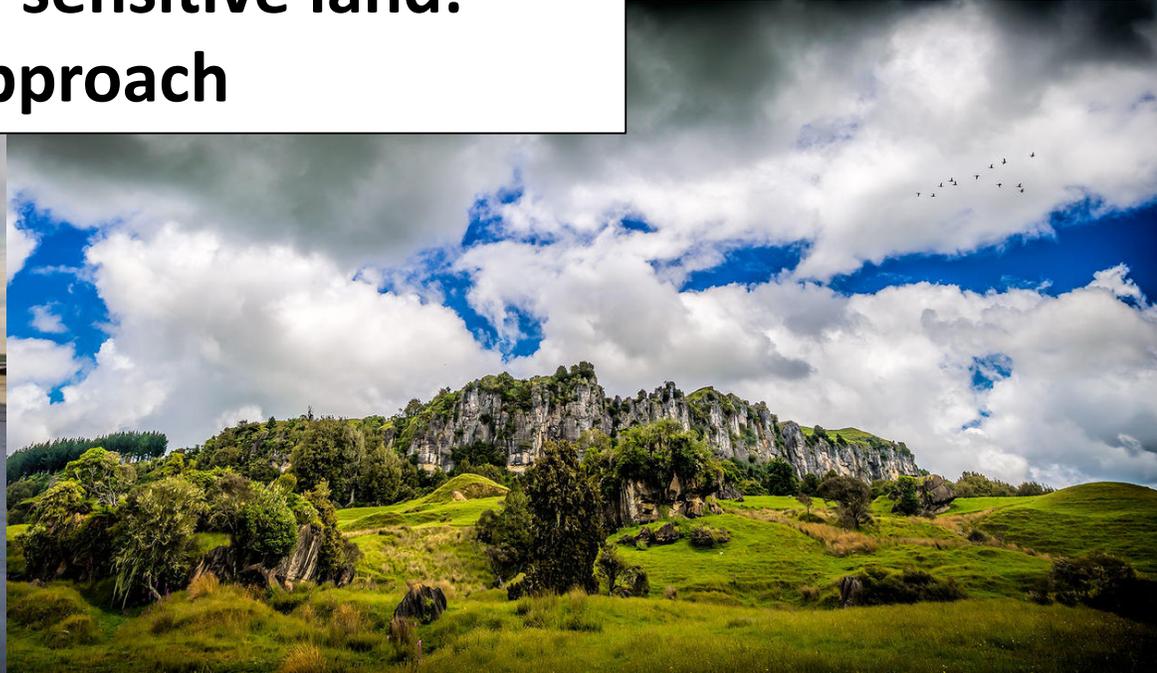


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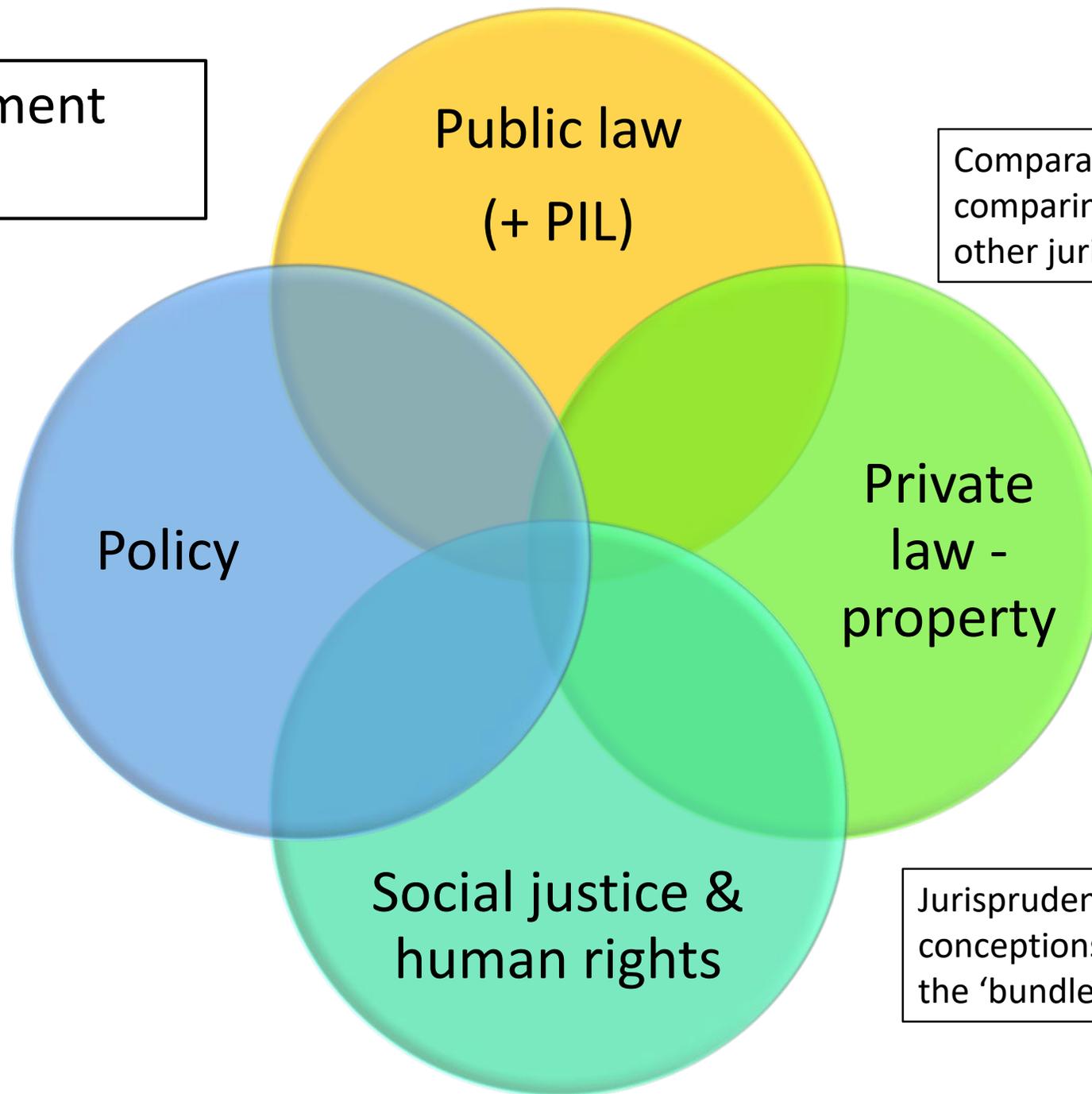




**Balancing the benefits of overseas investment
against the protection of sensitive land:
New Zealand's approach**



Overseas Investment
Law



Comparative law –
comparing NZ’s approach to
other jurisdictions

Jurisprudence –
conceptions of property,
the ‘bundle of rights’

A wealthy American couple were forced to sell this multi-million dollar home on Waiheke Island, near Auckland, at a huge loss, because they failed to meet the conditions set by the Overseas Investment Office

26 Feb, 2020 05:00 AM

🕒 5 minutes to read



New Zealand, inset showing location of Waiheke Island
Source: <https://quentinsadler.wordpress.com/2010/01/15/red-delights-from-new-zealand/>

The Glasshouse at 33-39 Okoka Rd, on Waiheke Island. Photo / Supplied

Overseas Investment Act 2005 (OIA)

3 areas of focus in my research:

- 1. What is New Zealand law and policy on overseas investment?**
 - How did it develop?
 - How & why has it changed recently?
2. How does the policy cycle, as per Allen + Clarke's understanding of it, apply to NZ's overseas investment law incl amendments
3. Does New Zealand overseas investment law demonstrate 'intergenerational governance'

Overview of today

1. The context and background
2. New Zealand's overseas investment law
 1. The Overseas Investment Act 2005
 2. The Overseas Investment Office
 3. Some examples
 4. 2020 amendments during COVID
 5. Consent
 6. Enforcement
3. Consider its application to the policy cycle
4. Consider 'intergenerational justice' and overseas investment
5. Conclusion and recommendations – in brief
6. Discussion

1. The context and background

Overview of overseas investment

- In New Zealand, direct overseas investment accounts for almost one hundred and thirteen billion dollars or 40% of our economy.
- The Overseas Investment Act 2005 regulates a small but important part of that investment - large business transactions and land purchases.
- The Act establishes the Overseas Investment Office as the regulator – it receives applications, monitors compliance
- A lot of my focus has been on investment in land and to a lesser extent business

Historical Context

- Overseas investment seems to attract controversy in NZ
- Conflicting opinions on
 - the need for it?
 - how much do we want?
 - in what sectors?
 - from where?
 - how to encourage it?
 - how to manage it?
- NZ has actively encouraged overseas investment since 1973 : the Overseas Investment Act 1973 (the 1973 Act) was our first legislation in this space
- The 1973 Act's short title: "An Act to make better provision for the supervision and control of overseas investment in New Zealand"
- It established the Overseas Investment Commission (OIC)
- Made decisions on proposals for overseas investment

Functions of the Overseas Investment Commission

s 9 Overseas Investment Act 1973

Points to note:

- Section 9(1)(b) Investment to be in 'the national interest' – but this was not defined
- Section 9(1)(b) proposals to be compatible with government **policy**
- Section 9(1)(e) "control the level and extent to which overseas persons may own or control property in NZ..."

9. Functions of Commission—(1) The functions of the Commission shall be—

- (a) To consider proposals concerning overseas investment that are to be submitted for approval, consent, permission, or exemption in accordance with regulations made under this Act:
- (b) To advise the Minister, or, as regulations made under this Act may so require, to determine, whether the proposals so submitted are in the **national interest** and whether any approval, consent, permission, or exemption to them should be granted or refused:
- (c) To advise the Minister, or, as regulations made under this Act may so require, to decide, on the compatibility of any proposal for overseas investment with **the policy of the Government** relating to any other matter:
- (d) To advise the Government on such means as will ensure that the fullest possible benefit from overseas investment will accrue to New Zealand in promoting economic growth and development by the efficient utilisation of resources, and the highest degree of production, trade and employment:
- (e) To keep under continuous supervision, and, if regulations made under this Act so require, to **control, the** level and extent to which overseas persons may own or control property in New Zealand, and to report from time to time on this matter to the Minister:
- (f) To advise the Government on all matters relating to overseas investment in New Zealand:
- (g) To exercise and perform such functions, powers, and duties in relation to overseas investment as are conferred or imposed on it under this Act or regulations made under this Act.

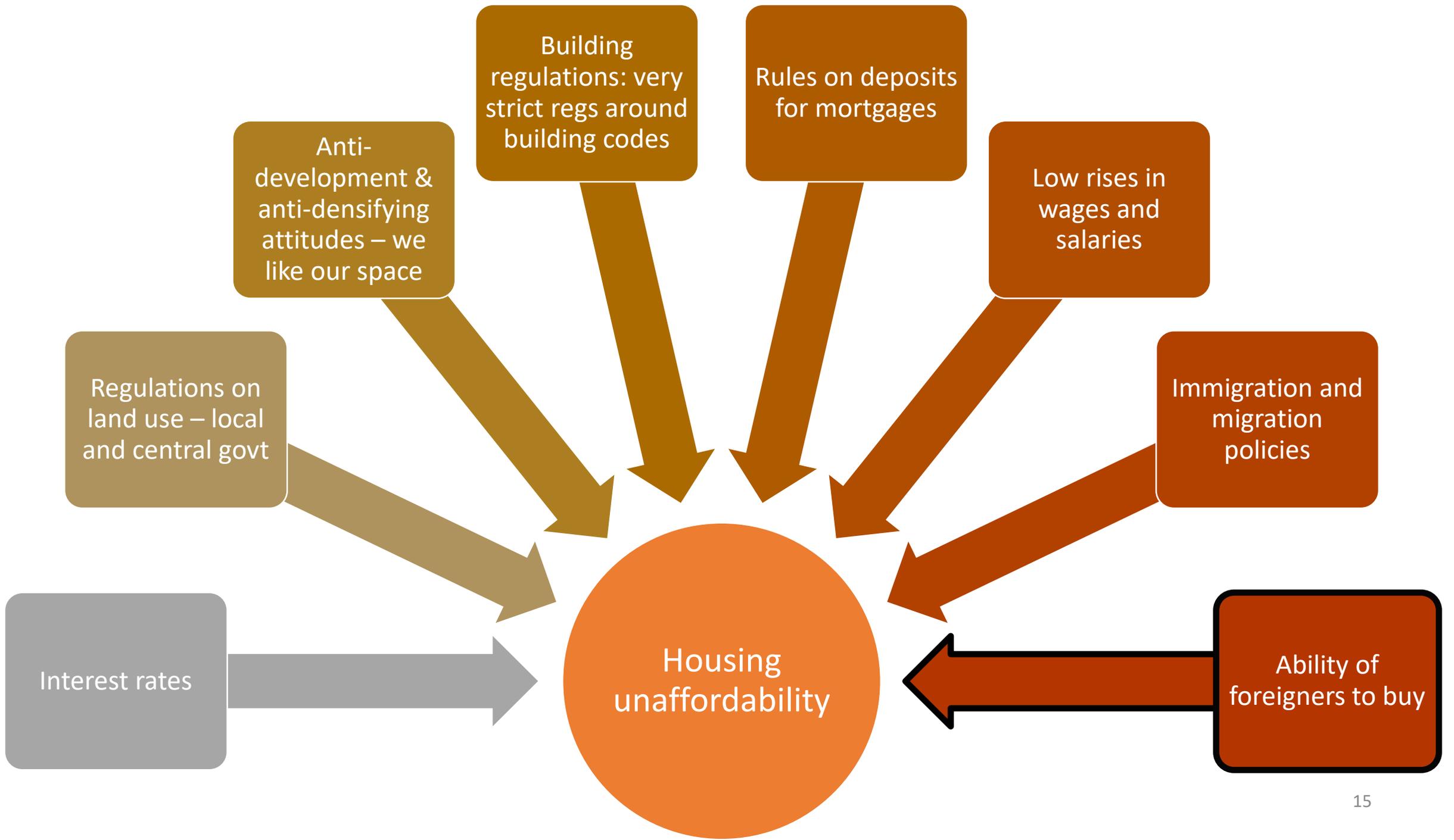
(2) In the exercise of its functions, powers, and duties, the Commission shall comply with the general policy of the

NZ is attractive to investors because...

- Peaceful
- A long way from anywhere
- No corruption – #1 Transparency Int'l Corruption Perceptions Index 2019
- Easy to do business - #1 on World Bank 'Doing Business'
- No capital gains tax (no tax to pay on sale of property)
- Can buy a property in one day, register easily, all online – no need to be here
- Small government
- Low interest rates
- Strong property market
- Strong protection of contracts, property
- Powerful passport = #1 in world on Henley & Partners 2020 ranking
- Good options for living here – free healthcare, free schooling, retirement pension, low barriers to starting a business, etc

Housing affordability problems

- During the early 2000s, property prices started rising rapidly
- Housing affordability dropped in NZ
- Ordinary New Zealanders couldn't afford to buy a house as they once had
- Key figures:
 - 1975: average mortgage 39.2% of annual income
 - 1987: average mortgage 67% of annual income
 - 2007-2009 – 60-80% of annual income
- 'the number of newly completed homes in 2011 was only 46% of the number built 35 years earlier, yet the number of households needing a roof over them had risen significantly in the interim' (Bassett and Malpass)
- National-leg government (2007-2018) encouraged foreigners to invest in land; also encouraged immigration, student visas, work visa-to-residence pathway to citizenship: perfect storm



In 2015, Labour housing spokesperson Phil Twyford found that people with Chinese surnames account for 40% of sales in Auckland within a 3 month period

Chinese pour \$1.5 billion into NZ housing market last year

Catherine Harris · 00:01, Sep 07 2018



'We've got Chinese buyers'

11 Jul, 2015 05:00 AM



The willingness of overseas-based Chinese buyers to pay above the odds has become the stuff of legend. Photo / Doug Sherring



By: **Anne Gibson**
Property editor, NZ Herald
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Asian advert's Auckland property boast: 'An investors' dream'

22 Apr, 2015 02:43 PM

5 minutes to read



The advert says the Auckland property scene is 'an investors dream, and very affordable'. File photo / NZ Herald



By: **Patrice Dougan**
Assistant Chief of Staff, NZ Herald
patrice.dougan@nzherald.co.nz
[@PatriceDougan](https://twitter.com/PatriceDougan)



2. New Zealand's current overseas investment law

Government's policy position

- The New Zealand Government acknowledges that:

[t]o grow our economy and lift productivity we need investment – both by New Zealand investors and by overseas investors

Source: The Treasury, “Overseas investment in New Zealand” in *Consultation Document: Reform of the Overseas Investment Act 2005 – Facilitating productive investment that supports New Zealanders’ wellbeing* (April 2019) <<https://treasury.govt.nz/sites/default/files/2019-04/overseas-investment-reform-consultation.pdf>>.

NZ Government's economic strategy

...is to build a productive, sustainable and inclusive economy.

Overseas investment contributes to this aim when it brings with it new jobs and increases productivity, which is the biggest determinant of people's living standards in the longer term.

Main benefits of overseas investment

- 1. Technology and process innovations:** domestic firms benefit from the adoption of up-to-date technologies and processes to support workers to undertake high-value work
- 2. Skill increases:** “foreign direct investment can result in the transfer of new expertise and skills into the country being invested in
- 3. More diverse international connections** and access to global distribution networks;
- 4. Participation in global value chains:** where different manufacturing processes are happening in different countries

Main risks of overseas investment

1. The risk that **economic activity in New Zealand might be lowered** if, for instance, a firm was moved offshore or if overseas investors invested in unproductive assets or assets in unsustainable sector
2. The risk that “overseas investors could under-invest in New Zealand assets during periods of global economic stress and instead prioritise their own domestic operations”
3. The risk that **profits could go offshore instead of being retained** and invested/spent in New Zealand
4. The risk that the foreign investment could **increase the prices of and reduce New Zealanders’ ability to buy assets**
5. The risk that **high levels of foreign ownership of sensitive New Zealand assets (e.g. land) could conflict with some people’s views that certain assets “should be owned or controlled by New Zealanders”** because of their “productive, environmental, historic or cultural value
6. The risk that overseas businesses could **pay less tax** than equivalent New Zealand businesses
7. The risk that foreign ownership of certain critical assets (eg infrastructure or strategically important industries) “could **pose risks to New Zealand’s national security or public order**”

Tension



Need to **increase**
overseas
investment to gain
benefits



Need to **limit**
overseas
investment
because of its **risks**

2. NZ's overseas investment law

Overseas Investment Act 2005 (as amended in 2018 & 2020)

This Act is NZ's primary tool for managing overseas investment in NZ's sensitive assets

Contains screening requirements for investments in sensitive land, significant business assets and fishing quota

1. Purpose
2. 'Overseas person'
3. 'Sensitive land'
4. 'Business assets'
5. 'Benefit to NZ' test
6. Conditions

Change of govt – change of focus



General election 17 Sept 2017
Labour-NZ First coalition govt

This is the NZ Govt in 2017
Prime Minister (and Leader of
the Labour Party) Ms Jacinda
Arden (next to Governor-
General (Queen's rep in NZ
Dame Patsy Reddy)
Deputy Prime Minister
Winston Peters (and Leader of
NZ First)

Arden's govt - change of tack



KEVIN STENT/STUFF

Prime Minister Jacinda Ardern and Trade Minister David Parker announce the ban on foreign investors in the residential housing market

Changes announced in August 2018

- **Overseas Investment Amendment Act 2018**
- All residential land is 'sensitive land'
- Overseas people can't purchase existing residential dwellings in NZ (except Australian and Singaporean citizens)
- **Came into effect on 22 August 2018**

Let's take a look at a few key sections...

Reprint as at 1 August 2020



Overseas Investment Act 2005

Public Act 2005 No 82

Date of assent 21 June 2005

Commencement see section 2

3 Purpose

- (1) The purpose of this Act is to acknowledge that it is a privilege for overseas persons to own or control sensitive New Zealand assets by—
 - (a) requiring overseas investments in those assets, before being made, to meet criteria for consent; and
 - (b) imposing conditions on those overseas investments.
- (2) This Act also has the purpose of managing certain risks, such as national security and public order risks, associated with transactions by overseas persons.

Section 3(2): inserted, on 16 June 2020, by [section 4](#) of the Overseas Investment (Urgent Measures) Amendment Act 2020 (2020 No 21).

7 Who are overseas persons

- (1) The purpose of this definition is to provide that persons are overseas persons if they themselves are overseas persons (for example, not a New Zealand citizen or ordinarily resident in New Zealand or, for companies, incorporated overseas) or they are more than 25% owned or controlled by an overseas person or persons.
- (2) In this Act, **overseas person** means—
 - (a) an individual who is neither a New Zealand citizen nor ordinarily resident in New Zealand; or
 - (b) a body corporate that is incorporated outside New Zealand or is a more than 25% subsidiary of a body corporate incorporated outside New Zealand; or
 - (c) a body corporate (**A**) if an overseas person or persons have—
 - (i) more than 25% of any class of A's securities; or
 - (ii) the power to control the composition of more than 25% of A's governing body; or
 - (iii) the right to exercise or control the exercise of more than 25% of the voting power at a meeting of A; or
 - (d) a partnership, unincorporated joint venture, or other unincorporated body of persons (other than a trust or unit trust) (**A**) if—
 - (i) more than 25% of A's partners or members are overseas persons; or
 - (ii) an overseas person or persons have a beneficial interest in or entitlement to more than 25% of A's profits or assets (including on A's winding up); or
 - (iii) an overseas person or persons have the right to exercise or control the exercise of more than 25% of the voting power at a meeting of A; or
 - (e) a trust (**A**) if—
 - (i) more than 25% of A's governing body are overseas persons; or
 - (ii) an overseas person or persons have a beneficial interest in or entitlement to more than 25% of A's trust

Part 2

Consent and conditions regime

Subpart 1—When consent required and criteria for consent

When consent required

10 Consent required for overseas investments in sensitive New Zealand assets

- (1) A transaction requires consent under this Act if it will result in—
 - (a) an overseas investment in sensitive land (*see* [section 12](#)):
 - (b) an overseas investment in significant business assets (*see* [section 13](#)).
- (2) *See* also [sections 56 to 58B](#) of the Fisheries Act 1996, which require consent for a transaction that will result in an overseas investment in fishing quota.

12 What are overseas investments in sensitive land

An **overseas investment in sensitive land** is the acquisition by an overseas person, or an associate of an overseas person, of all or any of the following (a **section 12 interest**):

- (a) an estate or interest in land if—
 - (i) the land that the estate or interest relates to is sensitive land under [Part 1](#) of Schedule 1; and
 - (ii) the estate or interest acquired is a freehold estate or a lease, or any other estate or interest, for a term of 3 years or more (including rights of renewal, whether of the grantor or grantee), and is not an exempted interest; or
- (b) rights or interests in securities of a person (**A**) if A owns or controls (directly or indirectly) an estate or interest in land described in paragraph (a) and, as a result of the acquisition,—
 - (i) the overseas person or the associate (either alone or together with its associates) has a more than 25% ownership or control interest in A; or
 - (ii) the overseas person or the associate (either alone or together with its associates) has an increase in an existing more than 25% ownership or control interest in A; or
 - (iii) A becomes an overseas person.

Section 12: amended, on 16 June 2020, by [section 9\(1\)](#) of the Overseas Investment (Urgent Measures) Amendment Act 2020 (2020 No 21).

Section 12(a): amended, on 16 June 2020, by [section 9\(2\)](#) of the Overseas Investment (Urgent Measures) Amendment Act 2020 (2020 No 21).

Section 12(a)(i): replaced, on 16 June 2020, by [section 9\(3\)](#) of the Overseas Investment (Urgent Measures) Amendment Act 2020 (2020 No 21).

Section 12(a)(ii): amended, on 16 June 2020, by [section 9\(4\)](#) of the Overseas Investment (Urgent Measures) Amendment Act 2020 (2020 No 21).

Section 12(b): amended, on 16 June 2020, by [section 9\(6\)](#) of the Overseas Investment (Urgent Measures) Amendment Act 2020 (2020 No 21).

Section 12(b)(i): amended, on 16 June 2020, by [section 9\(5\)](#) of the Overseas Investment (Urgent Measures) Amendment Act 2020 (2020 No 21).

Section 12(b)(ii): amended, on 16 June 2020, by [section 9\(5\)](#) of the Overseas Investment (Urgent Measures) Amendment Act 2020 (2020 No 21).

13 What are overseas investments in significant business assets

(1) An overseas investment in significant business assets is—

- (a) the acquisition by an overseas person, or an associate of an overseas person, of rights or interests in securities of a person (A) if—
 - (i) as a result of the acquisition, the overseas person or the associate (either alone or together with its associates) has a more than 25% ownership or control interest in A or an increase in an existing more than 25% ownership or control interest in A; and
 - (ii) the value of the securities or consideration provided, or the value of the assets of A or A and its more than 25% subsidiaries, exceeds \$100 million or an alternative monetary threshold that applies in accordance with regulations made under [section 61A](#); or
- (b) the establishment by an overseas person, or an associate of an overseas person, of a business in New Zealand (either alone or with any other person) if—
 - (i) the business is carried on for more than 90 days in any year (whether consecutively or in aggregate); and
 - (ii) the total expenditure expected to be incurred, before commencing the business, in establishing that business exceeds \$100 million or an alternative monetary threshold that applies in accordance with regulations made under [section 61A](#); or
- (c) the acquisition by an overseas person, or an associate of an overseas person, of property (including goodwill and other intangible assets) in New Zealand used in carrying on business in New Zealand (whether by 1 transaction or a series of related or linked transactions) if the total value of consideration provided exceeds \$100 million or an alternative monetary threshold that applies in accordance with regulations made under [section 61A](#).

Part 1

What land is sensitive

What land is sensitive

Land is **sensitive** under this Act if—

- (a) the land is or includes land of a type listed in table 1 and the area of that type of land exceeds the corresponding area threshold (either alone or together with any associated land of that type), if any; or
- (b) the land (**land A**) adjoins land of a type listed in table 2 and the area of land A exceeds the corresponding area threshold (either alone or together with any associated land), if any.

Table 1

Land is sensitive if it is or includes this type of land	... and that type exceeds this area threshold (if any)
residential land	—
non-urban land	5 hectares
land on islands specified in Part 2 of this schedule	0.4 hectares
land on other islands (other than North or South Island, but including the islands adjacent to the North or South Island)	—
foreshore or seabed	—
bed of a lake	0.4 hectares
land held for conservation purposes under the Conservation Act 1987	0.4 hectares
land that a district plan or proposed district plan under the Resource Management Act 1991 provides is to be used as a reserve, as a public park, for recreation purposes, or as open space	0.4 hectares
land subject to a heritage order, or a requirement for a heritage order, under the Resource Management Act 1991 or by Heritage New Zealand Pouhere Taonga under the Heritage New Zealand Pouhere Taonga Act 2014	0.4 hectares
a historic place, historic area, wahi tapu, or wahi tapu area that is entered on the New Zealand Heritage List/Rārangī Kōrero or for which there is an application that is notified under section 67(4) or 68(4) of the Heritage New Zealand Pouhere Taonga Act 2014	0.4 hectares
land that is set apart as Māori reservation and that is wahi tapu under section 338 of Te Ture Whenua Māori Act 1993	0.4 hectares

16A Benefit to New Zealand test

General test

- (1) The benefit to New Zealand test is met if all of the following are met:
 - (a) the overseas investment will, or is likely to, benefit New Zealand (or any part of it or group of New Zealanders), as determined by the relevant Ministers under [section 17](#); and
 - (b) if the relevant land is or includes non-urban land that, in area (either alone or together with any associated land) exceeds 5 hectares, the relevant Ministers determine that that benefit will be, or is likely to be, substantial and identifiable; and
 - (c) if the relevant land is or includes residential land, the relevant Ministers are satisfied that the conditions that the relevant Ministers will impose on the consent in accordance with [section 16B](#) will be, or are likely to be, met.
- (2) Subsection (3) applies if the relevant Ministers are satisfied—
 - (a) that the relevant land will be, or is likely to be, used exclusively, or nearly exclusively, for forestry activities; and
 - (b) that—
 - (i) the relevant land is not residential land only; and
 - (ii) if the relevant land includes any residential land, the residential land adjoins other land that is included in the relevant land but is not residential land; and
 - (c) that the relevant land will not be, or is not likely to be, used, or held for future use, for any residential purposes, except where—
 - (i) accommodation is being provided for the purpose only of supporting forestry activities being carried out on the relevant land; and
 - (ii) all buildings being used for that accommodation are located on land on which some or all of those forestry activities are being carried out or on land that adjoins land on which some or all of those forestry activities are being carried out; and

17 Factors for assessing benefit of overseas investments in sensitive land

- (1) For the purposes of [section 16A\(1\)\(a\) and \(b\)](#) (including where section 16A(3) is being applied), the relevant Ministers—
 - (a) must consider all the factors in subsection (2) to determine which factor or factors (or parts of them) are relevant to the overseas investment; and
 - (b) must determine whether the criteria in [section 16A\(1\)\(a\) and \(b\)](#) (including where section 16A(3) is being applied) are met after having regard to those relevant factors; and
 - (c) may, in doing so, determine the relative importance to be given to each relevant factor (or part).
- (2) The factors are the following:
 - (a) whether the overseas investment will, or is likely to, result in—
 - (i) the creation of new job opportunities in New Zealand or the retention of existing jobs in New Zealand that would or might otherwise be lost; or
 - (ii) the introduction into New Zealand of new technology or business skills; or
 - (iii) increased export receipts for New Zealand exporters; or
 - (iv) added market competition, greater efficiency or productivity, or enhanced domestic services, in New Zealand; or
 - (v) the introduction into New Zealand of additional investment for development purposes; or
 - (vi) increased processing in New Zealand of New Zealand's primary products:
 - (b) whether there are or will be adequate mechanisms in place for protecting or enhancing existing areas of significant indigenous vegetation and significant habitats of indigenous fauna, for example, any 1 or more of the following:
 - (i) conditions as to pest control, fencing, fire control, erosion control, or riparian planting:
 - (ii) covenants over the land:

18 Criteria for overseas investments in significant business assets

- (1) The criteria for an overseas investment in significant business assets are all of the following:
 - (a) the relevant overseas person has, or (if that person is not an individual) the individuals with control of the relevant overseas person collectively have, business experience and acumen relevant to that overseas investment:
 - (b) the relevant overseas person has demonstrated financial commitment to the overseas investment:
 - (c) the relevant overseas person is, or (if that person is not an individual) all the individuals with control of the relevant overseas person are, of good character:
 - (d) the relevant overseas person is not, or (if that person is not an individual) each individual with control of the relevant overseas person is not, an individual of a kind referred to in [section 15](#) or [16](#) of the Immigration Act 2009 (which sections list certain persons not eligible for visas or entry permission under that Act):
 - (e) if the overseas investment in significant business assets is a transaction of national interest, the Minister has not declined consent to the transaction (*see* [section 20C](#)).
- (2) *See* [section 19](#) in relation to subsection (1)(c) and (d).

Section 18(1)(d): substituted, at 2 am on 29 November 2010, by [section 406\(1\)](#) of the Immigration Act 2009 (2009 No 51).

Section 18(1)(e): inserted, on 16 June 2020, by [section 14\(1\)](#) of the Overseas Investment (Urgent Measures) Amendment Act 2020 (2020 No 21).

What does all that mean??

No consent needed

- New Zealand citizens (living in New Zealand or not).
- Anyone that is **ordinarily resident**.
- Australian or Singaporean citizens who wish to purchase **Residential Land**.
- If you are the partner or spouse of any of the above.

Consent needed

You are not **ordinarily resident** yet, but you:

- Have a New Zealand residence class visa, or
- Are an Australian or Singaporean permanent resident, or
- Are an Australian or Singaporean citizen wishing to purchase **Otherwise Sensitive Land**.

Unable to purchase

- New Zealand work visa
- New Zealand student visa
- New Zealand work-to-residence visa
- New Zealand working holiday visa
- New Zealand visitor visa
- Any other overseas person

A quick word on changes in 2020



Unite
against
COVID-19

COVID-19 and overseas development

- In June 2019, some changes were made to the Act under urgency
- The Overseas Investment (Urgent Measures) Amendment Bill
 - New sections introduced around strategically important businesses (SIBs)

1. **Temporary notification scheme**

Must notify of any investment by overseas person of more than 25%; and

Must notify of any increase in existing investment

Might be blocked if it is not in the 'national interest'

Temporary – renewed every 90 days (likely will end after COVID-19 is over)

2. **National interest test has been introduced**

It is in addition to existing tests – relevant to strategically important assets

3. **Streamlined the process to make it quicker to apply**

4. **Overseas Investment Office given stronger enforcement powers**

“These changes to the Overseas Investment Act enable New Zealand to be open for business for productive overseas investment while protecting New Zealand's taonga for future generations.” – OIO June 2020

The 'Stuff' media issue during lockdown

- In May 2020, the Australian owners of 'Stuff' – one of NZ's largest media groups – put it up for sale
- A rival NZ media group (NZME) couldn't reach agreement to buy it
- There was a chance it could be bought by foreign investors
- 2 things happened:
 - 1. It got sold to its management - for \$1 its Chief Exex and former journalist Sinead Boucher
 - 2. NZ Govt realized this was a gap in the law that needed to be closed urgently – can't have one of our largest media groups falling to overseas investors for \$1!

20G What are media businesses with significant impact

- (1) A **media business with significant impact**, in relation to an overseas investment transaction or a call-in transaction, is a business that publishes content, or causes content to be published, if—
 - (a) all or a significant part of the business involves the generation or aggregation of content; and
 - (b) the business has a significant impact on the plurality of content available to the public or a particular section of the public, either before or as a result of the overseas person’s (or their associate’s) acquisition.
- (2) Content is **available to the public or a particular section of the public** whether or not—
 - (a) a receiver has to pay for the content; or
 - (b) a receiver is required to be a subscriber or member of the publishing service; or
 - (c) the content is delivered on the demand of a receiver; or
 - (d) the content is aimed at particular groups of people (for example, people who are located in a particular area of New Zealand, who have a particular interest, or who speak a particular language).
- (3) In this section,—

content means news, information, or opinion

publish includes to transmit or broadcast by any means (including, but not limited to, Internet sites, applications, and software).

For more info on the COVID-19 changes see:

<https://www.treasury.govt.nz/system/files/2020-05/oi-factsheet-covid-19-may20.pdf>

Consent

- Under s 12 of the OIA, consent is required if an overseas person wants to purchase 'sensitive land'
- Applications are made to the Overseas Investment Office
- They consider the application and whether the criteria is met
- They often approve
- They publish summaries of all the decisions, monthly
- Couple of examples...

Example #1 of consent being granted by the OIO

Case 201900618 - Mainland Poultry Limited

Decision	Consent granted Section 12(a) Overseas Investment Act 2005
Decision Maker	The Minister of Finance and the Minister for Land Information
Decision Date	19 June 2020
Pathway	Sensitive land – substantial and identifiable benefit to New Zealand
Investment	An overseas investment in sensitive land, being the Applicant's acquisition of a freehold interest in approximately 217.9984 hectares of land at 116-118 Huirimu Road, Te Awamutu and approximately 15.1 hectares of land at 232 Huirimu Road, Te Awamutu.
Consideration	\$9,000,000
Applicant	Mainland Poultry Limited New Zealand 28.97%; United States of America 21.17%; United Kingdom 10.41%; Channel Islands 5.99%; Cayman Islands 5.62%; Finland 3.74%; Luxembourg 3.13%; British Virgin Islands 3.08%; Germany 2.99%; Thailand 2.71%; Malaysia 2.51%; Kuwait 2.25%; Ireland 2.05%; Canada 1.26%; Japan 1.17%;

Vendors

Narrandera Farms Limited
New Zealand (100%)

Anne Marie McKenzie, Kim Donald McKenzie, and Redoubt Trustees XIII Limited as trustees of the K & A McKenzie Family Trust
New Zealand (100%)

The Applicant is a New Zealand based agri-business that is a vertically integrated producer of eggs, egg products, and animal feeds. The Applicant is indirectly majority owned by an overseas-based investment fund with the remaining ownership held between the New Zealand founders of the Applicant.

The Applicant intends to acquire the land to develop a free-range egg farm that is expected to produce a substantial number of eggs once in full production.

The benefits to New Zealand include:

- The creation of new jobs involved in the construction and ongoing operation of the farm;
- Additional investment involved in the development;
- New Zealand participation in the investment;
- Protection of indigenous vegetation on the land;
- Advancement of New Zealand's economic interests with the increased production of eggs;
- Increased processing of egg products, and greater efficiency of the Applicant's business and productivity from the land.

The OIO has taken possible delays due to COVID-19 into account in formulating special conditions of consent to the investment.

Background

More information

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Example #2 – Microsoft

- In September 2020, the OIO approved an application by **Microsoft's NZ subsidiaries to acquire land in NZ**
- Purpose: to acquire business assets, including land (not sensitive land) exceeding \$100,000 million, for **cloud-based data centres**
- The application met the investor test in s 18 of the OIA
 - Applicant has relevant **business experience and business acumen**
 - Are of **good character**
 - **Committed to the investment**
- It also involved a 'national interest' assessment and consideration by the Minister of Finance, after changes were made to the OIA in June 2020
- Microsoft will be allowed to acquire land, although not 'sensitive land' to create data centres in Auckland for an 'on-shore data region'
- Decision: approved, 25 August 2020 available at: <https://www.linz.govt.nz/overseas-investment/decision-summaries-statistics/2020-08/201900507>

Enforcement



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Enforcement orders are listed on the Overseas Investment Office page: 'Enforcement Action' available at:

<https://www.linz.govt.nz/overseas-investment/enforcement/enforcement-action-taken>

Failure to seek consent before purchase or failure to comply with conditions

- If an overseas person purchases without consent, they may be forced to sell their property
- If approved but conditions are placed on consent, the OIO will monitor to make sure the consent conditions are followed
- If conditions are not subsequently followed, the owner of land may be forced to sell their assets at any point and they may face prosecution and penalties on top of being forced to sell

Ex 1: The 'Glasshouse' on Waiheke Island

luxury Waiheke home
Glasshouse after breaching
Overseas Investment Act

26 Feb, 2020 05:00 AM

🕒 5 minutes to read



The Glasshouse at 33-39 Okoka Rd, on Waiheke Island. Photo / Supplied

Michael Rems and
Julie O'Shea

20
December
2018

Rems and O'Shea (American investors) were granted consent in 2015 to acquire approximately 0.5 hectares of sensitive land on Waiheke Island. Consent conditions required the couple to become ordinarily resident in New Zealand within three years. They did not do so and consequently we required them to dispose of the property – which they have now done.

Ex 2: Chinese owners forced by the High Court to sell land near Warkworth

- In July 2019, the HC made an order forcing property owners to sell properties in NZ they bought in 2012 and 2014 without consent
- Overseas owners – Chinese businessmen Zhongliang **Hong** and Xueli **Ke**, and **IRL Investment** Limited and Grand Energetic Company Limited – should have applied to the OIO for consent to buy both properties because they are rural land of more than five hectares.
- Owners were forced to:
 - a) sell properties
 - b) pay penalty
 - c) pay costs

3. Consider its application to the policy cycle

The Policy Cycle



- Issues i.e. what is the problem
- Objectives i.e. what are the targets
- Policy instruments i.e. methods, options, plans
- Choices
- Implementation
- Monitoring, i.e evaluation; enforcement; review, leading to identification of new problems.

Source: Allen + Clarke

4. Consider 'intergenerational justice' 'international governance' & overseas investment

Might be the subject of a different paper?

Key points: food for thought



- Governments have a ‘presentist bias’ in policy-making
- They find it difficult to plan long-term - motivated by next election cycle and solving short-term problems
- Governments often give poor attention to ‘creeping’ or ‘slow-motion’ problems
- Retain policies that demonstrably unsustainable – economically, socially, environmentally

“those living the future are likely to incur greater costs and enjoy fewer benefits than would otherwise be the case” (Boston, 2017)

- Typical example: climate change – our lack of ability to do what’s needed
- In this context: how to encourage responsible overseas investment with a long-term focus when short-term focus is easier

I've been thinking about...

- How does our Overseas Investment Act 2005 reflect long-term decision-making
- Does it reflect an interest in 'inter-generational governance'
- Does it try to secure 'intern-generational justice'
- Still working on this idea

5. Conclusion and recommendations – so far...

Concluding points

Doing well....

- Investor test in s 18 seems good for protecting NZ
- National interest test is good backstop tool
- OIO is strong enforcer and active investigator
- Transparency is great – publishing everything on website incl enforcement action, judgements, settlement agreements ('name and shame')

Could be improved...

- Our penalty may not be high enough to deter in some instances – ie
- s 42: \$300,000 fine and/or 12 months prison
- S 45: \$100,000 fine for failing to keep to conditions
- Our investment regime is still quite strict – it may put off some investors because of complexity and cost/time?

Recommendations for other countries to consider 1/2:

1. Our legislation is strong and balances our national interest against need to encourage investment
 1. Seems to encourage 'good' investors (eg Microsoft's data centres in Auckland) and discourage 'bad' investors (those who fail to get consent or fail to keep to the conditions)
2. Designate residential houses as 'sensitive land' from the outset (it took NZ a while to figure this one out; helps to avoid housing unaffordability problem)
3. Have a national interest test for transactions that:
 1. relate to land or assets used for strategically important business, including those involved in military or dual-use technology, ports or airports, electricity, water, telecommunications, and financial market infrastructure; or
 2. involve certain levels of investment by an overseas investor that is, or is associated with, a foreign government. Have such a test from the outset.

Recommendations for other countries to consider 2/2:

4. Establish an Overseas Investment Office like NZ's - give it teeth to investigate, monitor and enforce (consider high penalties for failing to get consent or failing to stick to conditions)
5. Make sure your OIO acts in a transparent way – publish everything online
6. Set in place mechanisms for evaluation and review of your legislation



6. Discussion

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