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How the Overseas Investment Office uses information





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Overview

Foreign ownership of New Zealand land and businesses is a topic many New Zealanders feel strongly about.

Overseas investment in New Zealand's sensitive land, significant business assets, and fishing quota is regulated under the Overseas Investment Act 2005 (the Act). Potential overseas investors who are not ordinarily resident in New Zealand or citizens (overseas investors) need to apply for consent and demonstrate that they are suitable applicants. Each year, there are typically between 100 and 150 applications for overseas investments, worth several billions of dollars.

The Overseas Investment Office (the OIO) manages the process. The OIO reviews applications from potential overseas investors and advises the Ministers (or, in certain cases, senior staff in the OIO) on whether consent for the investment should be granted. If consent is granted, the OIO is responsible for monitoring the investment and enforcing compliance with any conditions attached to the consent.

However, it is not the OIO's role to set the criteria for whether overseas investment should be allowed, encouraged, or promoted. These criteria are in the governing legislation set by Parliament and policy expectations set by the elected government. Recent policy announcements have been made, for example, about ownership by non-New Zealanders of farm and forest land. Once the policy has been set, the OIO's role is to consider an overseas investment application against the criteria in the governing legislation and policy.

We carried out a review that focused on the OIO's use of information within the context of the governing legislation and ministerial direction. We wanted to know whether the OIO was collecting and using the right information at the right time to support good decisions.

We found that the OIO does provide the decision-maker with the right information to recommend whether consent for an investment should be granted. In the applications we reviewed, the OIO collected, considered, and used information carefully in preparing recommendations and provided the decision-maker with a comprehensive file of information to support its recommendations. It consistently addressed all the required criteria and supported the views it had taken.

Processing applications is not a simple or mechanical exercise. Judgement is required about whether the information available to the OIO meets the statutory test for consenting to overseas investment. Although the files we reviewed showed that the OIO demonstrated effective judgement, it could sometimes benefit from more ready access to specialist advice.

It was evident that the OIO relied heavily on statutory declarations and internet searches when considering the good character of an investor. In our view, this is a reasonable approach. A review by a Queen's Counsel in 2016 also found that the OIO's systems for checking good character were appropriate, and, in particular, that it was reasonable for the OIO to use and rely on statutory declarations. The OIO sought further information about an applicant's character where it considered that was required. We did not find any instances of the OIO failing to inform the decision-maker of the results of internet searches where they were relevant to an application.

The OIO makes recommendations about conditions that could be placed on a consent for an overseas investment. Conditions can include reporting requirements and requirements to take certain actions or follow certain processes in relation to the investment.

The OIO told us that, in the past, some conditions were unclear or too general or no time frame was specified. This sometimes limited the OIO's ability to enforce those conditions. Improving the nature of conditions of consent is a priority for the OIO and we agree that this is important. Conditions are more likely to be effective if they are relevant to the investment and able to be measured and enforced.

The OIO has previously placed less emphasis on its role in monitoring and enforcing compliance with conditions placed on consents. As we were carrying out our review, the OIO was improving the way it performs this role. These changes included more focus on monitoring and enforcement – including establishing a dedicated enforcement team, publishing information about enforcement action, and adopting new performance measures about enforcement. In my view, these changes were essential. Monitoring and managing of non-compliance are vital components of any effective regulatory regime.

Although it was too early for us to assess the effect of the wider changes the OIO has made to its process, they should improve the effectiveness and efficiency of the OIO. It is important that the OIO follows through with the changes it has begun to make.

I thank the staff of the OIO, staff from the Treasury, and the agents for applicants we talked to for their assistance with our review.

A handwritten signature in black ink, consisting of a stylized 'G' followed by a horizontal line.

Greg Schollum
Deputy Controller and Auditor-General

5 April 2018

Introduction

- 1.1 To varying extents, people and organisations can make investments globally. This includes investments in New Zealand by people who are not New Zealand citizens or ordinarily resident in New Zealand, or by organisations that are owned or controlled by overseas persons. The term “overseas investments” has been used to describe these investments when they are in New Zealand businesses, land, and fishing quota.
- 1.2 Parliament has determined how applications for overseas investments should be managed. Under the Overseas Investment Act 2005 (the Act), consent must be granted for overseas investments in sensitive land, significant business assets, or fishing quota before the investments are made.¹
- 1.3 This consent is granted through a process administered by the Overseas Investment Office (the OIO), which is part of Land Information New Zealand.
- 1.4 As part of the consultation process on our Office’s 2016/17 work plan, Parliament brought a situation to our attention that raised questions about how effectively the OIO collects, handles, and uses information that could be relevant to decision-makers.² Parliament suggested that the Auditor-General include a review of this matter in the annual work programme as part of our 2016/17 *Information* theme.
- 1.5 We have not reviewed that specific case – it was subject to an OIO internal review and an independent legal review of the OIO’s approach to “good character” in that case in May and June 2016.
- 1.6 We decided that we would review broader aspects of the OIO’s work as part of our work programme. This report sets out the results of our review.

Changes at the time of our review

- 1.7 At a similar time to our review, the OIO had begun developing and implementing changes to how it carries out its work. These included changes to how the OIO:
 - provides guidance to potential applicants;
 - considers applications; and
 - monitors and enforces the conditions of granted consents.
- 1.8 Although we have considered some of the changes as part of our review, it was too early to definitively comment on the effects of these changes.

1 Section 11 of the Overseas Investment Act 2005.

2 This was in relation to the OIO’s management of a 2013 Ceol & Muir application to purchase sensitive land in Taranaki. In that case, the OIO did not pass on information relevant to the assessment of two applicants’ good character to the Minister making the decision about their joint application. Further information about the OIO’s management of this application is available at linz.govt.nz.

Our focus on the use of information

What we looked at

- 1.9 In our terms of reference, we said that we would look at:
- what information the OIO collects to assess applications for investments in sensitive land and significant business assets, and to assess the benefits of overseas investments for investments in sensitive land;
 - how the OIO collects that information for those purposes;
 - how the OIO determines it has sufficient and accurate information for those purposes;
 - how the OIO uses the information it collects to provide accurate, balanced, and complete advice to decision-makers (both internal and external to the OIO);
 - how the OIO uses the information it collects to monitor a successful applicant's compliance with any consent, including monitoring, and for investments in sensitive land, evaluating the actual benefits of an investment; and
 - any other matters the Auditor-General considers it desirable to report on.
- 1.10 Before finalising these terms of reference, we sought feedback on them from Parliament's Finance and Expenditure Committee and from the OIO.
- 1.11 We excluded applications for overseas investments in fishing quota because they are infrequent.

What we did

- 1.12 We focused on the key aspects of the application process, including what are referred to as the investor test (see Part 4) and the benefit test (see Part 5). These aspects commonly require intensive information and analysis. We did not examine every aspect of how the OIO processes applications, nor how consents are monitored and enforced.
- 1.13 We reviewed about 3000 documents from the OIO and interviewed some staff. We also spoke with representatives from some of the law firms that make applications for overseas investments on behalf of clients. We refer to these representatives as "agents". We also spoke with officials from the Treasury.

- 1.14 We reviewed 15 applications for overseas investments that were decided in 2016. In total, these applications involved potential investments of more than \$1 billion in value. Although we selected the applications largely at random, we included some specific applications to ensure that our overall selection covered the range of types, value, and complexity of applications.
- 1.15 In addition, we reviewed four applications as background information when planning our review.
- 1.16 We also examined nine applications that had been through some aspect of the OIO's new "triage" process (see Part 3) and observed two of the OIO's application triage meetings.
- 1.17 Our review did not include consideration of any legislative changes to the overseas investment regime being proposed at the time of writing this report.

2

Regulating overseas investment in New Zealand

- 2.1 New Zealand's foreign investment policy (and the one in place at the time of our review), allows investment from overseas, commonly referred to as "foreign direct investment". That policy can be the subject of review and debate, as it currently is under the new government elected in September 2017.
- 2.2 Where that overseas investment is to acquire certain types of assets, potential overseas investors have to apply to the Government for approval to make the investment. That requirement is set out in the Act. The Act acknowledges it is a privilege for overseas persons to own or control sensitive New Zealand assets and, in light of that privilege, requires overseas investments in those assets to be given consent before they happen.³
- 2.3 Approval is required for overseas investments in:
- sensitive land (investments in non-urban areas greater than five hectares in area, or smaller areas of land that include or adjoin bodies of water, parks, and other areas of sensitivity);
 - significant business assets (investments when they are in a business worth more than \$100 million); and
 - fishing quota.
- 2.4 From 2014 to 2016, there were between 129 and 148 applications each year for overseas investment. Most applications were for investments in sensitive land. The net consideration value, representing the total dollar value invested in New Zealand, was between \$1.3 billion and \$4.4 billion each year.⁴ Three applications were declined between 2014 and 2016.

Administering aspects of foreign investment in New Zealand

- 2.5 The OIO is part of Land Information New Zealand and is the entity responsible for administering the application and consent process for overseas investments. The OIO has particular functions outlined in the Act:⁵
- Consider each application and advise the relevant Minister or Ministers on how the application should be determined.
 - Exercise any of the powers or functions that have been delegated to the OIO under the Act or regulations.
 - In relation to an application, consult as the OIO thinks appropriate.

³ Section 3 of the Overseas Investment Act 2005.

⁴ The "gross consideration value" of these investments was between \$7.6 billion and \$9 billion.

⁵ Section 31 of the Overseas Investment Act 2005. The Chief Executive of Land Information New Zealand is the "regulator" under the Act and is responsible for carrying out these functions. The functions are carried out through the OIO.

- Monitor compliance with conditions of consent.
- Issue guidelines when necessary.
- Compile and keep records relating to applications, for example, the number of applications in a particular year.
- Compile and make available statistics relating to applications.
- Provide general information for the benefit of applicants for consent about New Zealand's overseas investment rules.
- Do anything else that is necessary for the efficient operation of the rules relating to overseas investment in sensitive New Zealand assets.

2.6 In practical terms, the OIO's role is to receive an application from a potential overseas investor and evaluate whether that investment can be given the consent it requires before it can happen. When the OIO has completed that evaluation, it makes a recommendation to the appropriate decision-maker (who can be the relevant Minister or a delegated person within the OIO) who decides whether consent will be granted. After consent is granted, the OIO has a role in monitoring the investment and whether the investor is complying with the requirements of that consent, and taking enforcement action if necessary.

2.7 When carrying out its functions, the OIO's responsibilities do not extend to:

- promoting foreign investment in New Zealand. This may be carried out by other parts of government, such as New Zealand Trade and Enterprise or the Ministry of Foreign Affairs and Trade;
- approving or supervising overseas investments that do not relate to sensitive land, significant business assets, or fishing quota;
- managing citizenship or immigration issues related to the investment. These are the responsibilities of the Department of Internal Affairs and Immigration New Zealand (part of the Ministry of Business, Innovation and Employment) respectively; and
- providing policy advice to the Government about overseas investments. This function is carried out by the Treasury.

The Overseas Investment Act 2005 and the Overseas Investment Regulations 2005

2.8 The Overseas Investment Act 2005 requires consent to be granted before any overseas investments in sensitive land, significant business assets, or fishing quota that meet the necessary criteria. The OIO is to consider each application

on a case-by-case basis.⁶ Once consent is granted, any conditions placed on that consent are expected to be met.

- 2.9 The Act and the Overseas Investment Regulations 2005 (the Regulations) outline several requirements for the applicant to meet, which the OIO needs to evaluate when it is considering an application for consent. These requirements mean that there are a range of often complex factors to be considered when determining whether to grant consent for an overseas investment.
- 2.10 The OIO has to consider these factors when deciding how to advise the decision-maker.

Considering the type of investment, the suitability of the investor, and the benefits

- 2.11 There are some key issues for the OIO to consider in processing applications in sensitive land or significant business assets:
- Is there an overseas investment (in sensitive land or significant business assets)?
 - Who is in fact making the investment or is in control of the entity making the investment?
 - Is that person a suitable investor (the investor test)?
 - Where the investment involves sensitive land, is there a benefit to New Zealand (the benefit test)?

The investor test

- 2.12 The investor test determines whether the character and experience of the overseas investor meets the necessary requirements. These requirements include whether the person behind the investment has the necessary business experience and acumen for that investment, has demonstrated a financial commitment to that investment, is of good character, and is not excluded under sections 15 or 16 of the Immigration Act 2009.

The benefit test

- 2.13 The benefit test (determining whether the overseas investment will, or is likely to, benefit New Zealand) needs to be carried out whenever an investment involves sensitive land. There are a number of criteria set out in the Act and the

⁶ A person is also able to apply for an investment to be exempt from needing consent in situations including certain transactions relating to the holding of certain securities, New Zealand-controlled persons, where land of certain type and area is already in overseas ownership or control, and Australian investors in respect of certain overseas investments in significant business assets. Exemptions are outlined in the Overseas Investment Regulations 2005.

Regulations that the OIO must consider when making these evaluations. These criteria cover issues such as:

- whether the investment will or is likely to result in job opportunities, new technology or business skills, increased exports, or more market competition or efficiency; and
- whether there are adequate mechanisms for protecting or enhancing indigenous vegetation and fauna, certain wildlife, and walking access.

2.14 The Appendix shows the key decisions required by the Act. The reader may find it useful to fold out the Appendix for reference while reading this report.

A ministerial directive guides the Overseas Investment Office's work

2.15 The Minister of Finance also provides the OIO with a detailed directive that needs to be followed when evaluating applications.⁷ Under the Act, the Minister is able to direct the OIO about:⁸

- the Government's general policy approach to overseas investment in sensitive New Zealand assets, including the relative importance of different criteria or factors in relation to particular assets;
- the asset types, value thresholds, and area thresholds over which it has power to make decisions;
- the level of monitoring required in relation to conditions of consent;
- the criteria for including reserves, public parks, or other sensitive areas on the list of the types of sensitive land that the OIO must keep; and
- any general or specific matter relating to the regulator's functions, powers, or duties.

2.16 At the time of our review, the OIO was working to expectations outlined in a letter dated 8 December 2010 from the then Minister of Finance to the Chief Executive of Land Information New Zealand. The letter contained expectations that were directly relevant to the key decisions when considering an application and determining whether consent for an overseas investment should be granted.⁹

2.17 The letter contained detailed guidance about how to apply certain concepts in the Act. An example of this was the "overall policy approach to overseas investment in sensitive New Zealand assets":

⁷ The Minister of Finance is able to provide these directions because they are responsible for the Treasury, which administers the Overseas Investment Act 2005: see section 34 of the Act.

⁸ Section 34 of the Overseas Investment Act 2005.

⁹ The 8 December 2010 letter from the Minister of Finance is available at linz.govt.nz.

The Government's overall policy approach to overseas investment in sensitive New Zealand assets is to achieve a balance between ensuring those assets are adequately protected while facilitating overseas investment that provides benefits to New Zealand. While the Government acknowledges the purpose of the Act and the consent regime it establishes, the Government wishes to minimise any unnecessary delays or administrative costs in the consent process. The Government's general policy approach is to enable those investments that meet the statutory criteria for consent to proceed, by ensuring that they are not hindered by administrative issues and that the regulator's resources are used efficiently.

2.18 Another example was an expectation about conditions that might attach to a consent:

When imposing conditions of consent on an overseas investment, the regulator should ensure that the condition is necessary and achieves the intended result in the least onerous way including, where possible, at the least cost to the investor.

2.19 The letter also outlined expectations about how the OIO will carry out its functions, powers, or duties. When providing advice to Ministers, the OIO will:

- perform its functions in a timely, consistent, and efficient manner;
- seek sufficient information from applicants to be assured that information, advice, recommendations, or assessments of benefits is accurate;
- verify information provided by applicants by seeking evidence or input from third parties at the regulator's discretion;
- seek to recover operating costs for applications from applicants by fees set by regulation; and
- monitor compliance with conditions of approval, consent, permission, or exemption granted.

2.20 Together with the criteria in the Act and the Regulations, these directions provided a prescribed framework within which the OIO was to consider applications and make recommendations. Part of that framework was the direction that the information the OIO used would be gathered efficiently and would be accurate. At the same time, unnecessary delays and administrative costs were to be minimised.

2.21 In November 2017, after the completion of our fieldwork, the Minister in the newly elected government issued a new Directive Letter that included changes to criteria relating to rural land and forest land.¹⁰ For example, the new directive does not contain the expectation about imposing conditions which "achieves the intended results in the least onerous way" that was in the previous directive. The letter took effect on 15 December 2017.

Authority to make decisions about applications for overseas investments

- 2.22 There are three Ministers with decision-making powers under the Act. They are the Minister of Finance, the Minister for Land Information, and the Minister of Fisheries (previously the Minister for Primary Industries). Each of these Ministers has different responsibilities depending on whether the application involves significant business assets, sensitive land, or fishing quota (see Figure 1).

Figure 1
Ministers with decision-making powers under the Overseas Investment Act 2005

	Significant business assets (not including sensitive land)	Sensitive land	Fishing quota
Minister of Finance	•	•	•
Minister for Land Information		•	
Minister of Fisheries			•
Delegations	All consent decisions delegated from Minister to the OIO.	Many consent decisions delegated from Ministers to the OIO.	All consent decisions made by Ministers. No consent decisions delegated to the OIO.

- 2.23 Where two Ministers are to consider an application, the application goes to both Ministers. The advice from OIO to Ministers is that Ministers should discuss their views with the OIO and the other Minister if they propose to disagree with the other Minister.
- 2.24 Ministers have delegated some of their decision-making powers to the Chief Executive of Land Information New Zealand.¹¹ These powers have, in turn, been delegated to senior staff in the OIO. These are decisions about whether to grant consent for an investment in significant business assets and decisions about specified types of sensitive land applications (generally the “low-level” or “low-risk” applications).

11 The delegations are described in a designation and delegation letter dated 27 April 2009 from the Minister of Finance and the Minister for Land Information. It is available at linz.govt.nz.

3

The application for an overseas investment

- 3.1 The Act requires people who are seeking consent for an overseas investment to apply to the OIO for that consent before the investment is given effect.

Guidance for potential overseas investors

- 3.2 The OIO provides potential applicants with guidance about how to make an application and what information the applicant needs to provide. The OIO says that the purpose of this guidance is for the application to have “the best possible information” about the planned investment.
- 3.3 From October 2015, the OIO made a “Required Information Checklist” available on its website. This checklist was to help applicants determine whether they had provided all of the necessary information with their application. It asked whether the application covered, for example:
- in relation to the investor, “all matters potentially relevant to the good character of the [investor]” noting that “the OIO determines what is actually relevant”; and
 - in relation to claims there is benefit to New Zealand, the counterfactual situation (or likely state of affairs without the investment) and supporting evidence.
- 3.4 Before February 2017, a template application letter was available for applicants to use.
- 3.5 From late February 2017, the OIO has provided new and revised application templates on its website.¹² The templates are tailored to the various types of application an applicant may wish to make and include substantial guidance on the information applicants must provide. For example, there is a pack for applications about acquiring significant business assets.
- 3.6 The new templates are designed to be clearer about the information the OIO requires from applicants and to reduce the need to request additional information later. The OIO describes the templates in this way:
- We request that you use the Application Templates so that you can give us all the information we ask for, in the order we ask for it. Doing this is likely to result in your application being processed more quickly, or without us needing to ask you for more information.*
- 3.7 Each template contains guidance notes and links to other information.
- 3.8 As well as the new templates, the OIO has also issued guidance for applicants about what information is required for critical parts of the application. This is guidance about identifying relevant overseas persons and individuals with control, the OIO’s assessment of good character, and making submissions about benefits and counterfactuals. We discuss each of these topics later in this report.

Meeting with applicants before they make an application

- 3.9 The OIO may meet with a potential applicant on request by the applicant or if the OIO considers that an anticipated application warrants a meeting. The OIO has information on its website about pre-application meetings, including what they are, how they work, and why such a meeting might be useful for the applicant.¹³
- 3.10 The purpose of these meetings is described by the OIO as a way to “help [the applicant] prepare a clearly reasoned application that contains all the information we will need to assess [the] application”. Specifically, meetings are described as an opportunity for the applicant to:
- explain at a high level the application and investment proposal (where applicable);
 - ask any questions about presenting specific aspects of the application;
 - get feedback about how the application might be improved; and
 - ask any questions about the application process.
- 3.11 In this way, the meetings are to assist the applicant make the application and not to discuss the merits of the application yet to be finalised or made. The OIO does not intend the meetings as an opportunity to review draft applications for consent, provide legal advice, decide how long an application might take, or indicate what the likely outcome of a particular application might be.
- 3.12 During the course of our review, the OIO told us that it intended to meet or talk with potential applicants more often before they submit an application.

A structured process for considering applications

- 3.13 Once an application has been received, the OIO’s process includes the following steps:
- initial assessment and quality assurance review;
 - full assessment and information gathering (if required);
 - preparing draft conditions and considering statutory declarations;
 - making recommendations to the decision-maker;
 - decisions made by the decision-maker about whether consent will be granted;
 - notifying the applicant about the decision; and
 - publishing the decision.
- 3.14 Until October and November 2016, the first step in the process was allocation of the application to a staff member and an initial assessment of the application. This initial assessment was a quality assurance review where the application was checked to ensure that it contained the information required for a full

¹³ The OIO’s guidance on pre-application meetings is available at linz.govt.nz.

consideration by the OIO and was accompanied by the prescribed fee.¹⁴ The focus of this process was whether the key information had been provided.

- 3.15 If the application did not contain that key information or was deficient in some way, it was returned to the applicant. If the application passed this quality assurance review and more information was required, the OIO would request this information from the applicant.
- 3.16 An issue raised with us by agents of those who had applied for consent was that it was not unusual for the OIO to accept an application for consideration and then ask for a substantial amount of additional information or make multiple requests for information.¹⁵ In 12 of the 15 applications we reviewed, the OIO had made four or more requests for information.¹⁶ One application we reviewed, albeit sensitive and complex, involved 18 separate information requests during processing. Although such requests can provide OIO with more complete information, they can increase the costs for applicants.
- 3.17 In October and November 2016, the OIO began implementing a more considered review of applications when they are first received. It calls this a “triage review”. The intention is to apply experienced resources to understand the nature and risk in an application at the initial stage, to understand more precisely what information is needed for the application, and to request that information more efficiently. Senior staff, including managers, are involved in the triage review. The triage meetings we observed were attended by managers, a solicitor, and other staff.
- 3.18 This new process involves a more considered assessment of the application before it is allocated for evaluation than might have happened previously. At this point, the OIO assesses how complex the application is (including where the investors are based, the profile of the asset, and the proposed benefits), the level of risk associated with the investment (including the reputation of the investor, the size and value of the asset, and the importance of the asset to the local economy), what resources might be required for the application, and how long it might take to consider the application. This assessment is based on the information received at that time and on the OIO’s knowledge and experience.
- 3.19 At this triage stage, the OIO has also been considering whether the applicant (or investor behind the investment) is of “good character” or what further information might be required to establish good character (see paragraphs

14 The OIO has recently amended its approach to fees so that the correct fee will be requested from the applicant once the application has been accepted for assessment.

15 The comments we received and applications we reviewed predated the OIO’s new templates and guidance that we discuss in paragraphs 3.5-3.8.

16 This does not include requests for comment on draft conditions or consents, or requests for statutory declarations.

4.21-4.37). To do this, the OIO carries out an internet search of open sources and uses information provided by the applicant with the application.

Changes to assess key information earlier

- 3.20 It is helpful to potential applicants for the OIO to provide guidance about the process so the applicant knows what to expect and what is required of them. For the period relevant to the applications we reviewed (that is, before the changes we described in paragraphs 3.5-3.6), the information on the OIO's website, and in particular the Required Information Checklist and template letter, provided useful guidance to the applicant about what to provide in their application. We saw evidence in the applications we reviewed that the information asked for by the OIO was generally provided. The OIO relied on that information when initially evaluating the application and later when considering the application.
- 3.21 However, on several occasions in the applications we reviewed, the OIO needed to ask for more information from the applicant and sometimes there were multiple requests.
- 3.22 The OIO sought that information in the interests of being thorough and making the best recommendation. That approach adds to the time taken to process the application and can add cost to the applicant, who is required to obtain and provide the additional information. The process could be more efficient by getting the information the OIO needs when the application is made.
- 3.23 During 2017, after the applications we reviewed had been considered, the OIO has refined the information it provides to the applicant before the application is made and how it processes the application. The various application packs made available to applicants on the website should result in more detailed applications being submitted and the OIO seeing the information it needs to see when the application is made. This is useful to both the OIO (because it can engage with the issues when it first considers the application) and the applicant (who is less likely to be asked to provide more or different information).
- 3.24 The triage process, in which more complete information can be received, allows the OIO to focus on the essence of the application and allocate its resources according to the nature of the application. Like all public entities, the OIO has finite resources and it is good practice for it to be able to allocate those resources efficiently. Doing that relies on good and complete information being available when decisions are made about how to allocate resources.
- 3.25 The refined guidance, pre-application meetings, and triage changes should allow the OIO to receive better information earlier in the application process and allocate its resources effectively, taking that information into account. Whether this process reduces the occasions where the OIO needs to seek more information from the applicant remained to be seen at the time of our review.

4

Assessing the investor

- 4.1 After the OIO has accepted the application, there are several steps in considering whether consent should be granted. The OIO uses the information obtained from the applicant and other sources and information it already holds.
- 4.2 One of the key steps in the OIO's assessment of an application is the identification of the person or entity who in substance will control the investment. Specifically, one of the following needs to be identified:
- the “relevant overseas person” – the person/s or organisation/s making the investment; or
 - where the relevant overseas person is an entity rather than an individual, the individuals with control of the relevant overseas person for the investment (“individuals with control”). This might not be the person or entity that has applied for the consent.
- 4.3 The OIO describes the concepts of the “relevant overseas person” and “individuals with control” as reflecting the commercial reality that, for many investments, it is necessary to look past the person or entity purchasing an asset to identify those who will have ultimate ownership and control of the asset. Those persons, once identified, are subject to the investor test (described later in this Part).

Using applicant-provided information to identify who controls an overseas investment

- 4.4 The OIO's identification of the relevant overseas person and individuals with control is guided by the nature of the particular investor and investment. The applicant identifies who it considers the relevant overseas person or individuals with control are for the investment and provides the rationale for that conclusion. The OIO decides whether it agrees with that assessment.
- 4.5 To carry out that assessment, the OIO uses in the first instance the information provided by the applicant. This can include representations by the agent as part of the application. Where the OIO is using information provided by the applicant, we saw evidence of the OIO verifying or testing that information where, in the OIO's judgement, that was required.
- 4.6 Which relevant overseas person or individual with control is identified can influence the amount of information requested by the OIO. If that person or entity is clear and/or the OIO agrees with the applicant, little more is required. Where the OIO does not agree and seeks to identify those persons for itself, it might require substantially more information from the applicant or its agents.

- 4.7 In some situations, an investment is sought by a company that is part of a larger group of companies. In these situations, a practice used by OIO has been to consider companies several levels higher in the company structure (from the entity making the investment) as the relevant overseas persons. The directors of those companies are then routinely found to be individuals with control. We were told about a proposed investment where the OIO had identified more than 30 overseas directors of companies it considered had control and requested statutory declarations about their good character from all of them.
- 4.8 It is important that the OIO has the best or most complete information available when it is considering who is in fact in control of an investment. Identifying the correct person in control of the investment ensures that the criteria in the Act are applied for the relevant person. In the cases we reviewed, the OIO sought to identify the correct relevant overseas person or individuals with control and, if needed, sought more information from the applicant. It was evident from the analysis put to the decision-maker that the OIO staff had considered this point thoroughly.
- 4.9 Identifying the directors of companies in a group structure as those with control could result in the criteria in the Act being applied to persons with little or no knowledge of the investment. Such an approach can also increase costs for both the OIO and the applicant. For example, the OIO might then need to carry out unnecessary searches and reports about good character, and the applicant might be required to obtain more statutory declarations of good character than necessary and from persons not directly connected to the investment.
- 4.10 In our view, a good practice in these group situations would be to identify those persons who in substance control the investment. In complex situations, this might not be straightforward or may require some perseverance. However, it is those really in control of the investment that the Act is concerned with and the criteria should be applied to them. On a practical level, this also prevents the applicant having to collate information about, and assurances from, persons not substantively involved in the investment. The OIO told us that it intends to take more of a case-by-case approach to ensure that it focuses only on those who, in substance, control the investment.

Relying on applicant-provided information, internet searches, and statutory declarations

- 4.11 Once the OIO has identified the relevant overseas person or individuals with control of the investment, it can consider the investor test. We refer to the relevant overseas person and the individuals with control of the investment

collectively as the overseas investor. Where the relevant overseas person is in control of the investment, they are subject to the investor test. Where the relevant overseas person is not in control of the investment, the individuals with control are subject to the investor test.

- 4.12 As we have noted, that test involves assessing whether the overseas investor has the necessary experience, has demonstrated a financial commitment to the investment, is of good character, and is not excluded under section 15 or 16 of the Immigration Act 2009.

Business experience and acumen

- 4.13 In the applications we reviewed, the OIO took a flexible approach to whether the overseas investor has sufficient business experience and acumen based on the nature of the investment. This is routinely explained to the decision-makers in this way:¹⁷

The Court of Appeal has confirmed that the wording of this criterion allows considerable flexibility in determining what business experience and acumen is relevant to a proposed investment. More or less specific expertise may be required depending on the nature of the investment. Business experience and acumen that contributes to an investment's success may be treated as relevant even though the investor may have to supplement its experience and acumen by utilising the experience and acumen of others to ensure the investment succeeds.

- 4.14 We saw evidence of this approach reflected in the OIO's recommendations and advice to decision-makers. For example, the OIO does not expect a high level of experience for investments in lifestyle properties compared with investments in businesses. In the case of an acquisition of one lifestyle property, the OIO noted that "this would require relatively little specific expertise". Experience in maintaining and running a home, obtaining tertiary education, and professional training and experience were considered sufficient expertise for that investment. Previous business experience or ownership of similar businesses were factors considered by the OIO in several applications related to investments in businesses.
- 4.15 In the applications we reviewed, we found that the OIO largely relied on biographical information and information about past experience supplied by the applicant. In two of the applications we reviewed, we saw evidence of the OIO seeking or relying on information in addition to that provided by the applicant. In one case, this included the OIO searching on a range of business-networking sites.
- 4.16 In our view, the OIO's flexible approach to this element of the test is pragmatic and appropriate. Determining whether a particular overseas investor has the business experience and acumen to successfully carry out the investment will be a different exercise in each situation. Similarly, the information required for this

¹⁷ The OIO is referring to the decision of the Court of Appeal in *Tiroa E and Te Hape B Trusts v Chief Executive of Land Information New Zealand* [2012] NZCA 355.

assessment will depend on the nature of each investment. There is unlikely to be a standard set of information requirements for all investments. In the applications we reviewed, the type of information the OIO relied on was relative to the nature and complexity of the investment.

Financial commitment

- 4.17 Another consideration is whether the overseas investor demonstrates a financial commitment to the investment.
- 4.18 In the applications we reviewed, the OIO considered factors such as:
- the engagement of professional advisers (mostly law firms);
 - the existence of some form of agreement, such as a sale and purchase agreement (or entering into a merger agreement); and
 - the paying of a deposit.
- 4.19 In some applications, the OIO took into account the costs to the applicant of engaging in the investment, such as the commitment of executive time, participation in a competitive bid process, and the commitment of time to a due diligence process.
- 4.20 The courts have said this criterion can be interpreted and applied in the context of the particular investment proposed and ultimately as a pragmatic exercise.¹⁸ The OIO took this approach in the applications we reviewed.

Good character

- 4.21 Another key issue in the investor test is whether the relevant overseas person or individual with control is of good character and is not excluded under sections 15 or 16 of the Immigration Act 2009.¹⁹ In the applications we reviewed, the OIO relied on the statutory declarations about good character provided by the applicant to be satisfied there is no exclusion under sections 15 or 16 of the Immigration Act 2009. This was supplemented by internet searches performed by the OIO.
- 4.22 When making recommendations to a decision-maker, the OIO routinely provides the following advice about what the decision-maker must determine and take into account when considering if an overseas investor is of good character:
- The decision[-]maker must be satisfied that the relevant overseas person is of good character. Section 19 of the Act specifies that the decision-maker must take*

¹⁸ *Tiroa E and Te Hape B Trusts v Chief Executive of Land Information New Zealand* [2012] NZCA 355 at [37] and [40].

¹⁹ Sections 15 of the Immigration Act 2005 says that certain convicted or deported persons are not eligible for a visa or permission to enter or be in New Zealand. Section 16 of that Act says a person can be refused entry to New Zealand if there is reason to believe the person is likely to commit an offence in New Zealand or is (or is likely to be) a threat or risk to security, public order, or the public interest.

the following factors into account (without limitation) in assessing whether a person is of good character:

- *offences or contraventions of the law by the person, or by any person in which the person has, or had at the time of the offence or contravention, a 25% or more ownership or control interest (whether convicted or not); and*
- *any other matter that reflects adversely on the person's fitness to have the particular overseas investment.*

Internet checks

- 4.23 An online search for public information is one method used by the OIO in considering good character. These are internet searches on the names of people and organisations. Before the OIO used the new triage approach, these searches were carried out by the OIO solicitor working on the application. These searches are now carried out by a good character researcher, who provides the information to those considering the application. Internet searches are done early in the process, and are considered when the application is reviewed as part of the triage process.
- 4.24 The applications we reviewed (which were before the triage process was implemented) generally had a record of the date these internet checks were conducted and links to any information found. If information was found but not considered relevant (for example, it was a person of the same name but with a different birth date or nationality), there was a record of why that information was not considered relevant.
- 4.25 In all of the applications we reviewed, we saw evidence of the OIO including the results of internet checks in its advice to the decision-maker where those results were considered relevant to the application. To reduce the risk of critical information not being passed on to the decision-maker, the OIO also typically provides them with a full copy of the information provided by the applicant.²⁰
- 4.26 We also saw at least five instances from the 15 applications that we reviewed where internet checks showed information about which the OIO sought comment from the overseas investor. Where the OIO sought that further comment, we did not see evidence of it verifying the accuracy of the responses from overseas investors. The OIO did, as is common practice, obtain a statutory declaration from the investor that it had provided true and accurate information to the OIO.

²⁰ In some cases, a full copy of the application (with all its associated attachments) can have hundreds of pages of information. Whether it is reasonable or practical to expect the decision-maker to consider the full application, in addition to the advice and summary of the information (itself usually tens of pages) provided by the OIO, is something that the OIO needs to consider, taking into account the complexity of the overseas investment.

Statutory declarations

- 4.27 As well as information from its internet searches, the OIO relies on statutory declarations from overseas investors declaring that they are of good character. This approach is routinely explained to the decision-makers when the OIO is making recommendations in this way:
- The Applicant has provided statutory declarations stating that the individuals with control are of good character, have not committed an offence or contravened the law as described above and know of no other matter that reflects adversely on their fitness to have the Investments.*
- The OIO is satisfied that the statutory declarations can be relied on as they comply with the requirements of the Oaths and Declarations Act 1957.*
- The OIO has also conducted open source background checks on the individuals with control and found nothing relevant to this criterion.*
- Therefore, the OIO is satisfied that the individuals with control are of good character.*
- 4.28 Where an individual with control has provided a statutory declaration that they are of good character, the OIO usually makes a statement such as the following as part of the recommendation to the decision-maker:
- The applicants have provided statutory declarations (signed by each individual with control) stating the [Individuals with Control] are, respectively, of good character, have not committed an offence or contravened the law.*
- 4.29 This approach is to provide some assurance about good character. A statutory declaration must be completed in front of an authorised witness, and there are legal consequences for making a declaration that is not accurate. Under the Crimes Act 1961, it is an offence to make a false statutory declaration, with a penalty of imprisonment of up to three years.²¹ Section 46 of the Overseas Investment Act also creates an offence for anyone who makes a false or misleading statement, or material omission, as part of an application or in their communications with the OIO. The penalty is a fine of up to \$300,000. Providing false information could also ultimately result in the court ordering the disposal of the property acquired in the investment.²²
- 4.30 We saw an example in the files that we reviewed of an application being declined where one of the reasons for that was the good character statutory declaration not meeting the requirement of the Oaths and Declarations Act 1957.
- 4.31 Two of the applications we reviewed included lengthy discussion and advice about whether the investor was of good character.

²¹ Section 111 of the Crimes Act 1961.

²² Section 47 of the Overseas Investment Act 2005. See also sections 48-51.

- 4.32 In our review, it was evident that the OIO relied heavily on statutory declarations and internet searches when considering good character.
- 4.33 In 2016, the OIO engaged a Queen's Counsel to review its processes for assessing good character.²³ This was in response to an application where the OIO failed to provide the Ministers making the decision with relevant results of an internet good character check. That review found that the OIO's systems for checking good character were appropriate and that it is reasonable for the OIO to use and rely on statutory declarations.
- 4.34 It would be unreasonable to expect the OIO to obtain every detail about the character of the person behind the investment. What is important is that the OIO turns its mind to the question and obtains sufficient information to be satisfied that the statutory criteria is met. As with other parts of the OIO's role, a level of judgement is required. In the applications we reviewed, the OIO exercised this judgement. The OIO turned its mind to the question of good character in all the applications we reviewed, and presented all the relevant information relating to that point to the decision-maker when making its recommendation.
- 4.35 In the applications we reviewed, we also found no evidence of the OIO failing to inform the decision-maker of the results of the internet searches where those results were deemed to be relevant to the application.

Additional information

- 4.36 In the applications we reviewed, we saw evidence of the OIO seeking other information to inform decisions about good character and of advising an applicant of the need for statutory declarations to be current:
- ... the OIO/Ministers are reluctant to rely on statutory declarations of good character provided in relation to previous applications ... where such declarations are more than six months old.*
- 4.37 The decision to seek other information to inform assessment of good character appears to have been informed by professional judgement of the circumstances of an application and the risk associated with the individuals and/or organisations involved. We saw examples of the OIO using the following types of information:
- the results of the OIO internal investigations (an investigation into a previous retrospective consent and investigations into other investments with parties in common);
 - a police check from a foreign jurisdiction provided by the applicant;²⁴
 - monitoring of good character for previous overseas investments controlled by that person;

²³ The Queen's Counsel's review is available at linz.govt.nz.

²⁴ We note that the Queen's Counsel's review includes commentary on the possible use of police checks by the OIO.

- good character assessments made by previous decision-makers;
- whether there are conditions of consent in other investments requiring the person to be of good character;
- anonymous third-party submissions (these were rare in the applications that we reviewed);
- advice from New Zealand officials based in an overseas jurisdiction;
- information from an official entity with security responsibilities in an overseas jurisdiction; and
- the relevant overseas person's membership of professional bodies in other countries.

5

Assessing the benefit to New Zealand from an investment in sensitive land

- 5.1 If there is an investment in sensitive land (and the overseas investor is not going to reside permanently in New Zealand), the decision-maker needs to decide whether the investment will, or is likely to, benefit New Zealand.²⁵ In making this assessment, the decision-maker must consider specified factors, largely economic and conservation factors.

Carefully considering information about the benefits of an investment

Types of benefit

- 5.2 Using the information made publicly available by the OIO about each overseas investment decision made during 2016 (up to and including October 2016) we considered the various categories of benefit that have been identified as applying and how often they are cited by the applicant. Economic-related benefits are the most frequently cited (see Figure 2).

Figure 2

Overseas investment benefit categories cited for applications decided in 2016

Overseas Investment Act 2005	Frequency	% of cases
17(2)(a)(i) – Jobs	47	71%
17(2)(a)(iv) – Added efficiency	43	65%
17(2)(a)(v) – Additional investment for development purposes	32	48%
17(2)(a)(iii) – Increased export receipts	26	39%
17(2)(e) – Walking access	18	27%
17(2)(b) – Indigenous vegetation	15	23%
17(2)(a)(vi) – Increased processing of primary products	14	21%
17(2)(c) – Trout, salmon, wildlife, and game	8	12%
17(2)(f) – Offer to sell seabed, foreshore, or riverbed to the Crown	4	6%
17(2)(d) – Historic heritage	3	5%
17(2)(f) – Offer to gift lakebed to the Crown	3	5%
17(2)(a)(ii) – New technology or business skills	1	2%
Overseas Investment Regulations 2005	Frequency	% of cases
28(e) – Previous investments	44	67%
28(a) – Consequential benefits	30	45%
28(f) – Advance significant government policy or strategy	15	23%
28(g) – Enhance the viability of other investments	14	21%

²⁵ Section 17(1) of the Overseas Investment Act 2005. It is only where an investment is only in significant assets and does not involve sensitive land that the OIO does not need to consider whether there is a benefit to New Zealand.

28(j) – Oversight and participation by New Zealanders	14	21%
28(c) – Affect image, trade, or international relations	12	18%
28(i) – Economic interests	8	12%
28(b) – Key person in a key industry	7	11%
28(d) – Owner to undertake other significant investment	3	5%
28(h) – Strategically important infrastructure	1	2%

Source: Our analysis of information from the OIO's website. The analysis is limited to applications where a benefit category has been reported on the OIO's website.

Determining benefits

- 5.3 As outlined earlier, determining whether the criteria are met for each benefit category and, therefore, what the benefits are of an application is an important role for the decision-maker. The OIO provides the decision-maker with advice on the requirements of the benefit criteria for investments in sensitive land. In the applications we reviewed, this advice was thorough and provided the decision-maker with guidance about the criteria to be considered, the standard to which the decision-maker needs to be satisfied, and the OIO's recommendations about those elements.
- 5.4 In the applications we reviewed, it was common for the OIO to rely on the information provided by the applicant. That said, we saw evidence that the OIO carefully considered that information and did not always agree with the applicant's interpretation of the information. We saw the OIO:
- identifying additional benefit factors that were met over and above those identified by the applicant (in two of the applications we reviewed);
 - disagreeing with applicants' assertions that certain multiple benefit factors were met (in four of the applications we reviewed);
 - rejecting an initial application (later resubmitted as one of the applications we reviewed) because of insufficient information to demonstrate that the overseas investment was likely to be of benefit to New Zealand or that such a benefit would be substantial and identifiable (in one of the applications we reviewed);
 - finding links suggested by the applicant between the investment and benefits were too tenuous (in two of the applications we reviewed); and
 - asking detailed benefit-related questions of the applicant.
- 5.5 In two applications, we saw evidence of the OIO identifying benefits in the investment that had not been suggested by the applicant. In our view, this identification was in the interests of objectively evaluating the application against the statutory criteria and is consistent with providing the best advice to the decision-maker.

- 5.6 We saw the OIO use information above what was provided by the applicant to assess whether various benefit factors were met, including:
- comparative industry economic, efficiency, debt, and productivity data;²⁶
 - additional information in response to requests by the OIO for further information;
 - internal peer review advice;
 - third-party submissions; and
 - monitoring and other information held by the OIO related to the applicant's other overseas investments.
- 5.7 The OIO's use of comparative industry economic, efficiency, debt and productivity data in the cases that we saw involved analysis such as comparing the ratio of inputs (such as staff) to other inputs or outputs (such as stock units) proposed in the overseas investment against that ratio for the industry as a whole.

Non-urban land

- 5.8 If the overseas investment includes more than five hectares of non-urban land, the decision-maker also needs to determine whether the benefit will be, or is likely to be, substantial and identifiable. If the benefit is not or is not likely to be substantial and identifiable, consent cannot be given.
- 5.9 In the applications that we reviewed, the OIO provided advice to the decision-maker about whether there was a substantial and identifiable benefit with the overseas investment where that was relevant. In those applications, the OIO determined whether there was a substantial and identifiable benefit using the following information:
- the collective number of benefit categories it considered were met;
 - counterfactual information;
 - whether, overall, the benefits had been adequately quantified; or
 - the actual size of the benefits.
- 5.10 In one of the cases we reviewed, the application was declined because the OIO assessed that the application failed to meet this requirement and other criteria.

Determining the relative importance of the benefit factors

- 5.11 In many of the applications we reviewed, the OIO determined the relative importance of a number of the benefit factors. The factors used by the OIO to inform this determination included the ministerial directive (for example in certain circumstances economic benefits, economic interest, and oversight

²⁶ We note that the definition of "full-time equivalent" used by the OIO in this type of analysis is consistent with the definition used in Statistics New Zealand's *Quarterly Employment Survey*.

and participation by New Zealanders might be relatively important) and the contribution of an investment to New Zealand relative to the national contribution of the relevant industry.

Counterfactual analysis

- 5.12 As part of determining whether an investment will benefit New Zealand, the decision-maker must consider only those benefits that are over and above what would occur if the investment was from within New Zealand. This requires the decision-maker to first identify what would happen without the overseas investment (the counterfactual scenario) and then compare this with the expected benefits of the overseas investment. The OIO routinely provides advice to the decision-maker on this issue when making a recommendation about an application.
- 5.13 Identifying the right counterfactual scenario is important to the outcome of the OIO's assessment of an investment's benefit to New Zealand. Different counterfactuals may lead to different conclusions on the benefits of an investment. Generally, the OIO considers what would happen without an overseas investment in a given case by considering what a New Zealand purchaser of the land or business would do. There is judgement involved in this consideration.
- 5.14 For example, a judgement about what might otherwise happen is easier to make in situations involving farm land where that land has been offered on the open market in New Zealand before the overseas investment application. If there has been interest shown by New Zealand parties in purchasing the land, a purchase from a New Zealand-based party might be the suitable counterfactual. Where there is no interest, the counterfactual might be that no New Zealand buyer would invest in the asset.
- 5.15 Where the asset that is the subject of the application for an overseas investment has not been made available to the New Zealand market, it is more challenging for the OIO to determine whether there would be a New Zealand buyer without the overseas investment, and if there is a New Zealand buyer, what benefits may result.
- 5.16 In the applications we reviewed, the OIO included its counterfactual analysis in the material provided to decision-makers where this analysis was required. We saw evidence of the OIO carrying out counterfactual analysis for some of the individual factors making up the overall benefit, as well as for the overall benefit of the investment. This was to test whether those purported benefits were generated by the overseas investment. In carrying out the counterfactual analysis and making recommendations, the OIO generally relied on the same types of information it used to identify the relevant benefit factors and their relative importance.

Applying judgement when assessing benefits

- 5.17 The OIO's advice to the decision-maker was thorough, included information about the standard to be applied when applying the benefits test, and set out whether, in its view, the particular investment would, or was likely to, benefit New Zealand.
- 5.18 In the applications we reviewed, it was common for the OIO to rely on information from the applicant. However the OIO critically considered that information and, where it thought necessary, sought to verify it. Judgement is required when evaluating whether the proposed investment will give rise to a benefit and we saw evidence of the OIO applying that judgement. Although the OIO did, on occasion, seek expert input from other agencies about the degree of benefit in a particular investment, such assistance could be more routine in what are sometimes complex economic evaluations. This could be particularly helpful when considering the relevant counterfactual scenarios.
- 5.19 An issue for the OIO is how to access the wide range of technical expertise and specialist information that could be required to inform its advice to decision-makers. We saw examples of the OIO seeking information from other government agencies, such as the Ministry for Primary Industries, the Ministry of Foreign Affairs and Trade, and New Zealand Trade and Enterprise. However, this was not common.
- 5.20 At the time of our review, the OIO was considering how it might arrange more ready access to specialist industry advice and information. This was through:
- recruiting advisory staff with different skills and experience from existing staff (in progress at the time of our fieldwork); and
 - considering the establishment of a panel or similar arrangement where experts from other public entities were more readily available to provide advice to the OIO.
- 5.21 We encourage those initiatives.

The recommendation for consent for an overseas investment

- 6.1 After the OIO has analysed the application, a recommendation about whether consent should be granted is prepared and provided to the relevant decision-maker.

Consistently structured and comprehensive consent recommendations

- 6.2 In coming to a recommendation, the OIO will consider the information it has gathered from the application, the investor and benefit tests, declarations, and other checks, such as an overseas investor's character.
- 6.3 The OIO also retains:
- a written explanation of the main issues and how or why staff are satisfied about them, a record of the steps taken in considering the application, and why a particular recommendation is being made; and
 - a record of the peer review, managerial review, and checks that all the required documents (such as the statutory declarations) have been received.
- 6.4 The recommendation prepared for the decision-maker includes the following information:
- introduction, background to the applicant and the application, and any issues identified in the quality assurance process;
 - what is known about the applicant, their business activities, and any previous applications;
 - information about the relevant overseas person, including all the details about directors and executives and those who might be in control;
 - information about the vendor;
 - information about the transaction, the consideration being paid, and the rationale for the transaction;
 - the investor test;
 - the benefit test (if required);
 - what conditions might be placed on the consent; and
 - communications with the applicant or their agent.
- 6.5 In the applications we reviewed, the OIO provided a full copy of the application to the decision-maker as well as the OIO's analysis and advice. This meant all of the information provided to the application was available to the decision-maker to review if they chose to.

Improving the conditions of consent

- 6.6

A consent to make an overseas investment can be granted subject to any conditions the relevant decision-maker thinks appropriate.²⁷ The person granted the consent is required to fulfil those conditions.
- 6.7

The Act also places some general conditions that the consent holder needs to fulfil. Every consent is provided on the basis that all information provided by the applicant in the course of getting the consent was correct when it was provided. In addition, the person granted the consent “must comply” with what it told the OIO it would do (the “representations and plans” put to the OIO) and which the decision-maker notifies the person have been taken into account.²⁸
- 6.8

If the OIO considers that specific conditions should be attached to a consent, it includes those proposed conditions as a list of items in the consent that need to be fulfilled in the recommendation to the decision-maker. In the applications we reviewed with a recommendation to approve the application, the OIO always included advice to decision-makers about specific conditions.²⁹
- 6.9

The type of conditions we saw included process requirements, reporting of certain information by certain dates, and performing certain actions or commitments of the overseas investment (see Figure 3).

Figure 3
Examples of conditions included as part of a consent for an overseas investment

Process conditions	Content conditions	Reporting conditions
<p>Allow inspection by the OIO of the overseas investment if requested.</p> <p>Follow a specified process for disposing of the overseas investment if the conditions are not met.</p>	<p>Complete settlement of the investment, usually by a specified date.</p> <p>Implement a specified project and complete it by a specified date.</p> <p>Possess a residence class visa within 12 months.</p> <p>Continue to be of good character.</p>	<p>Provide details on settlement.</p> <p>Provide an annual report detailing compliance with specified requirements.</p> <p>Report on any change in circumstances.</p> <p>Provide a written report on specified compliance issues, if requested.</p>

- 6.10

We saw evidence of the OIO staff consulting applicants on proposed conditions before providing advice to the decision-maker. It was also evident that, where the OIO staff considered there was more risk associated with a particular application more conditions were recommended.

27

Section 25 of the Overseas Investment Act 2005.

28

Section 28 of the Overseas Investment Act 2005.

29

The number of additional conditions ranged from three (for an application where it was not a requirement to demonstrate the benefit to New Zealand) to 25 (for an application where the assessment of benefits was particularly complicated).

Effectiveness of conditions

- 6.11 A condition will be effective if it is relevant to the investment and can be measured and enforced. A degree of judgement may be required in the circumstances of a given application as to what the appropriate conditions are for that investment. For example, in most of the applications we reviewed where the overseas investment was required to be of benefit to New Zealand, there was a link between the relevant benefits and the subject of the conditions. Where there was not a direct link, the conditions focused on the delivery of the actual investment rather than delivery of specified benefits.
- 6.12 Some of the conditions we saw were very specific (for example, a certain action has to be done by a certain date).
- 6.13 We saw some conditions that were more general in nature. For example:
- some conditions included terms such as “make all reasonable efforts to ...” without any indication of what was reasonable in the circumstances;
 - some conditions required the overseas investor to report spending in certain specified categories with no specific amounts that had to be spent; and
 - some required working with a particular organisation and implementing what is agreed with that organisation with no certainty that anything would be agreed.
- 6.14 The OIO told us as at late 2016 the nature of the conditions placed on older consents by the OIO had sometimes limited its ability to enforce them. Staff described situations such as:
- the anticipated benefits of the investment being realised may depend on the actions or activities of third parties and be beyond the control of the consent holder;
 - the requirements placed on the consent holder being unclear and/or not specifying what they are required to do;
 - conditions that specify certain actions of the consent holder but do not specify when those actions are to have occurred or provide a long period in which to complete those actions; and
 - conditions that might not provide any guidance about how tolerant the OIO should be if conditions are not met for what might be valid unforeseen reasons.
- 6.15 The OIO told us that improving the nature of conditions is a priority.
- 6.16 The OIO will be able to more efficiently and effectively monitor and enforce conditions that are measurable. For example, a condition that quantifies the

agreed benefits can be tested at a later time. Similarly, a condition that requires a particular action by the investor by a particular date can be measured in the future.

- 6.17 Ensuring that the conditions of consent are specified in a manner that allows them to be monitored will assist both compliance by the applicant and enforcement by the OIO.
- 6.18 In our view, the OIO might consider whether knowledge from other applications informs the types of conditions it recommends. It was not evident in the applications we reviewed, and in the discussions we had, that the OIO was consistently making use of the information about conditions used in previous applications, and the resulting benefits, when preparing and recommending conditions in present cases. The OIO could consider whether those are sources of information it might access more consistently in preparing and recommending conditions.
- 6.19 In March 2018, when providing comment on the draft of this report, the OIO told us that it:
- was in the process of finalising changes to the format and content of consent conditions to make them clearer and more effective; and
 - intends to establish a reporting template to assist people to identify progress against those conditions and to enable the OIO to identify areas to follow up.

Monitoring, enforcement, and public information

7

- 7.1 Once a consent has been granted, the OIO has a role in monitoring compliance with the consent (and any conditions attached to it) and taking enforcement action where that is required.

The need for more focus on monitoring and compliance

Monitoring

- 7.2 When a consent is granted, information about any conditions that apply to it is entered into the OIO's Investment Management System database. This system can generate reminder letters to the consent holder (that, for example, updates or reports are due).
- 7.3 Typically, a consent holder is required to provide certain reports to the OIO. These can be reports about when and how the investment was entered into, an annual report about how it is progressing against the various requirements outlined in the consent and the conditions, and notification of any changes to the material aspects of the consent (such as good character, control, or financial commitment). The reports are reviewed by the OIO against the information in the Investment Management System and a list of the conditions applying in each application. Any issues or concerns resulting from these reviews are passed to those responsible for enforcement.
- 7.4 In recent years, the OIO has had many obligations outlined in consents to monitor each year. In each of the financial years between 2011/12 and 2014/15 there were between 630 and 704 obligations arising from consents that required monitoring. During that period, there was one full-time equivalent staff member carrying out this monitoring.
- 7.5 We understand from our discussions with the OIO that, until recently, monitoring has largely been approached as an administrative task. By this we mean that although the provision of monitoring information has been tracked and recorded, there has been limited analysis of that information. This is consistent with what we observed, including in our review of applications.
- 7.6 In the applications we reviewed, we saw evidence of the OIO sending reminders to the consent holder that a monitoring report was due (usually sent one month before it was due), and evidence of recording monitoring information when it was provided. There was limited evidence that the content of the monitoring information was verified or considered. The OIO told us that it intends to release a standard reporting template to help consent holders provide clearer reports to assess progress against consent conditions.

- 7.7 We were told by agents who make applications on behalf of applicants that there is little feedback provided by the OIO about the monitoring information provided by the applicant, except where the OIO suspects there is a compliance issue. The OIO could consider whether communication with agents about these reports would improve the quality of those reports, and therefore the OIO's understanding of the investor's compliance.

Enforcement

- 7.8 Applicants for overseas investments need to comply with the requirements of the Act and any conditions on a consent for an overseas investment. If applicants do not comply, there can be consequences.
- 7.9 The scheme of the Act provides offences for certain behaviour, powers for the court to order certain sanctions (on application by the OIO), and administrative penalties that the OIO can impose. The OIO is able to impose administrative penalties for the late filing of information by an applicant or consent holder, and for seeking a retrospective consent for an investment made without consent.³⁰
- 7.10 In the applications we reviewed, we saw a few examples of enforcement activities. In these examples, the OIO obtained information from sources other than the applicant and outside the application process:
- One of these applications involved an investigation that determined there had been a breach of the Act and an administrative penalty was imposed. Good character issues formed part of this investigation, and the OIO obtained foreign company annual returns, deeds, facility and loan agreements guarantees and mortgage documents as part of the investigation. Another application we reviewed also resulted in an administrative penalty imposed by the OIO.
 - Another investigation was ongoing at the time of our fieldwork. This included the OIO obtaining information from the New Zealand Police, Immigration New Zealand, Inland Revenue Department, and the Department of Internal Affairs.
 - In one application there was evidence of the OIO using information gained through a different application and different people to test ongoing compliance with the conditions for an existing consent.
- 7.11 Of the 15 applications we reviewed, five involved an applicant applying for retrospective consent. The OIO took a variety of approaches in those situations. For example, one application contained the required information and ultimately retrospective consent was granted. Obtaining this retrospective consent was part of a settlement agreement between the applicant and the OIO in relation to past non-consented transactions. In another application, consent was not ultimately

granted (and therefore the investment did not meet the statutory criteria) and the OIO pursued a more formal investigation and sanction.³¹

- 7.12 Since late 2016, the OIO has begun to increase its focus on enforcement and compliance. Changes include:
- Establishing a dedicated Enforcement Team with a specific responsibility for monitoring and enforcement. That team comprises 7.8 full-time equivalent staff, including a Manager, Principal Adviser, and an analyst.
 - Increasing the flow of information between the Enforcement Team and those considering applications.
 - Publishing information about enforcement strategic priorities and criteria, including outlining when the OIO might consider taking action and how that might happen.³²
 - Publishing information about the enforcement activities it has carried out since 2015.
 - A commitment to performing a certain number of site visits each year (across all consents) to check compliance with the conditions of consent.
 - Adopting new performance measures about enforcement.³³
 - Developing more formal relationships with other public entities to enhance its ability to enforce consents, and to share information about applicants, potential investments, and whether consent holders are complying with the Act.
- 7.13 As part of its increased focus, the OIO has improved, or is seeking to improve, how information about consents and applicants behaviour flows between those carrying out monitoring/enforcement and those considering applications. By way of example, it is envisaged that the Enforcement Team could contribute more to the consideration of the application in the triage process when an application is first received.
- 7.14 These changes were needed. This is because monitoring and management of non-compliance are key components of any regulatory regime. They are part of the key responsibilities of any effective regulator.
- 7.15 Figure 4 shows the use of enforcement activities by the OIO between 2015 and 2017. More enforcement activities have happened in 2017 than in previous years, in number and proportion of applications decided.

31 This investigation and enforcement action was ongoing at the time of our fieldwork.

32 The enforcement strategic priorities and criteria are available at linz.govt.nz.

33 At least 90% of incidents are reviewed for possible breach of the Overseas Investment Act within 10 working days of receipt of a public alert, and at least 20 enforcement actions are taken each year by the OIO.

Figure 4
Enforcement activities by type, 2015 to 2017

Type of enforcement	2015	2016	2017
Compliance letter	-	3	19
Public warning	2	4	2
Settlement agreement	1	1	-
Disposal of property	1	1	6
Court proceedings	1	2	-
Penalties for late provision of information	-	-	5
Referral to Law Society	-	-	1
Total approvals	129	136	98

Source: Overseas Investment Office.

- 7.16 In making more information available to the public about its enforcement activities and more resources available for enforcement, the OIO could increase an awareness of the need to comply and the consequences of not doing so. It could also provide some assurance that the overseas investment system, as far as the OIO is responsible for it, is working.

Accessing intelligence to identify overseas investments made without consent

- 7.17 In our view, it is important that the OIO has access to intelligence that will enable it to identify overseas investments made without consent having been sought, as part of strengthening its enforcement activities. This is the sort of information that could be obtained from complaints,³⁴ media coverage, other regulatory bodies, and other organisations. The OIO told us that it was considering developing more formal relationships with some other public entities. We support that happening if it leads to better information and intelligence available to the OIO to enforce the Act (including any conditions of consent made under that Act).

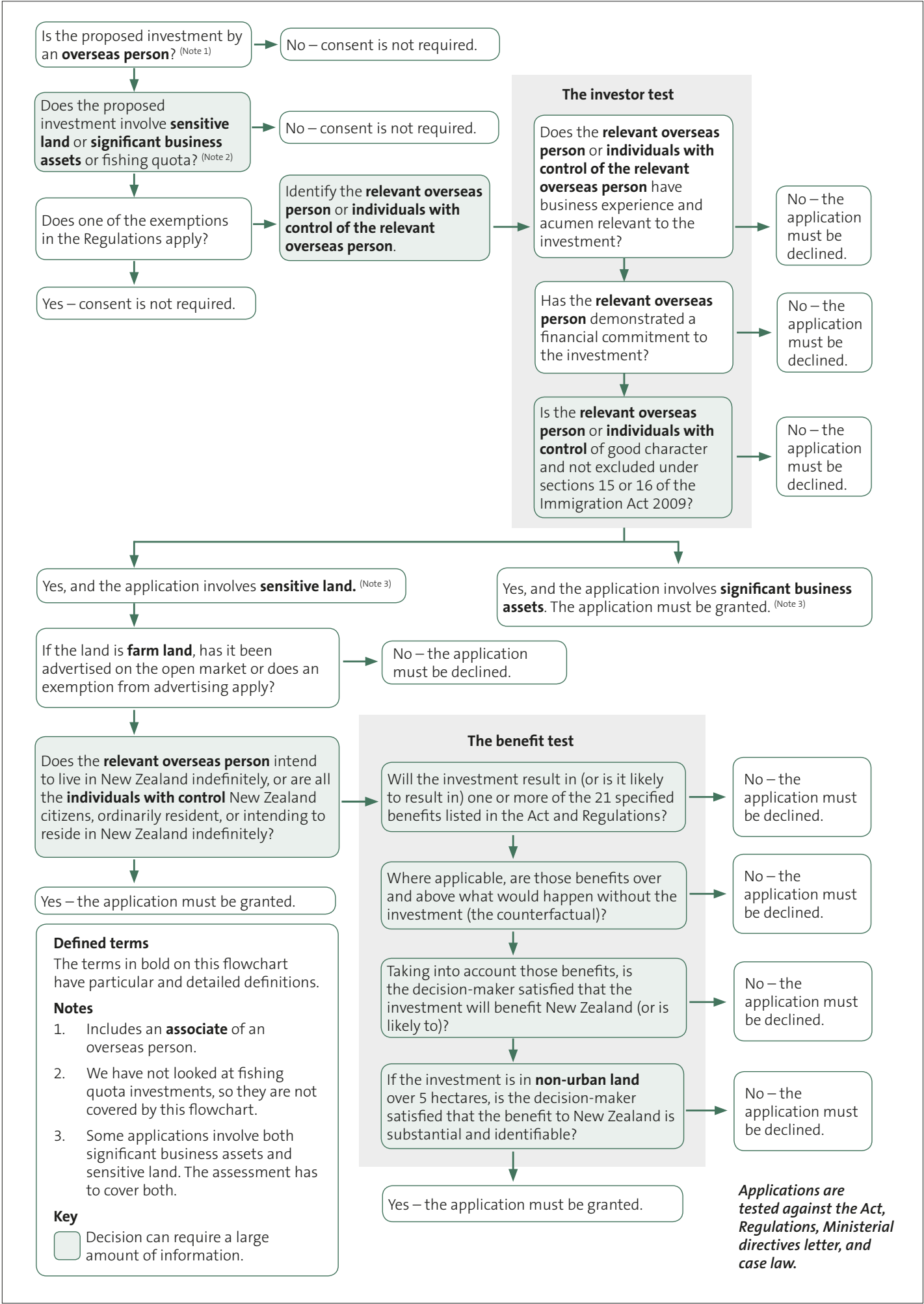
³⁴ We note that in early 2017 the OIO added a facility to its website to enable people to report a suspected breach of the Overseas Investment Act 2005. This is available at linz.govt.nz.

Making more information publicly available

- 7.18 The OIO publishes a summary of each application on its website (a “decision summary”) once a decision has been made on that application. The information is posted monthly and usually includes:
- the date of the decision and whether it was granted or declined;
 - a brief description of the investment and the background to the investment;
 - details about the applicant, the vendor, and the consideration to be provided; and
 - a contact for more information (usually an agent of the applicant).
- 7.19 The OIO has also published monthly summary statistics, including information such as the value of the assets acquired in that month, the total land area approved for sale to overseas persons, the number of applications declined, and comparative information for the previous year.
- 7.20 As well as information about applications and enforcement, there is scope for the OIO to make more information publicly available, including:
- more specific information about the conditions of an individual consent, where that is appropriate within the requirements of privacy and commercial sensitivity, and including the specific benefits to New Zealand. This might strengthen public accountability of the applicants and inform the OIO’s work advising on the conditions of a consent; and
 - analysis of what sorts of overseas investments and/or conditions result in what sorts of benefits to New Zealand.
- 7.21 In March 2018, when providing feedback on a draft of this report, the OIO told us it had made recent improvements to the information it makes available. The improvements it describes include:
- improving the information on released decision summaries;
 - updating the content of the website to support the application process and to provide guidance about how to best make an application; and
 - providing information on the website about enforcement priorities and processes and about enforcement action taken.

Appendix

Key decisions the Overseas Investment Office has to make when considering an application for an overseas investment



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