

FOREIGN INVESTMENT IN NEW ZEALAND RESIDENTIAL PROPERTY

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In 2018, New Zealand changed its law on the purchase of residential property to make it more difficult for non-New Zealanders to purchase houses in New Zealand. The goal of the legislation is to increase the affordability of houses for New Zealanders. This legislation note provides an overview of the legislation.

Dans le but clairement affiché de rendre l'accès à la propriété plus facile aux citoyens néo-zélandais, le gouvernement néo-zélandais a en 2018, profondément modifié le régime juridique applicable aux acquisitions par des étrangers de biens immobiliers en Nouvelle-Zélande. Cet article liste et analyse les principales dispositions de ce nouveau dispositif.

I BACKGROUND TO THE OVERSEAS INVESTMENT AMENDMENT ACT 2018

New Zealand used to maintain an open housing market where foreigners were free to purchase residential property in the country.¹ However, in recent years, the government has been facing an increasing outcry due to spiralling house prices. In a global ranking of house price increase published in 2016, New Zealand topped the world chart with an 11% annual growth.² The house price inflation is the most apparent in Auckland where the average price was NZD 1 million in 2016, representing an increase of 15.9% over the previous year.³ Statistics New Zealand reported that by December 2016 home ownership by New Zealanders had sunk to a

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1 New Zealand for many years had land purchase restrictions eg the Land Settlement Promotion Act 1952 had general limits on "farm land" transactions. The Overseas Investment Regulations 1995 made under the Overseas Investment Act 1973 imposed restrictions on foreign investment in eg land of more than 5 hectares, and islands. Extension to houses is more recent.

2 Patrick Collinson "New Zealand tops world house price increase" (6 September 2016) The Guardian <www.theguardian.com/money/2016/sep/06/new-zealand-tops-world-house-price-list>.

3 Andrea Rush "QV reports that average value for Auckland tops \$1million" (6 September 2016) QV <www.qv.co.nz/property-insights-blog/qv-reports-that-average-value-for-auckland-tops-1million-237>.

sixty-six-year low of 63.2% (the all-time lowest rate was 61% for 1951).⁴ Research shows that first-time house buyers, retirees, and Māori and Pasifika groups are the most susceptible to the bad effects of the ongoing housing crisis. Noticeably, between 1986 and 2013, the number of Māori and Pasifika people who owned properties dropped by 20% and 34.8% respectively while the national rate decreased by 15.3%.⁵

New Zealand has allegedly become a bolt-hole for wealthy people around the world as more and more foreigners invest in properties. It was reported that properties sold to overseas persons in 2016 was almost six times higher than in 2015.⁶ Auckland and Queenstown seem to be the most attractive destinations for foreigners where almost 5% of the home transfers were entered into by people without New Zealand citizenship or residency; that was the highest rate nationwide.⁷ Together with the shortage of infrastructure and new construction, foreign investment in residential properties is believed to have amplified the existing housing unaffordability.

That urged the government to take action to curb the housing crisis. The immediate reaction was to ban foreigners from buying more houses in New Zealand. By doing that, the government hopes to attract more foreign investment in more productive sectors such as development of new properties, rather than in housing speculation. That provided the impulse to amend the Overseas Investment Act 2005. After a great deal of controversy and opposition, the Overseas Investment Amendment Act 2018 (the Amendment Act) came into force on 22 October 2018. It not only promotes a ban on foreign investment in residential houses but also provides exemptions to channel foreign investment into construction of new facilities such as residential dwellings, hotels and rest homes.

The controversy is whether it is premature to cause such a drastic change to the current home ownership regime. On one side, banning foreigners from buying

4 Statistics New Zealand "Dwellings and households – Information releases" (2016) <http://archive.stats.govt.nz/browse_for_stats/population/estimates_and_projections/dwellinghouseholdestimates_HOTPD16qtr.aspx>.

5 *Change in Home-Ownership Patterns 1986–2013: Focus on Māori and Pacific People* (Statistics New Zealand, June 2016) at 18 <www.stats.govt.nz/assets/Reports/Changes-in-home-ownership-patterns-19862013-Focus-on-Maori-and-Pacific-people/changes-home-ownership-maori-pacific-1986-2013.pdf>.

6 Eleanor Ainge Roy "Stress is huge: New Zealand's foreign buyers ban brings home scale of crisis" (17 August 2018) *The Guardian* <www.theguardian.com/world/2018/aug/17/stress-is-just-huge-new-zealands-foreign-buyers-ban-brings-home-scale-of-crisis>.

7 Statistics New Zealand "Property transfer statistics: December 2018 quarter" (8 February 2019) <www.stats.govt.nz/information-releases/property-transfer-statistics-december-2018-quarter>.

houses is expected to benefit locals and tackle inequality, especially for the disadvantaged and the poor who have been renting for years due to house unaffordability. Also, it is in the whole nation's interest when foreign investment is injected to build new houses and other accommodation facilities. On the other side, the causality between foreigners' house ownership and the housing crisis is not well established. Statistics New Zealand points out that the foreigners' house ownership ratio was only 2.1% in 2017 and slightly increased to 3.3% in 2018.⁸ Even though the Amendment Act efficiently directs the foreign investment flow, it is unclear how tightened rules on such a low rate of foreign ownership will improve the unaffordability and the locals' capability to buy homes.

II NEW BAN ON FOREIGN INVESTMENT IN RESIDENTIAL PROPERTY

A Overseas Persons

It was made clear from the beginning that the Amendment Act is to define home ownership as the birthright of New Zealanders and "acknowledge it is a privilege for overseas persons" to purchase and own residential properties in New Zealand. Therefore, only overseas persons who meet all requirements and conditions prescribed by law may obtain consent to buy houses.

In principle, the ban on foreign investment in residential property will apply to every overseas person. The term "overseas person" in essence refers to any individual who is neither a New Zealander nor an ordinary resident of New Zealand or any legal entity at least 25% of which is owned or controlled by overseas persons.⁹ Residence class visa holders may be treated as overseas persons if they do not ordinarily reside in New Zealand. To be deemed "ordinarily resident in New Zealand" residence class visa holders must be tax resident in New Zealand and have been residing and present in New Zealand for at least 183 days in the immediately preceding twelve months.¹⁰

Despite the aforesaid, not all overseas persons are treated in the same way. In compliance with New Zealand's international commitments, Australians and Singaporeans are not deemed overseas persons.¹¹ Due to such exemption, Australians and Singaporeans are not restricted from buying residential property in

8 Statistics New Zealand "Property transfer statistics: December 2018 quarter" (8 February 2019) <www.stats.govt.nz/information-releases/property-transfer-statistics-december-2018-quarter>.

9 Overseas Investment Act 2005, s 7(1).

10 Section 6(2).

11 Overseas Investment Regulations 2005, rr 75 and 81.

New Zealand. The differentiated approach however may undermine the efficiency (if any) of the ban in improving housing affordability. It has been reported that Australian buyers are the second largest group purchasing residential properties, only after Chinese.¹²

B Residential Land being Deemed Sensitive Property for the First Time

Under the Amendment Act, residential land (which includes land rated "residential" or "lifestyle" on the district valuation roll) are for the first time deemed "sensitive" property. As sensitive property, ownership over residential land is exclusively restricted to local people. In order to obtain the right to purchase residential property, overseas persons need to prove that they have legitimate needs and reasons for doing so. The legitimacy will be screened and recognised by the Overseas Investment Office ("OIO") by the issuance of consent.

C OIO Consent

In a nutshell, overseas persons must obtain OIO consent before buying residential properties in New Zealand, unless exempted by law. Those who have bought such property without OIO consent (where it was required) may obtain OIO consent retrospectively, subject to late filing fines. The applicable fines range from NZD 5,000 up to NZD 40,000, depending on the test under which OIO consent is applied for and the value of the transaction.

Upon a breach of the Overseas Investment Act or a failure to comply with OIO consent or exemption from OIO consent, the competent authority may require the involved persons to dispose of all relevant interests in the property.¹³ In addition, implementing an overseas investment without a required OIO consent may be subject to a fine of up to NZD 300,000 and imprisonment of up to 12 months (the latter applies to individuals only).¹⁴

There are different tests imposed on applications for OIO consent, subject to the purchase purpose of applicants. Essentially, the purposes can be categorised as residential or non-residential.

12 "How many NZ homes are being snapped up by overseas buyers?" (7 June 2018) Radio New Zealand <www.radionz.co.nz/news/national/359069/how-many-nz-homes-are-being-snapped-up-by-overseas-buyers>.

13 Overseas Investment Act, s 41F.

14 Section 42.

1 Residence-based test

In principle, it is not possible for overseas persons to buy properties purely for residential purpose. They can obtain OIO consent to do so only if their circumstances induce permanent residence in New Zealand (ie 'commitment to reside in New Zealand' test).

Under the 'commitment to reside in New Zealand' test, the key requirement is that the overseas person must commit to reside in New Zealand for at least 183 days in every twelve months from the issuance of OIO consent and will become and remain a tax resident in New Zealand.¹⁵ In addition, the property to be purchased under such OIO consent must be the main residence of the overseas person.¹⁶

2 Non-residence-based tests

Overseas persons with non-residential purposes may apply for OIO consent under other tests. They will have to demonstrate that the contemplated purchase benefits New Zealand or is necessary for their existing business in New Zealand.

(a) The 'investor' test requires an applicant to be of good character and to possess necessary business experience, acumen and financial commitment relevant to the contemplated investment.¹⁷ It may be waived in two circumstances. One is when an overseas person is applying for the 'commitment to reside in New Zealand' test only and the land comprises residential land only. The other one is when the overseas person is applying under the 'increased housing' test only and such test is satisfied by the ongoing construction of a building comprising at least 20 residential dwellings ("large development").¹⁸

(b) An applicant can satisfy the 'benefit to New Zealand' test by demonstrating that they may create more jobs, bringing in advanced technology or business skills or improving export yield, competitiveness or manufacturing capacity for New Zealand's economy.¹⁹ The benefits should also be provided on the basis that the applicant will maintain appropriate methods to maintain and protect New Zealand's environment and wildlife.

15 Overseas Investment Act 2005, s 5(1) of Sched 2.

16 Section 5(1)(a) of Sched 2.

17 Section 16(2).

18 Section 16(3).

19 Sections 16A, 16B and 17.

(c) The 'increased housing' test applies only when the residential land is not sensitive for any other reason.²⁰ In order to satisfy this test, applicants must prove that they will or are likely to cause an increase in the number of residential dwellings or the construction of long-term accommodation facilities (such as rest homes).²¹ They may also apply under this test if they provide supporting development works for the aforesaid purpose. Two important conditions imposed on applicants under this test are that the applicants (i) must not occupy the property and (ii) will fully dispose of the property within a time limit as prescribed in the relevant OIO consent ("on-sale outcome").²² The requirement for on-sale outcome will be exempt in the cases of a long-term accommodation facility and a large development with shared equity, rent-to-buy or rental arrangements.²³

(d) The 'non-residential use' test applies with the prerequisite that applicants have been operating a business in New Zealand. The Minister will review the feasibility and potential of the business to determine whether it can be carried out for a reasonable period.²⁴ Applicants need to commit to use such residential property for non-residential purposes in the ordinary course of their business. If applicants cannot fully meet the aforesaid requirement for the whole land area under the application, they may alternatively prove that they can ensure the on-sale outcome or the non-occupation outcome.²⁵ The on-sale outcome is the same as that applied in the "increased housing" test. The non-occupation outcome aims to prevent the applicants and any of their related parties from occupying the residential property. Related parties include, among others, other overseas persons who have at least a 25% interest or control over such applicants (in case they are legal entities) or those who do not acquire the residential property on arm's length transaction.²⁶

(e) Like the 'non-residential use' test, applicants under the 'incidental residential use' test need to have an existing business in New Zealand. This test allows applicants to acquire residential property necessary for their business provided

20 Section 10 of Sched 2.

21 Overseas Investment Act 2005, s 11(1)(a) of Sched 2.

22 Section 11(1)(b) of Sched 2.

23 Section 11(2) of Sched 2.

24 Section 12(3) of Sched 2.

25 Section 13(2), (3) and (4) of Sched 2.

26 Section 17(3) of Sched 2.

that the purpose of the business is not using land for residential purposes.²⁷ Applicants need to prove that the contemplated purchase and use of residential land is the most reasonable amongst other possible alternatives.²⁸ The comparison can be based on the proximity to the current place of business, the necessity and the plan to use the residential land for accommodation of the staff in the ongoing business. The on-sale outcome may be imposed when only part of the land in the application meets the 'incidental residential use' test.

Each OIO consent may be issued subject to certain conditions in order to ensure overseas persons' compliance with the conditions on purchase of residential properties.

OIO consent does not only apply to purchase but also to other cases which do not involve a direct transfer or purchase of residential property. The first instance is transfer of at least 25% or an increase in an existing 25% ownership or control in a New Zealand entity with existing ownership over residential property.²⁹ The other instance is when overseas persons lease a residential property with a lease term (including any right to renewal) of more than three years.³⁰

D Exemptions from OIO Consent Requirement

Before the Amendment Act, exemptions from the consent requirement were made available through general and descriptive guidelines. It allowed the relevant Ministers to make decisions subject to factual details, as they deemed fit and appropriate at their discretion. Accordingly, the Overseas Investment Act 2005 provides generally that, subject to applicable terms and conditions, the relevant Ministers may exempt any transaction, person, interest, right, or assets, or class of transactions, persons, interests, rights, or assets, from the requirement for consent or from the definition of overseas person or associate or associated land.³¹

Under the Amendment Act, the Ministers' discretion in granting exemptions is substantially reduced due to the introduction of detailed instructions. The purpose of the exemptions is specified as:³²

27 Section 14(1) of Sched 2.

28 Section 14(2) of Sched 2.

29 Section 12(b).

30 Section 12(a)(ii).

31 Section 61D (prior to the Amendment Act).

32 Section 61B.

- (a) provide flexibility where compliance with this Act is impractical, inefficient, or unduly burdensome but where the purpose of this Act can still be substantially achieved through terms and conditions of the exemption; or
- (b) allow for exemptions that are minor or technical; or
- (c) allow for exemption in respect of all or any of the following matters:
 - (i) interests in land to be used for diplomatic or consular purposes for the purpose of a mission or consular post;
 - (ii) persons registered as a charitable entity under the Charities Act 2005;
 - (iii) minor increases in ultimate ownership and control by overseas persons if consent has already been granted for those overseas persons to own or control sensitive assets;
 - (iv) security arrangements that are entered into in the ordinary course of business;
 - (v) relationship property as defined in s 8 of the Property (Relationships) Act 1976;
 - (vi) interests in land acquired for the purpose of providing network utility services;
 - (vii) interests in residential (but not otherwise sensitive) land acquired in order to comply with a requirement imposed by or under the Resource Management Act 1991 and to support a business that is not principally in the business of using land for residential purposes.

Applicants for an exemption need to identify for which purposes they are applying. For the issuance of an exemption, the relevant Ministers will have "regard to the purpose" of the Amendment Act.³³ However, the discretionary exemptions on the basis of what is "impractical, inefficient or unduly burdensome" may serve as a theoretical more than a practical relief. The purpose of the Amendment Act is to ensure that overseas persons cannot own residential properties until proven that their contemplated purchase is necessary or beneficial for New Zealand. Upon receipt of an application for such a discretionary exemption, the relevant Ministers need to consider whether the contemplated purchase is beneficial or necessary for New Zealand. But if the purchase in question meets such a condition, the applicant may have applied for OIO consent directly. Considering that the application for a

33 Overseas Investment Act 2005, s 61E.

discretionary exemption could be even more complicated than an application for OIO consent, it is recommended that overseas persons consult the OIO in advance.³⁴

Notwithstanding the above, the specific exemptions under the Amendment Act are crucial and practical. They include exemptions applicable to large developments, hotels and long-term leases:

(a) *Large developments*. The most important exemption is the one available to large developments or developments which increase the number of apartments by 20 or more.³⁵ Developers would be qualified for exemption certificates if they have obtained the necessary authorisation for the development, acquired adequate financial capacity and presented a good record in using residential land and complying with regulatory conditions.³⁶

An exemption certificate allows a developer to sell a number of apartments to overseas persons without the need for such overseas persons to obtain separate OIO consent.³⁷ The maximum percentage of apartments which a developer may sell to overseas persons off plan is 60%.³⁸ Overseas persons who purchase the property in this case are not required to on-sell the property but are not allowed to occupy the property themselves.³⁹

Once a developer has sold beyond the percentage under the exemption certificate, subsequent overseas persons buyers are required to obtain a consent from OIO or be subject to the on-sale outcome.

(b) *Hotels*. Similarly, an exemption certificate enables overseas persons to purchase certain units in a hotel development without OIO consent. However, overseas persons must enter into a lease-back agreement with the hotel operator and not stay in the unit for more than 30 days in a year.⁴⁰ If the lease-back agreement expires, they either need to enter into a renewal or must dispose of the

34 "Discretionary Exemptions" (7 December 2018) Land Information New Zealand <www.linz.govt.nz/overseas-investment/applying-for-consent-purchase-new-zealand-assets/applying-for-exemption/discretionary-exemptions>.

35 Overseas Investment Act 2005, s 4(1) of Sched 3.

36 Section 4(3) of Sched 3.

37 Section 4(4) of Sched 3.

38 Overseas Investment Regulations 2005, s 32(2).

39 Overseas Investment Act 2005, s 6 of Sched 3.

40 Section 5(2) of Sched 3.

unit within 12 months.⁴¹ Overseas persons are not allowed to occupy and use the unit when it is not leased back to the hotel company.⁴²

(c) *Leases*. Overseas persons may be entitled to an exemption if they are renting sensitive land (residential land only) for a residential lease of less than 5 years.⁴³ If sensitive land comprises residential land and other categories of sensitive land, overseas persons can apply for an exemption if the lease is less than 3 years and can be terminated at will by the grantor or grantee.⁴⁴

E Standing Consent

The Amendment Act introduces a new regime of standing consent which can be used for multiple transactions of residential properties in the future. As a principle, standing consent is conditional on an overseas person's satisfaction of all requirements under the applicable tests during the term of the standing consent. If applying for a standing consent under the 'commitment to reside in New Zealand' test, an applicant needs to commit to reside in New Zealand.⁴⁵ With respect to 'increased housing', 'non-residential' and 'incidental use' tests, an applicant needs to have adequate financial capacity and a good record in using the residential land and complying with consents.⁴⁶ Additional conditions may be imposed on standing consent such as the total permitted land area, location, geographic type, the maximum construction period and the number of transactions which can be made under such standing consent.⁴⁷ Most importantly, the relevant authority must be notified about each transaction entered into based on such standing consent.

The issuance of standing consent however comes with a significant cost. An applicant for standing consent under 'increased housing', 'non-residential use' or 'incidental residential use' tests has to pay NZD 34,100 for the issuance of the standing consent per se and NZD 13,000 for each transaction made under such standing consent.⁴⁸ This cost may discourage overseas persons from applying for standing consent.

41 Overseas Investment Act 2005, s 5(2) of Sched 3.

42 Section 5(2) of Sched 3.

43 Section 3 of Sched 3.

44 Section 2 of Sched 3.

45 Section 1 of Sched 4.

46 Section 2 of Sched 4.

47 Section 2 of Sched 4.

48 Overseas Amendment Regulations 2005, s 11 of Sched 2.

F Requirement for Eligibility Statement

The Amendment Act introduced a new requirement for lodging eligibility statements. It applies not only to overseas persons but also to all purchasers or lessees (with a lease term of at least 3 years) of residential properties.⁴⁹ Eligibility statements must be lodged with a lawyer (conveyancer) before any transaction involving residential properties.⁵⁰ They basically include information about whether concerned persons are overseas persons subject to the Amendment Act and, if so, whether they have obtained OIO consent or exemption from OIO consent.⁵¹ An eligibility statement must be retained by the lawyers for at least seven years from the date it is lodged.⁵²

III CONCLUSION

New Zealand has imposed a ban on foreign ownership of residential property in an attempt to reduce housing unaffordability. The Amendment Act confirmed that home ownership is a privilege of overseas persons. It requires overseas persons to prove that their purchase of residential property is necessary or beneficial to New Zealand.

Whether the Overseas Investment Act can achieve its economic purposes and outcomes remains to be seen. There is little doubt that reduced demand in the housing market will slow down the spiralling house price in most areas. However, to what extent the new ban may contribute to such result is questionable. Most noticeably, the current housing crisis is happening when more than 80% of house transactions involve at least one New Zealander or permanent resident visa holders,⁵³ who all have the right to purchase houses regardless of the ban.

What is known with certainty is the government's determination to control the participation of overseas players in New Zealand's housing market. Further, the government has already announced a plan to review the new mechanism and to streamline the application procedure for OIO consent.⁵⁴ The remaining question is whether another overhaul will be taken if house prices do not drop as expected.

49 Overseas Investment Act 2005, s 51A(1).

50 Section 51A(5).

51 Section 51A(2).

52 Section 51C(2).

53 Statistics New Zealand "Property transfer statistics: December 2018 quarter" (8 February 2019) <www.stats.govt.nz/information-releases/property-transfer-statistics-december-2018-quarter>.

54 [Ed. See *Reform of the Overseas Investment Act 2005 – Consultation document* (The Treasury, Wellington, April 2019).