

# Determining Ownership or Control Interest

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Recent updates to this resource:

9 July 2009: Amendments to Overseas Investment Regulations.

## Introduction

Measuring ownership or control interest is relevant to determining if a company, trust, partnership or unincorporated joint venture requires consent to invest in sensitive New Zealand assets.

Consent may be required for:

- a transaction by an overseas person to acquire 25% (or more) ownership or control interest
- a transaction to acquire less than 25% ownership or control interest if the aggregated ownership or control interest of unrelated overseas persons is 25% (or more)
- the loan of money by an overseas person to a New Zealand individual or entity that invests in New Zealand.

A company incorporated outside New Zealand is an overseas person regardless of who owns or controls it.

## Legislation

Section 6(4) and 6(5) of the Overseas Investment Act 2005 define 25% (or more) ownership or control interests.

Trusts are defined section 7(2) of the Act.

Regulation 33(1) of the Overseas Investment Regulations 2005 exempts certain situations relevant to ownership and control, such as:

- internal restructuring arrangements
- the transfer of property to an overseas person beneficiary of the trust
- the replacement of a trustee with an overseas person trustee.

## **Control, beneficial entitlement and voting power**

If an overseas person has 24.9% ownership of a company that holds sensitive land, but the overseas person is given the power to appoint 50% of the directors of the company under the company's constitution, then consent is required for the acquisition by the company. In order to determine whether a transaction will increase an existing 25% (or more) ownership or control interest in "B", one must determine whether:

- the person will have a beneficial entitlement to more of B's securities than they already hold
- the person will control the composition of a larger proportion of B's governing body, and
- the person will be able to exercise more voting power at a meeting of B.

Where one or more of these factors increases, and the others remain the same, then the transaction will result in an increase in an existing 25% (or more) ownership or control interest.

For example:

Facts:

O, an overseas person, owns 30% of the shares in T, and exercises 30% of the voting power at meetings of T. O has no ability to control the composition of the governing body of T.

O proposes to acquire an additional 10% of the shares from a third party.

Result:

O's shareholding and voting power will increase. O will still have no ability to control the composition of the governing body of T.

O will have increased their 25% (or more) ownership or control interest.

Where one or more of these factors decreases, and the others remain the same, then the transaction will not result in an increase in an existing 25% (or more) ownership or control interest.

In all other cases there will inevitably be some doubt, particularly where there are special, limited or conditional voting rights conferred by the constitution. See the OIO's Associate Provisions resource or contact the OIO for more information.

## **Aggregating the interests of unrelated overseas persons**

A transaction to acquire less than 25% ownership or control interest may require consent if the aggregated ownership or control interest of overseas persons, even unrelated overseas persons, is 25% (or more).

Consent is required if, as a result of a transaction, a company (or other person) that owns or controls sensitive land becomes an overseas person - see section 12(b)(ii) of the Act.

For example:

Facts:

C is a company registered in New Zealand that owns or controls sensitive land.

24 percent of the shares in C are owned by overseas persons. 76 percent of the shares in C are owned by New Zealanders.

O, an overseas person, purchases 3 percent of the total shares in C from one of the New Zealand shareholders.

Result:

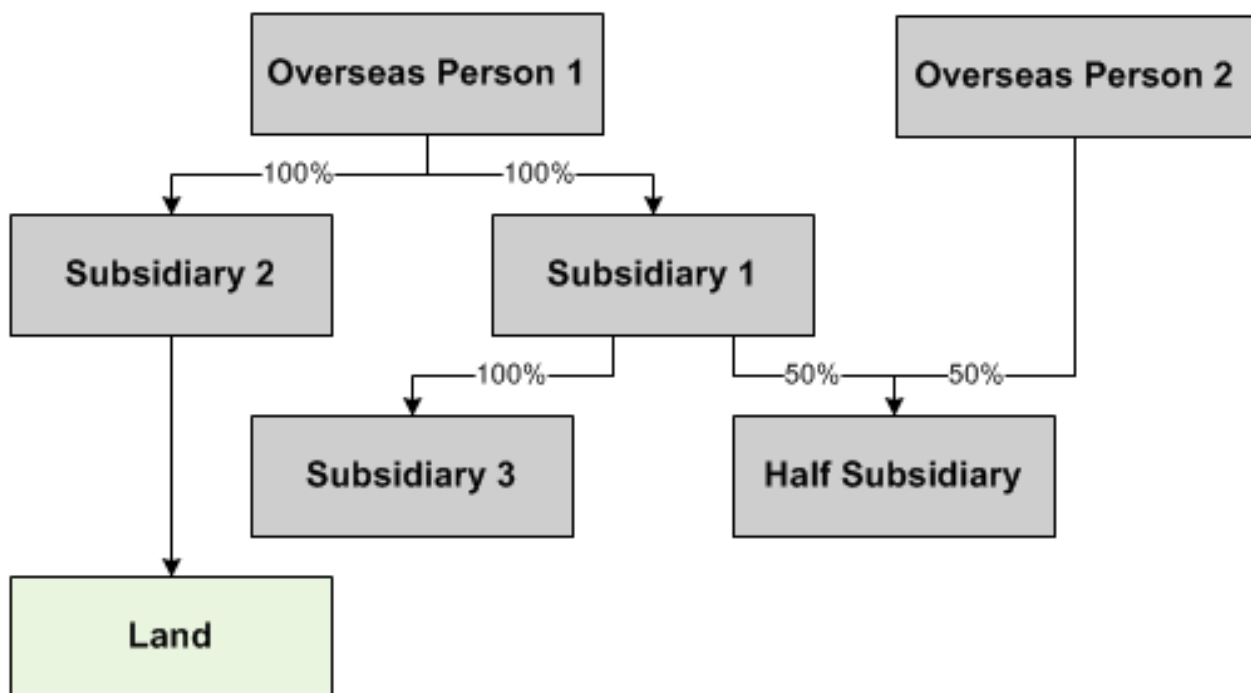
After the transaction, 27 percent of the shares in C are owned by overseas persons.

C becomes an overseas person.

O requires consent to acquire the 3 percent shareholding in C.

## Internal rearrangements

Regulation 33(1)(a) exempts certain internal restructuring arrangements. The regulation specifically requires that the parties to a transaction must be from a group comprising an overseas person and persons who are directly or indirectly wholly owned by the overseas person.



For example:

Facts:

'Overseas Person 1' is the 100% owner of 'Subsidiary 1' and 'Subsidiary 2'.

'Subsidiary 1' owns a parcel of sensitive land. 'Subsidiary 2' is the 100% owner of 'Subsidiary 3' and has a 50% share in '50% Subsidiary' with 'Overseas Person 2'

'Overseas Person 1' wishes to transfer the sensitive land to another entity.

Result:

'Overseas Person 1' can take direct ownership of the sensitive land, or have it transferred to 'Subsidiary 2' or 'Subsidiary 3' without the need for consent. Overseas Person 1, Subsidiary 1, Subsidiary 2 and Subsidiary 3 are all members of a group comprising 'Overseas Person 1' and persons who are directly or indirectly wholly owned by 'Overseas Person 1'.

The exemption does not permit 'Overseas Person 1' to transfer the land from 'Subsidiary 1' to '50% Subsidiary' or 'Overseas Person 2' because they are not part of that group. Both '50% Subsidiary' and 'Overseas Person 2' would require consent to acquire the land.

## Trusts

A trust is an overseas person if:

- its governing body is 25% (or more) owned or controlled by an overseas person
- an overseas person has a beneficial interest in or entitlement to 25% (or more) of a trust's property
- 25% (or more) of the persons who have the right to amend or control the amendment of the trust's deed are overseas persons, or
- 25% (or more) of the persons who have the right to control the composition of a trust's governing body are overseas persons.

See section 7(2)(e) of the Act.

### Unit trust

A unit trust is an overseas person if:

- the manager or trustee, or both, are overseas persons, or
- an overseas person has a beneficial interest in or entitlement to 25% (or more) of a trust's property.

See section 7(2)(f) of the Act.

### Discretionary trust beneficiaries

The Act treats a trust as a person rather than a relationship between trustee and beneficiary. The Act recognises three separate classes of person, each member of which might be an overseas person independently of each other:

- the trust itself
- the trustees, and
- the beneficiaries.

Under a discretionary trust, potential beneficiaries have no interest in the trust property until the trustees' discretion has been exercised in their favour. Until then, the beneficiaries simply have a right to be considered<sup>1</sup>. Accordingly, a beneficiary could not be said to "have an entitlement to 25% (or more) of the trust property".

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<sup>1</sup> Gartside v Inland Revenue Commissioners; sub nom Gartside's Will Trusts, Re [1968] AC 553; [1968] 1 All ER 121

In principle, a discretionary trust in which the following applies will not be considered an overseas person.

- less than 25% of the trustees are overseas persons
- less than 25% of the persons having the power to appoint, or control the appointment of, the trustees, or amend the provisions of any instrument establishing the trust, are overseas persons, and
- overseas persons and New Zealanders are discretionary beneficiaries.

However, if at any stage all of the discretionary beneficiaries are overseas persons, then the OIO would consider that the trust has become an overseas person. This is because it would then be certain that overseas persons have an entitlement to the trust fund, as any discretion could only be exercised by the trustees among a class of overseas persons. The same reasoning would apply where the rule in *Saunders v Vautier* applies - the rule that permits all discretionary beneficiaries, being of full age and mental capacity, to combine together and demand the transfer of the trust property to them.

Note that where the trustee of a trust is controlled or influenced by an overseas person then the trustee may be an associate of that overseas person. The obligation to have consent applies equally to associates as to overseas persons. See the OIO's Associate Provisions resource.

### **Transfer to beneficiaries**

The exemption in regulation 33(1)(g) allows a trust to transfer property to an overseas person beneficiary of the trust so long as the trust's ownership had previously been consented to and the transfer is not contrary to conditions of that consent.

Transfer of property that a trust did not require consent to acquire, but the beneficiary now does, is not exempted. For example:

- land that has become sensitive since being acquired by the trust, and
- shares in a company whose assets have grown to exceed \$100m since being acquired by the trust.

### **Change of Trustees**

Regulation 33(1)(e) exempts the replacement of a trustee with an overseas person trustee (or the addition of an overseas person trustee) in limited circumstances. Specifically, the trust must not become an overseas person as a result of the change.

In practice, this means that either:

- the total number of overseas person trustees must remain less than 25%, or
- the trust must have already been an overseas person.

In every other circumstance, the change will require consent.

## **Security arrangements**

The loan of money by an overseas person to a New Zealand individual or entity that purchases land in New Zealand may constitute an acquisition of interests in sensitive New Zealand assets. The loan or security may be arranged directly or via a corporate entity that the overseas person owns or controls.

### **Exemption for legitimate lenders**

Interest is defined in section 6(1) of the Act to include a legal or equitable interest. In this context an interest may be outright ownership or a lesser property right over the asset. The most common examples of lesser property rights are mortgages and leases.

The Regulations recognise that this would interfere with the legitimate business interests of mortgage lenders and exemptions are provided to protect these interests. Regulation 33(1)(h) exempts the acquisition by an overseas person of “securities” or rights or interests in “securities” under a “security arrangement”.

For a loan to be made in the ordinary course of business, the OIO would normally need to be convinced that the lender is in the business of lending money and would usually need to see evidence of other similar loans made to other parties.

### **Loans requiring consent**

The OIO’s normal stance will be that loan transactions from persons or entities that are not traditional financial institutions will probably require consent under the Act.

Consent will probably be required when a mortgage is incapable of being re-transferred to the borrower or extinguished when the loan is repaid. A mortgage contract that contains an option for the lender to purchase the mortgaged property is an example of an arrangement that is regarded as preventing the borrower from having the mortgage re-transferred.

In some cases, provisions in a mortgage providing for significant collateral advantages to the lender (beyond the lender’s right to repayment of the loan, plus interest) will also be regarded as making the mortgage incapable of being re-transferred.

### **Reacquisition following discharge**

Regulation 33(1)(j) exempts the re-acquisition by an overseas person of an interest in property as a result of the discharge of a security arrangement (as defined by Regulation 33(1)(h)).

## **Apply for consent**

See the OIO’s resource [How to Apply for Consent](#).

## **Further information**

Visit the OIO website at [www.linz.govt.nz/oio](http://www.linz.govt.nz/oio) to find related links, documents and answers to frequently asked questions. Read the Overseas Investment Act 2005 and the Overseas Investment Regulations on [www.legislation.govt.nz](http://www.legislation.govt.nz).

If you require further information, please contact the OIO.

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