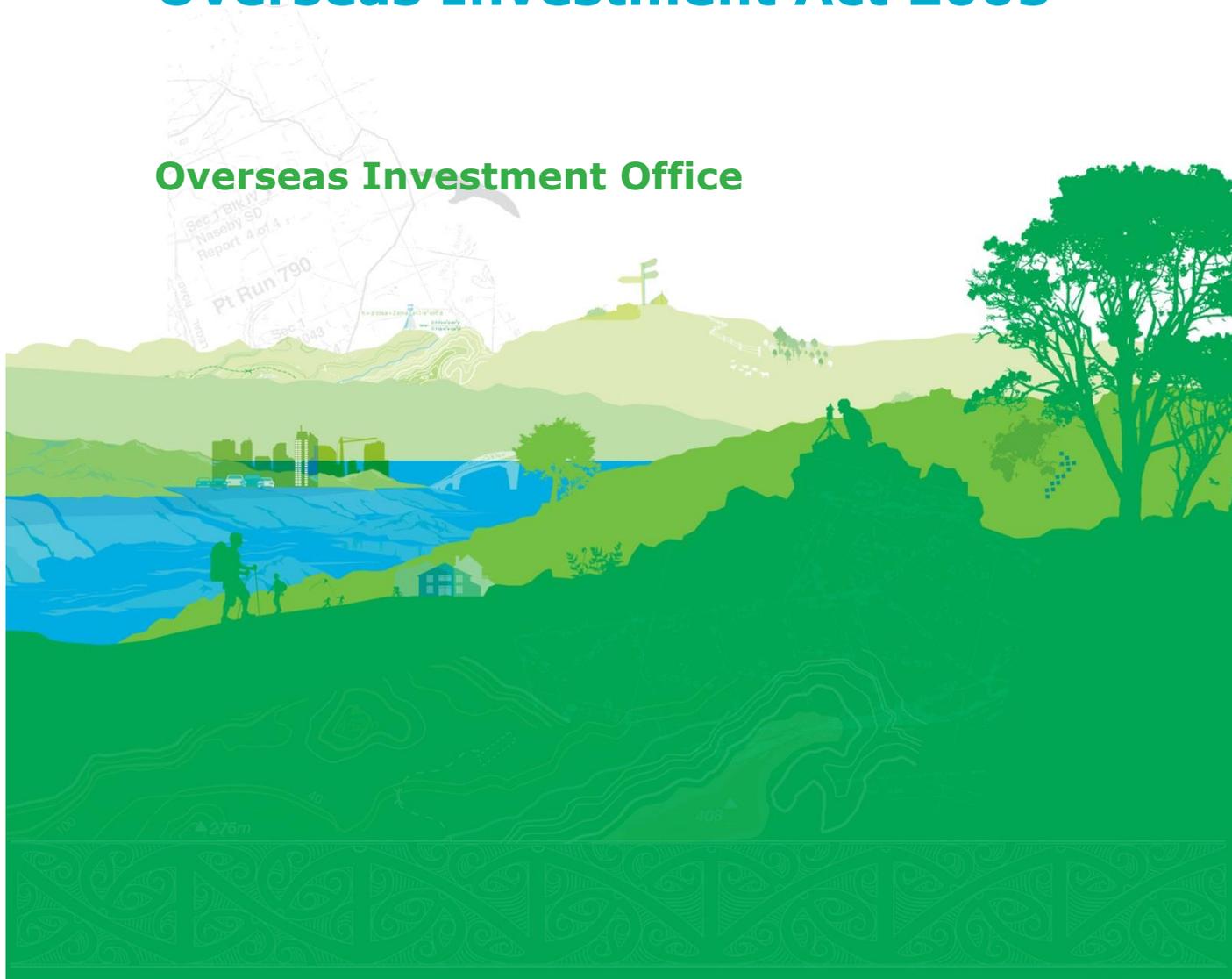


Enforcement under the Overseas Investment Act 2005

Overseas Investment Office



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1 Enforcement function and strategic priorities

Overseas people must get consent to own many types of property (especially land) in New Zealand. They must also keep the commitments they make when they apply for consent.

1.1 Enforcement Purpose

The overseas investment rules are found in the Overseas Investment Act 2005 and the Overseas Investment Regulations 2005. They allow overseas people to bring benefits to New Zealand, such as by:

- committing to the New Zealand community they live in
- providing more housing for New Zealanders, or
- delivering substantive benefits to New Zealand through quality investments.

Our enforcement function is about making sure overseas people:

- who own or control New Zealand sensitive property are allowed to get, and that they get, consent to do so
- keep the commitments they make when they apply for consent
- give us truthful and complete information about themselves and their plans.

1.2 Our Enforcement activity

The Overseas Investment Act recognises that it is a privilege for overseas people to own sensitive New Zealand property. Our job is to make sure those purchases or investments are made in accordance with the Rules.

This may be through our own monitoring and surveillance activities, through information provided to us by informants, or through our work with other regulatory and Government agencies.

All consent holders must also:

- provide us with information about their investment promptly
- provide us with honest and reliable updates on their progress on meeting their commitments
- co-operate with us so we can assess progress, including co-operating with any site inspections.

We will consider taking enforcement action when we find people:

- own or control an asset without the correct consent
- have not met their commitments in a material way - for example because they:
 - have not moved to New Zealand
 - have not increased housing as promised or
- failed to deliver the promised benefits from their investment have not provided us with information we require

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- misled or deceived us.

Taking enforcement action ensures fair treatment for those who comply with the Rules, as well as ensuring that those who do break the Rules are held to account and that others are deterred from doing so. It also gives the New Zealand public confidence we are doing our job.

2 Enforcement Criteria

2.1 Considering enforcement action

When we consider whether to investigate and what enforcement action to take, we target issues that present the greatest risk of harm to our purpose.

We make each decision based on the particular circumstances, but matters we are likely to consider include:

- our strategic priorities
- seriousness of the conduct
- the public interest
- the strength of our case.

Together, these factors enable us to decide how to prioritise our resources, whether to commence an investigation and what enforcement tools we might use.

2.2 Strategic priorities

While all breaches of the Rules are important to us, we cannot take every case or pursue every breach of the Rules. Nor would it be in the public interest for us to do so. We have therefore identified 8 strategic priorities to guide what and how we carry out our enforcement work. These priority areas are important as they impact on public confidence in the overseas investment process.

We are likely to prioritise matters for investigation and enforcement action where we think:

- the overseas person has acquired a sensitive New Zealand asset without consent
- a benefit that was an important factor in the decision to allow the investment has not been delivered
- a person has deliberately or recklessly broken the Rules, or has tried to disguise their behaviour
- the breach involves an asset of particular significance to New Zealand and New Zealanders – for example, because it has high cultural, historic, social or environmental value or it represents a material part of the productive economy or of a particular industry or sector
- an investment made without consent would not have been approved if the person had applied
- an overseas person has made, or will make, a significant gain from an asset acquired in breach (property speculation and land-banking do not benefit New Zealand)
- where the Rules or conditions have been broken and the investor's conduct creates public harm, indicating that they are not fit to hold the asset- this might be because the person has breached environmental or animal welfare laws and these are relevant to the type of investment they hold

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- the person has provided us with information that turns out not to be accurate or complete in a material way

This list does not describe every aspect of our enforcement work. Rather it outlines the areas where we see the greatest impact on public confidence in the effectiveness of the overseas investment process. We use the list to guide what and how we might carry out our enforcement activity.

We will review and update our strategic priorities from time to time.

Taking the residential housing rules as an example, we are likely to apply our strategic priorities by prioritising matters for investigation where a person:

- buys residential housing land without consent, particularly if they are not allowed to buy a house under the rules or if the person is speculating in the property market by buying several houses
- attempts to disguise overseas ownership to avoid the overseas investment rules
- fails to meet conditions they need to meet, such as the person does not live in house they have consent to buy or fails develop promised new housing.

2.3 Seriousness of the conduct

We are most likely to take action where the person's conduct is serious and/or public confidence in the Rules is threatened by their actions.

Conduct factors we consider include where:

- a person has deliberately or recklessly broken the Rules
- a person has provided us with information that turns out not to be accurate or complete in a material way
- a person has not applied for consent, particularly where consent is unlikely to have been granted if they had applied or we can no longer set appropriate conditions
- an person has not provided the benefits they promised when they applied for consent
- there have been repeated breaches or ongoing disregard for the Rules
- the extent to which the person has co-operated with us.

The seriousness of the person's conduct will be an important factor when we decide whether to take criminal rather than civil proceedings.

2.4 The public interest

We consider the public interest when deciding whether to take enforcement action and what enforcement tool is appropriate and proportionate.

In assessing the public interest we are likely to have regard to a number of factors, including:

- the harm or potential for harm arising from the breach
- the opportunity we missed to impose conditions to create benefits for New Zealanders through the investment
- the deterrence or educational value of taking action
- public confidence in the integrity of the overseas investment regime

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- the environmental, cultural, social or heritage value of the asset
 - whether the action can be undone or otherwise remedied
 - mitigating factors relating to the investment or the investor. This might include where the investment has provided benefits for New Zealand despite the lack of consent or breach of conditions, the personal circumstances of the investor, the investor's reliance on legal advice
 - the risk the investor will offend again. This may include considering any commitment the investor has made to implementing a compliance policy for other investments
 - whether it is more appropriate that another enforcement agency takes action
 - the likely penalty that might be imposed.

2.5 Strength of our case

When considering enforcement action, particularly when we are considering taking civil or criminal litigation, we also take account of the strength of our case in light of factors which include:

- the quality of the evidence
- the Prosecution Guidelines issued by the Solicitor General¹ and LINZ's prosecution policy²
- any limitation issues, and
- any need to clarify the law.

3 How we take action

We will consider investigating and taking enforcement action when we believe people have broken the Rules or have not met their commitments.

Taking enforcement action ensures fair treatment for those who comply with the Rules, as well as ensuring that those who do break the Rules are held to account and that others are deterred from doing so.

3.1 Achieving our enforcement strategy

We will carry out our enforcement function through a range of activities including:

- educating people about the need to comply with the Rules before an overseas investment is made
- monitoring compliance with the conditions imposed on consent, including the steps taken to comply with representations and investment plans provided to us as part of an application
- carrying out surveillance activities, including through site inspections
- investigating possible breaches of the Rules, and

¹ <http://www.crownlaw.govt.nz/assets/Uploads/Prosecution-Guidelines/prosecution-guidelines-2013.pdf>

² <http://www.linz.govt.nz/about-linz/publications/linz-prosecution-policy>

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- taking enforcement action where we find that the Rules have been broken and it is appropriate to take action.

In carrying out our enforcement function we will:

- act independently³
- act fairly and proportionately
- be as transparent as possible, recognising that sometimes we must protect the confidentiality of the information we hold to ensure fair process.

³ The responsibility for enforcing the Rules lies with the Chief Executive of Land Information New Zealand and is delegated to positions within the Overseas Investment Office.

3.2 What we will investigate

What we investigate is guided by our enforcement strategy and criteria which we use to prioritise our resources. Broadly, our investigations fall into the following types:

- failure to get consent for an overseas investment before the transaction is effected
- attempts to circumvent or evade the Rules
- failure to meet commitments made when the investor applied
- providing us with false, inaccurate or incomplete information
- failure to comply with notices requiring information to be produced.

When we believe a breach of the Rules has occurred, we assess the breach against our enforcement criteria and consider the full range of enforcement tools available to us to take the most appropriate and proportional response in the circumstances.

3.3 What to expect when we investigate

When we investigate a matter the steps we take and what you will need to do in response will depend on the circumstances of each case. Being upfront and honest with us is likely to speed up the investigation and your co-operation may be a factor in determining an appropriate and proportionate enforcement response.

When we investigate a possible breach of the Rules, we may:

- ask you to explain what has happened by letter or by informal discussion
- make inquiries using intelligence available to us from other agencies and from public resources
- analyse monitoring reports, including considering independent expert reports
- carry out site inspections
- issue notices requiring information be provided to us
- require a consent holder to provide a statutory declaration about how they have complied with the conditions of consent, the reasons for any breach and steps they intend to take to remedy the breach
- carry out formal interviews
- exercise our search and seizure powers under the Rules.

3.4 Reporting a breach

If you think you have made a mistake by failing to comply with the Rules, please let us know, as we may be able to take your co-operation into account when considering how we exercise our powers.

If you think you or someone else has breached the Rules, you can report that to us by using the "Report a Breach" form on our website or contacting the OIO by email oio@linz.govt.nz or calling us on +64 4 462 4490.

3.5 Notices

We expect quality investors will willingly provide us with information to enable us to monitor compliance with the conditions of consent. However, we can issue notices requiring:

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- a consent holder to provide information for monitoring and certify it is correct
 - any person to provide information relevant to the monitoring of conditions.

We can also issue notices requiring information and documents to be provided where this is needed for us to carry out our monitoring and enforcement functions.

Anyone issued with such a notice has the same privileges in relation to the provision of the information or document as a witness in any court proceeding, such as the right to legal professional privilege.

It is an offence to fail to comply with a notice under the Rules without lawful excuse.

3.6 Interviews

We find interviews a useful way to gather and clarify information. You are not under any obligation to attend an interview and you are entitled to end the interview at any time. We invite you to bring along a legal adviser or other support person.

Our preference is to record interviews, but we will always seek your permission if we intend to do so and will make a copy of the recording available to you.

3.7 Providing information to us

Any information you provide to us, whether orally or in writing, must be complete, accurate and truthful.

In particular:

- it is a condition of every consent that all information provided to us in connection with an application for consent was correct at the time it was provided
- it is an offence to resist, obstruct or deceive us when we seek to exercise a power or function under the Rules
- it is an offence to knowingly or recklessly make any false or misleading statement or material omission in:
 - any representation made for the purpose of the Rules or
 - any information or document provided to us, or
 - any communication with us.

4 Powers and Tools

4.1 What enforcement action will we take?

There is a range of regulatory tools or actions we can take if we believe the Rules have been broken. These range from informal engagement, through to seeking civil and criminal penalties through court proceedings.

In deciding which tools or options to use, we will consider what is the most appropriate and proportionate response in the circumstances. We will use our enforcement criteria to decide what tool to use, including considering:

- our strategic priorities
- the seriousness of the conduct
- the deterrence or disciplinary value of taking action

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- the educational value of taking action
 - our ability to give effect to any enforcement action, including consideration of any limitation issues,
 - the precedent or clarification benefit of taking court action, and
 - the most effective use of our resources and, where applicable, court resources whether the matter falls more appropriately within another agency's jurisdiction.

We are more likely to take court action for serious breaches of the Rules and where we have strong evidence. We may also take cases to court though where clarification of the requirements of the Rules would be helpful.

Where a person can demonstrate that they inadvertently breached the Rules, and they agree to fully co-operate with us to sell the property, it may be appropriate for us to issue a disposal notice setting out our concerns and how their interest should be disposed of, rather than seek a court ordered disposal and penalty. The notice is issued at our discretion and when we believe it will be complied with. The benefit of a disposal notice is that the land is quickly returned to the New Zealand market. The benefit for the owner is that by co-operating with us to sell the property, they do not face court imposed penalties.

On some occasions we may have a choice as to whether to seek a criminal penalty or a civil penalty in court. We will lay charges for a criminal offence only where we consider the Solicitor-General's prosecution guidelines⁴ are met and will usually (particularly if imprisonment may be ordered) take such action only for very serious breaches of the Rules, such as where there is a deliberate and reckless breach.

When seeking a civil penalty, we start from the position that effective deterrence requires that a wrongdoer does not benefit from their breach of the rules.⁵ Where someone stands to gain from their breach, we will ordinarily seek a penalty which takes account of the gain they have made in breach of the rules.

We will generally publish the outcome of the enforcement action we take. It is important we do this as part of our function to deter and educate people about the need to comply with the Rules.

⁴ <http://www.crownlaw.govt.nz/assets/Uploads/Prosecution-Guidelines/prosecution-guidelines-2013.pdf>

⁵ *Chief Executive of Land Information New Zealand v Tang* [2018] NZHC 382 at [16], [31] and [26].

4.2 Enforcement Tools

The following table sets out the enforcement tools available to us.

This list is not exhaustive and we could pursue one or more tools, depending on the circumstances.

	Enforcement tools ⁶	When tool may be used ⁷
1	No further action warranted	<ul style="list-style-type: none"> No breach or offence Insufficient evidence to pursue breach Not in public interest to pursue Breach not sufficiently serious to commit further resource Limitation period expired and no other suitable enforcement option
2	Referral to another agency	<ul style="list-style-type: none"> Another agency has appropriate jurisdiction and/or more appropriate enforcement powers
3	Referral to disciplinary body, such as Law Society or Real Estate Agents Authority	<ul style="list-style-type: none"> Another agency has appropriate jurisdiction Protection of the public
4	Administrative penalty if late in providing documentation (s 52)	<ul style="list-style-type: none"> Late to provide documents required by notices, without good reason Late to provide documents required as part of monitoring consent conditions, without good reason
5	Agreed variation to conditions (s 27)	<ul style="list-style-type: none"> Amendment will deliver benefits in a timely way Circumstances have changed beyond consent holder's control
6	Retrospective penalty (s 53)	<ul style="list-style-type: none"> Retrospective consent is appropriate (section 25(1)(f)) – find out more about our retrospective policy.
7	Compliance letter	<ul style="list-style-type: none"> Advise of breach, educate and/or warn the person who has broken the Rules Require action to remedy breach and/or develop compliance programme Suitable for minor breaches, or in conjunction with other enforcement options
8	Formal warning	<ul style="list-style-type: none"> Breach of Rules and sufficiently serious to warrant public attention Deterrence value
9	Revoke consent (s 26)	<ul style="list-style-type: none"> Before investment has been given effect Consent obtained by fraud

⁶ Options may not be exclusive. One or more options could be pursued in the circumstances. Section references to the Overseas Investment Act 2005 are included for reference to more specific information. Other actions are taken to achieve the OIO's general function of doing anything necessary for the efficient operation of the Rules (section 31).

⁷ The situations listed are indicative and are not exhaustive. Our enforcement criteria will be considered to assess what is appropriate and proportionate in the circumstances, including the precedent or clarification benefit of taking court action.

	Enforcement tools⁶	When tool may be used⁷
10	Seek court order to require compliance with condition, exemption, or exemption certificate (s 51)	<ul style="list-style-type: none"> • Failure to meet condition or exemption and no indication of commitment, or continued failure to remedy • Indications will act in breach of condition and there will be difficulties undoing action
11	Settlement agreement, such as involving payment for public good and/or agreement to dispose of property	<ul style="list-style-type: none"> • Breach of Rules but court action is not the appropriate response • Can include contribution to OIOs costs
12	Issue a notice to get a person to dispose of their property within a specified period and thereby avoid any further penalty (s 41F)	<ul style="list-style-type: none"> • Breach of the rules. • The OIO has discretion to issue such a notice. It is likely to be appropriate where the person: <ul style="list-style-type: none"> ○ obtained the property on reliance on incorrect advice; and ○ is willing to fully co-operate with the OIO, including to actively market the property or otherwise dispose of their interest in a timely way to an independent party • This tool is not suitable in property speculation situations, or where an investor has sought to disguise the overseas ownership, or where a person does not co-operate with the OIO
13	Order to dispose of property (s 47)	<ul style="list-style-type: none"> • Breach of Rules • Failure to comply with conditions of consent • Can be sought where notice to dispose is not complied with • Can be sought alongside orders for penalties
14	Seek court order to cancel transaction (s 29)	<ul style="list-style-type: none"> • Breach of Rules • Failure to comply with conditions of consent • Level of co-operation will dictate if an agreement or court order appropriate
15	Seek court order for a mortgage to be registered over land (s 49)	<ul style="list-style-type: none"> • To secure performance of an obligation or payment of a civil penalty
16	Civil penalty for being involved in the contravention of the Act or commission of an offence or failure to comply with the Act. (ss 6(7), 48 and 48A)	<ul style="list-style-type: none"> • A person must not aid, abet or obtain the contravention of the Act. This addresses situations where someone assists another person to breach the Act • Defences are available where someone has acted reasonably
17	Conveyancer required to obtain and keep a residential land statement (ss 51A, 51C and 48)	<ul style="list-style-type: none"> • Conveyancer required to obtain and hold statement for residential land transactions • Instrument cannot be lodged without statement or if reasonable grounds exist to believe it is not correct • Penalty up to \$20,000

	Enforcement tools⁶	When tool may be used⁷
18	Civil proceeding. Can involve penalty (for instance, up to \$300,000 or three times the quantifiable gain) and/or disposition of property (s 48)	<ul style="list-style-type: none"> • Serious breach of Rules • Failure to comply with conditions of consent • Clarification of the Rules • Any quantifiable gain made (or to be made) from the investment in breach of the rules will be relevant to assessing penalty. A person can expect to be stripped of any gain.
19	Prosecution for criminal offence. Penalties can include up to 12 months prison or fine up to \$300,000 (s 42-46)	<ul style="list-style-type: none"> • Very serious and/or deliberate or reckless breach of the Rules, such as: <ul style="list-style-type: none"> ○ Deliberately or recklessly makes false or misleading statements to us or material omission in communication with us ○ Deliberately or recklessly defeats, circumvents or evades the Overseas Investment Act ○ Resists, obstructs or deceives someone exercising a power or function under the Rules