

**OVERSEAS INVESTMENT ACT 2005:
REASONS FOR DECISION BY RELEVANT MINISTERS**

As relevant Ministers under the Overseas Investment Act 2005, we set out below the reasons for our decision on an overseas investment application by the Canadian Pension Plan Investment Board (the Applicant): Application No's 200720116 and 200810020.

Description of application

The Applicant proposes to acquire a 40% shareholding in Auckland International Airport Limited (AIAL) with its voting rights limited to 24.9%. The transaction involves a purchase of shares followed by an acquisition of assets during an amalgamation process. The transaction requires consent under the Overseas Investment Act 2005 (the Act) in respect of two categories of investment:

- a. sensitive land; and
- b. significant business assets.

Purpose of the Overseas Investment Act 2005

The application is required to be considered under the Act, and so our consideration of the application is framed generally within the purpose of the Act (section 3), which states:

The purpose of this Act is to acknowledge that it is a privilege for overseas persons to own or control sensitive New Zealand assets by –

- (a) *requiring overseas investments in those assets, before being made, to meet criteria for consent; and*
- (b) *imposing conditions on those overseas investments.*

Advice to Ministers


The Overseas Investment Office (OIO) has analysed the application, and submissions from third parties, in accordance with its delegated function as regulator, and has advised us how the application complies with the Act's requirements. The Act requires that we, as relevant Ministers, must reach our own decision notwithstanding any particular advice from the OIO.

The specifics of the law and how relevant Ministers must apply them

Section 14 of the Act states that we must grant consent to an overseas investment in sensitive land and to an overseas investment in significant business assets if we are each satisfied that all of the criteria in section 16 and section 18 respectively are met; and conversely that we must decline to grant consent if we are not each satisfied that all of those criteria are met. The full text of sections 14, 16 and 18 is set out in the Appendix to this decision.

There are seven criteria in section 16 and four criteria in section 18 that must be met. The first four criteria in section 16 are the same as in section 18 and relate to the overseas investor (or the individuals controlling it) having relevant business experience and acumen, demonstrating financial commitment to the investment, being of good character, and not being ineligible to enter New Zealand under the Immigration Act 1987.

As these criteria are repeated in section 18, we need only consider the same criteria once (section 14(3)). On the basis of advice from the OIO, we are satisfied that the overseas investment meets the first four criteria in section 16 and all the criteria in section 18.



In respect of the remaining criteria, section 16(1)(e)(i) does not apply and we must accordingly consider whether section 16(1)(e)(ii) and (if applicable) 16(1)(e)(iii) are met. Section 16(1)(e)(ii) is therefore the fifth criterion and requires that the overseas investment will, or is likely to, benefit New Zealand (or any part of it or group of New Zealanders), as determined by the relevant Ministers under section 17 (factors for assessing benefit of overseas investment in sensitive land). In this decision, we call this criterion "the benefit to New Zealand criterion".

The OIO advises that the relevant sensitive land is non-urban land and exceeds 5 hectares in area. If we determine under section 16(1)(e)(ii) that the overseas investment will, or is likely to, benefit New Zealand, we must therefore also consider, under section 16(1)(e)(iii) as the sixth criterion, whether that benefit will be, or is likely to be, substantial and identifiable. We must be satisfied on this matter in order for section 16(1)(e)(iii) to be met.

The seventh criterion requires that if the relevant land is or includes farm land, the farm land has been offered for acquisition on the open market to non overseas persons, unless the overseas investment is exempted from this criterion. The Applicant in this case is seeking such an exemption.

Benefit to New Zealand criterion

Under section 17(1) of the Act we, as relevant Ministers:

- must consider all of the factors in section 17(2) to determine which factor or factors (or parts of them) are relevant to the overseas investment;
- must determine whether the benefit to New Zealand criterion is met having regard to the relevant factors and whether that benefit will be or is likely to be substantial and identifiable;
- may, in doing so, determine the relative importance to be given to each relevant factor (or part).

Applying the factors to the application

There are 11 factors, or part factors, under section 17(2), and (pursuant to section 17(2)(g)) a further eight factors in Regulation 28 of the Overseas Investment Regulations 2005 (the Regulations). The full text of section 17(2) and Regulation 28 is set out in the Appendix to this decision. The 19 factors are referred to collectively as "factors".

The OIO's analysis concluded that in relation to this application:

- three of the factors are not applicable (indicated by "N/A", which we interpret to mean are not relevant to this application);
- two of the factors are given a positive assessment (indicated by a tick);
- six of the factors are given a negative assessment (indicated by a cross); and
- eight of the factors were assessed as "unknown".

The OIO has not given us advice as to the relative importance to be given to each relevant factor and we have made our own assessment of relevance as outlined below.

Not applicable factors

We have interpreted references in the OIO advice to "N/A" to mean that, in the OIO's view, that factor is not relevant to this overseas investment application. We agree that the factors relating to indigenous flora and fauna (section 17(2)(b)) and significant habitats of wildlife and game (section 17(2)(c)) are not relevant to this overseas investment.

We also consider that the factor relating to increased processing of primary products (section 17(2)(a)(vi)) (which the OIO gave a negative assessment) is not of material relevance to this overseas investment.

The relevant factors

We are therefore left with 16 factors, all of which we consider to be relevant to this overseas investment application. We have considered and analysed the information provided to us by the OIO, including the application itself.

The relevant factors (which we have considered as set out in the Act or Regulations but which for ease of reference we have summarised below), our ranking of their relative importance, and our assessment of each of them follows.

Low to no importance factors

We have determined four factors to be either of low or no importance in relation to this overseas investment:

- Regulation 28(d) - consequential significant NZ investment: (OIO *cross*)
- Regulation 28(e) - previous investment of benefit to NZ: (OIO *cross*)
- Regulation 28(g) - enhancing ongoing viability of other investments in NZ: (OIO *cross*)
- Section 17(2)(f) - whether foreshore, seabed, riverbed or lakebed has been offered to the Crown as special land: (OIO *N/A*)

We accept the OIO's assessment that there is insufficient evidence that:

- granting the application for consent will, or is likely to result in other significant investment in terms of Regulation 28(d);
- previous investments by the Applicant have been, or are, of benefit to New Zealand in terms of Regulation 28(e); and
- the investment will, or is likely to, enhance the ongoing viability of other overseas investments by the Applicant in terms of Regulation 28(g).

We note that AIAL has applied for a waiver of the requirement to offer back its special land (section 17(2)(f)). The OIO has advised that the obligation to offer back special land under Regulation 13 is only triggered because of the amalgamation proposal and that application for the waiver was made for the avoidance of doubt. For the purposes only of assessing whether the application meets the benefit to New Zealand criterion, we assume that the factor is complied with as if Regulation 15(2) applied.

Medium importance factors

We have determined three factors to be of medium importance in relation to this overseas investment:

- Section 17(2)(d) - protecting or enhancing historic heritage (OIO *tick*)
- Section 17(2)(e) - providing or improving walking access (OIO *tick*)
- Regulation 28(b) - investor a key person in key industry abroad (OIO *unknown*)

Sections 17(2)(d) and 17(2)(e) factors

We accept the OIO's advice that there is evidence in the application that there are adequate mechanisms in place for protecting historic heritage and adequate mechanisms in place for providing public walking access in terms of sections 17(2)(d) and 17(2)(e). The Applicant has stated that it will support these measures.



However, we consider these factors to be of only medium importance as the protection, enhancement, provision or improvement involved is already being achieved, or planned to be achieved, by AIAL and is the subject of external requirements under the local District Plan and/or the Historic Places Act 1993. The status quo would merely be confirmed if the application were granted.

Regulation 28(b)

We do not think that the OIO advice, or the information provided by the Applicant, is particularly helpful in assessing the investment in terms of Regulation 28(b). Neither, given the time available to us (if we are to meet the Applicant's deadline), do we have other information that enables us to conclude that the Applicant is key person in a key industry of a country with which New Zealand will, or is likely to, benefit from having improved relations.

High importance factors

We have determined nine factors to be of high importance in relation to this overseas investment:

Section 17(2)(a)(i) - creation or retention of jobs: (OIO *unknown*)

Section 17(2)(a)(ii) - introduction of new technology or business skills: (OIO *cross*)

Section 17(2)(a)(iii) - increased export receipts: (OIO *unknown*)

Section 17(2)(a)(iv) - more competition; efficiency, productivity, domestic services: (OIO *unknown*)

Section 17(2)(a)(v) - additional investment for development purposes: (OIO *unknown*)

Regulation 28(a) - consequential benefits to New Zealand: (OIO *cross*)

Regulation 28(c) - NZ image overseas, trade, international obligations: (OIO *unknown*)

Regulation 28(f) - supporting significant government policy or strategy: (OIO *unknown*)

Regulation 28(h) - NZ control of strategically important infrastructure: (OIO *unknown*).

Discussion of high importance factors

The OIO advises us that all of the factors that we have determined to be of high importance are assessed negatively or were not able to be conclusively assessed. We comment on each of the nine high importance factors below.

Section 17(2)(a)(i)

We agree that it is unknown whether the overseas investment will or is likely to result in the creation of new jobs or whether it will result in the retention of existing jobs that would or might otherwise be lost. It is uncertain whether the Applicant would be able to influence the AIAL board in initiatives that are claimed to result in new jobs given its restricted voting rights. Also, projects planned by AIAL that could create new jobs might occur irrespective of the proposed investment – a prospect the OIO regards as likely.

Section 17(2)(a)(ii)

We agree with the OIO's advice that the Applicant has not identified whether any technology or business skills it may bring to New Zealand are likely to be "new" to New Zealand.

Section 17(2)(a)(iii)

The OIO considers that it is uncertain whether the Applicant will be able to influence the AIAL board in relation to this factor, given its restricted voting rights in order to implement the proposed initiatives. In any event, however, it is not clear that the investment itself is likely to result in increased export receipts for New Zealand exporters.

Section 17(2)(a)(iv)

The Applicant has outlined a number of opportunities in relation to this factor. However, it is not known whether the initiatives proposed by the Applicant will be implemented. We are not persuaded that the investment will, or is likely to result in added market competition, greater efficiency or productivity, or enhanced domestic services in New Zealand.

Section 17(2)(a)(v)

The Applicant noted in its application that it is supportive of proposed AIAL developments in relation to Auckland International Airport and forecasts that there will be additional capital spending as a result of their own initiatives. We accept the OIO's assessment that based on the information provided by the Applicant it is not clear that the investment will, or is likely to, result in the introduction into New Zealand of additional investment for development purposes.

Regulation 28(a)

We do not consider that the Applicant has shown that as a result of the overseas investment there will, or is likely to, be other consequential benefits to New Zealand in terms of Regulation 28(a).

Regulation 28(c)

We are not satisfied that refusing the application for consent will, or is likely to, adversely affect New Zealand's image overseas or its trade or international relations or result in New Zealand breaching any of its international obligations. We note the OIO advice that other countries also have foreign investment restrictions, including on airport ownership.

Regulation 28(f)

The Applicant has identified a number of initiatives which the Applicant claims will advance or give effect to a significant government strategy. The OIO's analysis is that it is unknown whether the Applicant will be able to influence the AIAL board given its restricted voting rights in order to implement the proposed initiatives. Accordingly, we agree and consider that it is not clear that this overseas investment itself will, or is likely to, give effect to or advance a significant Government policy or strategy.

Regulation 28(h)

The Applicant has submitted that the restriction of its voting rights confirms that it will not control AIAL, and the Applicant's investment will assist New Zealand to maintain New Zealand control of Auckland Airport (and its infrastructure on sensitive land). The OIO's analysis is that it is unknown whether the Applicant's proposed investment is likely to assist New Zealand to maintain New Zealand control of strategically important infrastructure on sensitive land.

We consider that the Applicant's investment is not likely to assist maintenance of New Zealand control of this strategically important infrastructure, and that would be particularly so if the Applicant's investment is taken in conjunction with potential further small acquisitions of shares by overseas investors in AIAL.

Decision on the benefit to New Zealand criterion

In approaching the overall decision on the criteria in section 16(1)(e)(ii) and (e)(iii), we note that the OIO considered that the proposed overseas investment is or is likely to benefit New Zealand having regard to the two factors in s17(2)(d) (historic heritage) and s17(2)(e) (walking access).

We consider that those two factors are of medium relative importance. They both relate to the continued maintenance of mechanisms for protecting heritage and walking access that would exist irrespective of the proposed investment.

In relation to none of the factors that we have assessed as being of high importance have we found sufficient evidence to conclude that those factors weigh in favour of us finding that the proposed investment will, or is likely to, benefit New Zealand.

Accordingly, considering all the relevant factors and on the basis of the information before us, we are not satisfied that the proposed investment will, or is likely to, benefit New Zealand (or any part of it or group of New Zealanders), in terms of section 16(1)(e)(ii). We are conscious that others may disagree. In particular, others may disagree on the basis of incoming funds arising from the sale of AIAL shares accruing to New Zealand shareholders is of such magnitude as to constitute a benefit in and of itself.

However, all new overseas investments would bring funds to New Zealand. There is no legal authority for Ministers to consider funds coming into the country as a benefit in itself, independent of evidence that the incoming funds are related to the statutory criteria and factors. However, even if we were to accept that there was such a benefit, we consider the requirement under section 16(1)(e)(iii) that the benefit will be, or is likely to be, substantial and identifiable, would clearly not be met.

Our decision

For the reasons outlined above, having had regard to the relevant factors, we are not satisfied that the benefit to New Zealand criterion is met. Even if we were to agree with the OIO's conclusion that that criterion is met, we could not agree that the benefit is substantial and identifiable. We therefore cannot be satisfied that all of the criteria in section 16 are met and in accordance with section 14(d) we must decline to grant consent to the application.

We accordingly decline to grant consent to the application.

Consequentially, it is not necessary for us to make a decision as to whether the Crown should grant the farmland advertising waiver nor it is necessary to formally issue a waiver for the requirement to offer back special land under Regulation 15.



Hon Clayton Cosgrove
Associate Minister of Finance

Date 10/4/2008



Hon David Parker
Minister of Land Information

Date 10/4/2008

Appendix

Overseas Investment Act 2005

14 Approach to criteria for consent

- (1) The relevant Minister or Ministers, in considering whether or not to grant consent to an overseas investment transaction,—
 - (a) must have regard to only the criteria and factors that apply to the relevant category of overseas investment under this subpart (subject to this section); and
 - (b) may consult with any other person or persons, as the Minister or Ministers think appropriate; and
 - (c) must grant consent if satisfied that all of the criteria in section 16 or section 18 (as the case may be) are met; and
 - (d) must decline to grant consent if not satisfied that all of the criteria in section 16 or section 18 are met.
- (2) For a transaction that is in more than 1 category of overseas investment, the relevant Ministers must have regard to the criteria that apply to all of the relevant categories.
- (3) However, if the criteria are the same, the relevant Ministers only need to consider the same criteria once (and not consider them under each relevant category).

16 Criteria for consent for overseas investments in sensitive land

- (1) The criteria for an overseas investment in sensitive land are all of the following:
 - (a) the relevant overseas person has, or (if that person is not an individual) the individuals with control of the relevant overseas person collectively have, business experience and acumen relevant to that overseas investment;
 - (b) the relevant overseas person has demonstrated financial commitment to the overseas investment;
 - (c) the relevant overseas person is, or (if that person is not an individual) all the individuals with control of the relevant overseas person are, of good character;
 - (d) the relevant overseas person is not, or (if that person is not an individual) each individual with control of the relevant overseas person is not, an individual of the kind referred to in section 7(1) of the Immigration Act 1987 (which lists certain persons not eligible for exemptions or permits under that Act);
 - (e) either subparagraph (i) is met or subparagraph (ii) and (if applicable) subparagraph (iii) are met:
 - (i) the relevant overseas person is, or (if that person is not an individual) all the individuals with control of the relevant overseas person are, New Zealand citizens, ordinarily resident in New Zealand, or intending to reside in New Zealand indefinitely;
 - (ii) the overseas investment will, or is likely to, benefit New Zealand (or any part of it or group of New Zealanders), as determined by the relevant Ministers under section 17;
 - (iii) if the relevant land includes non-urban land that, in area (either alone or together with any associated land) exceeds 5 hectares, the relevant Ministers determine that that benefit will be, or is likely to be, substantial and identifiable;
 - (f) if the relevant land is or includes farm land, either that farm land or the securities to which the overseas investment relates have been offered for acquisition on the open market to persons who are not overseas persons in accordance with the procedure set out in regulations (unless the overseas investment is exempt from this criterion under section 20).
- (2) See section 19 in relation to subsection (1)(c) and (d).

17 Factors for assessing benefit of overseas investments in sensitive land

- (1) If section 16(1)(e)(ii) applies, the relevant Ministers—
- (a) must consider all the factors in subsection (2) to determine which factor or factors (or parts of them) are relevant to the overseas investment; and
 - (b) must determine whether the criteria in section 16(1)(e)(ii) and (iii) are met after having regard to those relevant factors; and
 - (c) may, in doing so, determine the relative importance to be given to each relevant factor (or part).
- (2) The factors are the following:
- (a) whether the overseas investment will, or is likely to, result in—
 - (i) the creation of new job opportunities in New Zealand or the retention of existing jobs in New Zealand that would or might otherwise be lost; or
 - (ii) the introduction into New Zealand of new technology or business skills; or
 - (iii) increased export receipts for New Zealand exporters; or
 - (iv) added market competition, greater efficiency or productivity, or enhanced domestic services, in New Zealand; or
 - (v) the introduction into New Zealand of additional investment for development purposes; or
 - (vi) increased processing in New Zealand of New Zealand's primary products:
 - (b) whether there are or will be adequate mechanisms in place for protecting or enhancing existing areas of significant indigenous vegetation and significant habitats of indigenous fauna, for example, any 1 or more of the following:
 - (i) conditions as to pest control, fencing, fire control, erosion control, or riparian planting;
 - (ii) covenants over the land:
 - (c) whether there are or will be adequate mechanisms in place for—
 - (i) protecting or enhancing existing areas of significant habitats of trout, salmon, wildlife protected under section 3 of the Wildlife Act 1953, and game as defined in sections 2(1) of that Act (for example, any 1 or more of the mechanisms referred to in paragraph (b)(i) and (ii)); and
 - (ii) providing, protecting, or improving walking access to those habitats by the public or any section of the public:
 - (d) whether there are or will be adequate mechanisms in place for protecting or enhancing historic heritage within the relevant land, for example, any 1 or more of the following:
 - (i) conditions for conservation (including maintenance and restoration) and access:
 - (ii) agreement to support registration of any historic place, historic area, wahi tapu, or wahi tapu area under the Historic Places Act 1993:
 - (iii) agreement to execute a heritage covenant:
 - (iv) compliance with existing covenants:
 - (e) whether there are or will be adequate mechanisms in place for providing, protecting, or improving walking access over the relevant land or a relevant part of that land by the public or any section of the public:
 - (f) if the relevant land is or includes foreshore, seabed, or a bed of a river or lake, whether that foreshore, seabed, riverbed, or lakebed has been offered to the Crown in accordance with regulations:
 - (g) any other factors set out in regulations.



18 Criteria for overseas investments in significant business assets

- (1) The criteria for an overseas investment in significant business assets are all of the following:
- (a) the relevant overseas person has, or (if that person is not an individual) the individuals with control of the relevant overseas person collectively have, business experience and acumen relevant to that overseas investment:
 - (b) the relevant overseas person has demonstrated financial commitment to the overseas investment:
 - (c) the relevant overseas person is, or (if that person is not an individual) all the individuals with control of the relevant overseas person are, of good character:
 - (d) the relevant overseas person is not, or (if that person is not an individual) each individual with control of the relevant overseas person is not, an individual of the kind referred to in section 7(1) of the Immigration Act 1987 (which lists certain persons not eligible for exemptions or permits under that Act).
- (2) See section 19 in relation to subsection (1)(c) and (d).

Overseas Investment Regulations 2005

28 Other factors for assessing benefit of overseas investment in sensitive land

The other factors that are referred to in section 17(2)(g) of the Act for assessing whether an overseas investment in sensitive land will, or is likely to, benefit New Zealand are as follows:

- (a) whether the overseas investment will, or is likely to, result in other consequential benefits to New Zealand (whether tangible or intangible benefits (such as, for example, additional investments in New Zealand or sponsorship of community projects)):
- (b) whether the relevant overseas person is a key person in a key industry of a country with which New Zealand will, or is likely to, benefit from having improved relations:
- (c) whether refusing the application for consent will, or is likely to,—
 - (i) adversely affect New Zealand's image overseas or its trade or international relations:
 - (ii) result in New Zealand breaching any of its international obligations:
- (d) whether granting the application for consent will, or is likely to, result in the owner of the relevant land undertaking other significant investment in New Zealand:
- (e) whether the relevant overseas person has previously undertaken investments that have been, or are, of benefit to New Zealand:
- (f) whether the overseas investment will, or is likely to, give effect to or advance a significant Government policy or strategy:
- (g) whether the overseas investment will, or is likely to, enhance the ongoing viability of other overseas investments undertaken by the relevant overseas person:
- (h) whether the overseas investment will, or is likely to, assist New Zealand to maintain New Zealand control of strategically important infrastructure on sensitive land.

