

The Treasury

Overseas Investment Act 2005 – Phase One Review Policy Advice (2017/18) Information Release

March 2019

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- [2] 9(2)(a) - to protect the privacy of natural persons, including deceased people
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Reference: T2018/521 IM-5-1-1

Date: 5 March 2018

To: Associate Minister of Finance (Hon David Parker)

Deadline: None



Aide Memoire: Overseas Investment Amendment Bill: Treatment of permanent resident visa holders and resident visa holders

The purpose of this aide memoire is to summarise options and issues relevant to the treatment of permanent resident visa holders (PRVs) and resident visa holders (RVs) under the Overseas Investment Amendment Bill (the Bill). On 2 March we provided a Treasury Report (T2018/441) recommending a change to the Bill's settings for RVs.

Background

The Bill provides two different pathways that affect the eligibility of PRVs and RVs to acquire residential land:

- *Ordinarily resident in New Zealand definition* – A person who meets the definition of 'ordinarily resident' in New Zealand is exempt from requirements to obtain consent. The Bill provides for PRVs to be ordinarily resident if they have resided in New Zealand for the past 12 months and been present in New Zealand for at least 183 days in the past 12 months (the 12 months/183 days test).
- *Commitment to Reside in New Zealand pathway* – PRVs and RVs can obtain consent if they meet requirements under the Commitment to Reside in New Zealand pathway (i.e. they declare their intention to be present in New Zealand for 183 days each 12 months, and to be a New Zealand tax resident within 12 months of consent).

Any changes to the definition of ordinarily resident will have flow on implications for the type and number of overseas persons that would rely on the Commitment to Reside in New Zealand pathway.

Appendix Two summarises the consent pathways in the Bill.

Submissions

The key arguments raised in submissions were:

- RVs should also be treated as ordinarily resident if they meet the 12 months/183 days test. This is on the basis that there is little difference in the entitlements PRVs and RVs, and therefore they should be treated the same.

- There should be no requirement for PRVs to reside in New Zealand to meet the 12 months/183 days test. This is because, under the requirements to obtain a visa, a PRV has already shown a commitment to New Zealand.
- Migrants who obtain residence under the Investor visa categories should be able to acquire residential land even if they do not meet ordinary requirements. This is on the basis that investor migrants have demonstrated their commitment to New Zealand through satisfaction of immigration rules and make significant contributions to their communities (through jobs, investment, philanthropy etc).

Issue One: Differentiation between permanent resident visas and resident visas

As Box One outlines, New Zealand law generally treats PRVs and RVs equally. One point of difference is that a PRV will have already demonstrated 'commitment to New Zealand' (e.g. by living in New Zealand for at least 184 days in each of the previous two years).¹

Box One: What is the difference between a *permanent resident visa* and a *resident visa*? Not much

A "residence class visa" is a *resident visa* or a *permanent resident visa*.

They both entitle the holder to:

- live, work and study in New Zealand indefinitely
- access to free healthcare, vote in elections (if the visa holder has lived in New Zealand for more than one year),
- access to benefits such as the Jobseekers Allowance and New Zealand Superannuation (subject to other criteria).

The main difference in entitlements is that *resident visas* have travel conditions that only allow the person to re-enter New Zealand as a resident until a certain date. In contrast, a *permanent resident visa* allows indefinite re-entry to New Zealand. *Resident visa holders* may also have other conditions on their visa, for example, to maintain an investment or remain in a particular job.

The majority of first time residents (over 80%) are granted a *permanent resident visa* within their first five years.

A *permanent resident visa* is not a required step in order to get citizenship.

¹ For the purpose of the Immigration Rules, "a commitment to New Zealand" for the purposes of obtaining a *permanent resident visa* can be shown by one of the following: Has lived in New Zealand for at least 184 days in each of the past two years; Is a New Zealand tax resident, and been resident for 41 days or more in each of the past two years; Has invested \$1,000,000 in New Zealand for the past two years; Successfully established a business in New Zealand that has been trading successfully and benefiting New Zealand in some way for the past year; They have been in New Zealand as a resident for a total of at least 41 days in the past 12 months and have established a base in New Zealand (eg they own and maintain a family home or have worked full time in New Zealand).

Issue Two: Consistency between 12 months/183 days test and tax residency

If a person meets the 12months/183 days test to be ordinarily resident, they will also be a New Zealand tax resident.

A person is a New Zealand tax resident if they:

- are in New Zealand for more than 183 days in any 12-month period and haven't become a non-resident; or
- have a 'permanent place of abode' in New Zealand; or
- are away from New Zealand in the service of the New Zealand government.

For the Bill, the 12months/183 days test was established for determining who is 'ordinarily resident'. This provides a more robust test than tax residency and addresses the risk that a person may easily claim tax residency on the basis having established a 'permanent place of abode' in New Zealand. The 12 months/183 days test also provides a more-certain, bright line requirement compared to the tax residency test.

On 23 January 2018, Cabinet decided that applicants for consent under the Commitment to Reside in New Zealand pathway would need to declare their intention to be a New Zealand tax resident within 12 months of obtaining consent (CAB-18-MIN-0004). This declaration was relevant as an additional measure of a person's forward-looking commitment to reside in New Zealand, particularly because some applicants under this pathway could have only recently arrived in New Zealand. However, an additional tax residency requirement would not be necessary for the definition of 'ordinarily resident', because anyone who has previously been present in New Zealand in accordance with the 12 months / 183 days test would automatically be a tax resident.

Issue Three: Investor visas

We continue to be of the view that providing flexibility for investor migrants is difficult to reconcile with the objective that only people with a commitment to reside in New Zealand should be able to acquire residential land. If you wished to address concerns for Investor visa holders, changes could be made to the Commitment to Reside in New Zealand pathway.

Options for treatment of permanent resident visa holders and resident visa holders

Appendix One outlines options for the treatment of PRVs and RVs, reflecting different settings for the definition of ordinarily resident and the Commitment to Reside in New Zealand pathway.

We recommend expanding the definition of 'ordinarily resident' to also include RVs who meet the 12 months/183 days test (T2018/441).

Even if you decide to expand the definition of 'ordinarily resident' to also include RVs who meet the 12 months/183 days test, we consider it is important to retain the Commitment to Reside in New Zealand pathway. Without that pathway, there would be risks if new migrants intending to reside in New Zealand could not acquire a house in which to live. This could work against the objectives of the immigration system including attracting skilled migrants.

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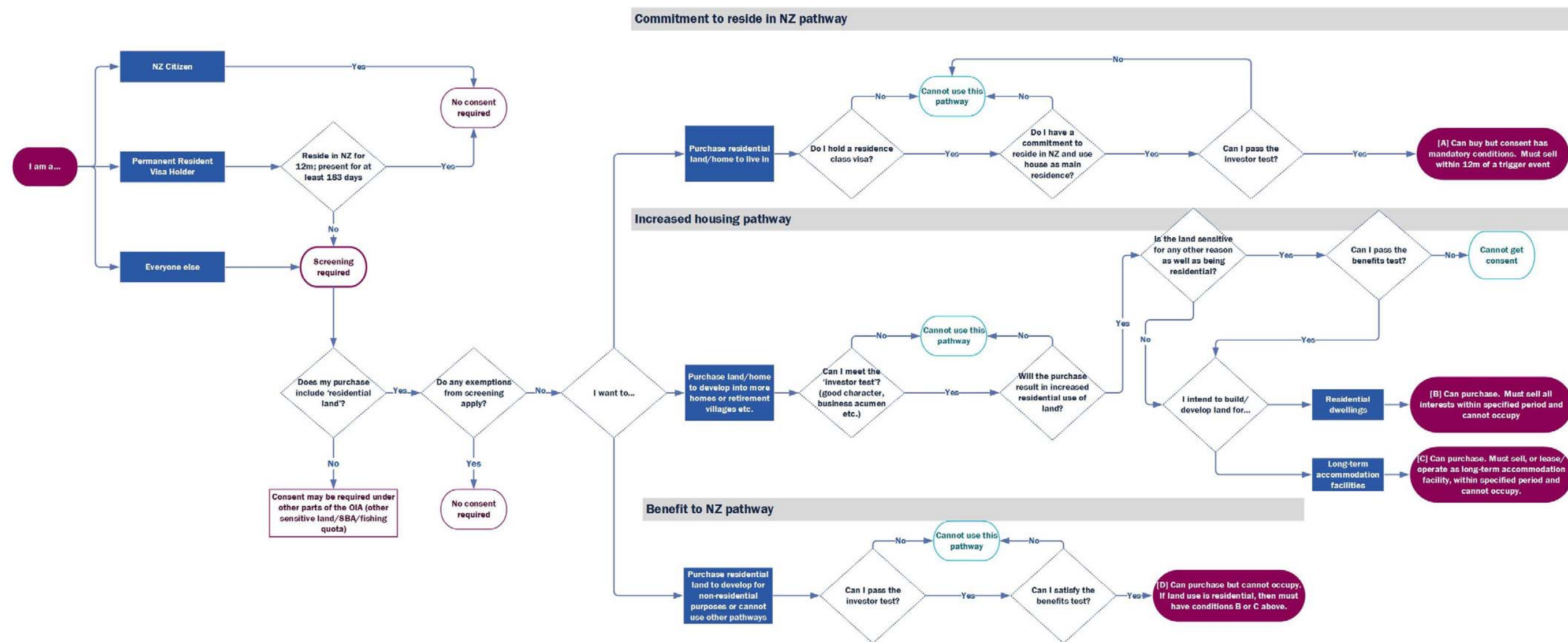
Appendix One:

Options for treatment of permanent resident visa holders and resident visa holders

Note: the table makes a distinction between persons who have resided in NZ for the past year and persons who have not resided in NZ for the past year. This is based on the 12 months/183 days test.

Option	How difference classes are treated under each option				Principles this option reflects
	PRVs who have resided in NZ for the past year	PRVs who have not resided in NZ for the past year	RVs who have resided in NZ for the past year	RVs who have not resided in NZ for the past year	
Option 1: Bill as introduced	No consent required (ordinarily resident)	Must demonstrate commitment to reside and comply with conditions			Only PRVs who have resided here for the past year are presumed to be committed to New Zealand
Option 2: Treat RVs the same as PRVs (Recommended)	No consent required (ordinarily resident)	Must demonstrate commitment to reside and comply with conditions	No consent required (ordinarily resident)	Must demonstrate commitment to reside and comply with conditions	PRVs and RVs are to be treated the same . A PRV or RV is presumed to be committed to New Zealand if they have resided here for the past year
Option 3: Exempt all PRVs and RVs that meet 12m/183d	No consent required (ordinarily resident)			Must demonstrate commitment to reside and comply with conditions	Would reflect that the commitment of PRV holders has already been assessed through the Immigration rules.
Option 4: Exempt all PRVs (Raised by submitters)	No consent required (ordinarily resident)		Must demonstrate commitment to reside and comply with conditions		PRVs and RVs are to be treated differently . Would reflect that the commitment of PRV holders has already been assessed, but would not provide an opportunity for RV holders to be 'ordinarily resident'
Option 5: Exempt all PRVs and RVs (Raised by submitters)	No consent required (ordinarily resident)				Would reflect that all PRVs and RVs have been assessed through the immigration system.

Appendix Two: Summary of new consent pathways



Do I need consent?

Residential land

- Land that has a property category of residential or lifestyle in, or for the purpose of, the relevant district valuation roll; and
- includes a residential flat in a building owned by a flat owning company.

Exemptions

- The Government intends to exempt Australian citizens, and Australian permanent residents that reside in NZ for 12m and present for at least 183 days.
- Existing exemptions set out in Part 2 of the Overseas Investment Regulations 2005 e.g. relationship property.
- Ministers or the OIO can also grant exemptions

Investor Test

Existing OIA test. Involves an assessment of the investor's:

- good character;
- business experience and acumen;
- financial commitment;
- eligibility for a visa or entry to New Zealand under the Immigration Act

Benefits Test

Existing OIA test. Involves an assessment of whether the investment would benefit New Zealand (or any part of it or group of New Zealanders). Involves an assessment against 21 factors set out in the OIA and the Overseas Investment Regulations.

Pathways to obtain consent

Commitment to reside in NZ pathway

- Since the first reading of the Bill, Cabinet has decided the following details of this pathway:
- Eligibility for the pathway: permanent resident visas and all resident visas
- Test to be granted consent: intend to be present in New Zealand for at least 183 days in each 12-month period from the date of consent; and intend to be a tax resident in New Zealand within 12 months from the date of consent and continue to be a tax resident while they own the relevant land.
- Trigger events for disposal of property (and resolution): expiry or cancellation of a visa; and absence from NZ for more than 183 days in 12 months, except if present for 183 days in 12 month period following trigger event or satisfy Minister/OIO that have not served commitment to reside in NZ.

Cabinet has also decided that:

- The elements of this pathway above should be set out in the Bill and not regulations as is currently proposed by the Bill; and
- Applicants under this pathway should not be subject to the 'investor test' if the residential land is not sensitive for any other reason.

Long-term accommodation facility

- a retirement village or rest home;
- student accommodation;
- any other facility operated for long-term accommodation for residential purposes with provision of assistance for persons who dwell there;
- does not include hospital; a hotel, motel, inn, hostel, or boarding house; a camping ground; or any facility set out in regulations as a an "excluded accommodation facility".

Specified Period

Will be set on a case-by-case basis in individual consents and will provide sufficient time to complete consented activities.