

Chair

CABINET ECONOMIC GROWTH AND INFRASTRUCTURE COMMITTEE

SIMPLIFYING THE OVERSEAS INVESTMENT ACT

Proposal

1. This paper proposes changes to the screening process for overseas investments in order to simplify the regime and reduce compliance costs while ensuring that the most sensitive New Zealand assets are adequately protected.

EXECUTIVE SUMMARY

2. The Overseas Investment Act regulates investments by overseas persons in significant business assets, sensitive land and fishing quota.

3. One of the six pillars of the Government’s medium-term economic agenda is improving the regulatory environment for business [CAB Min (09) 24/7 refers]. The complexity of the overseas investment regime has increased since it was amended in 2005. While the proportion of investments declined has remained low, compliance costs for investors – both time cost and financial cost – have increased significantly. Some specific decisions, such as Auckland Airport, have created regulatory uncertainty. In addition, the regime screens some investments that are not particularly sensitive, such as land adjoining local parks.

4. I propose a number of amendments to the Overseas Investment Act. The table below outlines two illustrative packages of changes, though individual changes can be decided largely independently.

Common changes (both packages)	
<ul style="list-style-type: none"> • Narrow the scope of sensitive land that is screened by raising the threshold for non-urban land from 5 to 10 hectares, and exclude land adjoining local parks and reserves • Simplify the process of offering special land to the Crown • Remove the ability to make substantive policy change by regulation • Introduce a substantial harm test to allow Ministers, in exceptional circumstances, to decline an investment if it is likely to cause substantial harm, and remove the current strategic assets factor • Exempt some trustee company and portfolio entity investments 	
Package 1 (more change)	Package 2 (less change)
<ul style="list-style-type: none"> • Replace the current benefit test for sensitive land with a narrow benefit test • Increase the screening threshold of significant 	<ul style="list-style-type: none"> • Replace the current benefit test for sensitive land with a simplified benefit test, close to the status quo • For all other areas, maintain the status quo

business investments from \$100m to \$150m <ul style="list-style-type: none"> • Remove the requirement to offer riverbed to the Crown before sale to an overseas person • Remove screening for investors who increase their level of ownership/control in an investment that was previously screened • Exempt New Zealand linked repeat investors 	
Expected impacts	
<ul style="list-style-type: none"> • Application numbers reduced by around 44 per year (around 20%) resulting in investor compliance cost savings of between \$4.3 and \$7.6 million per annum. • Investor effort to prepare applications reduced by around 40-50% and OIO effort to assess by 40-45%. 	<ul style="list-style-type: none"> • Application numbers reduced by around 28 per year (around 15%) resulting in investor compliance cost savings of between \$3.8 million and \$5.1 million p.a. • Investor effort to prepare applications reduced by around 15-20% and OIO effort to assess by 10-15%.

5. The five additional changes in the 'more change' package and the substantial harm test are outlined in the below along with the associated judgements:

Proposed change	Main judgements
Sensitive land: hurdle Change the current 'benefit' test for investments in sensitive land to either a 'targeted benefit' or 'narrow benefit' test	<ul style="list-style-type: none"> • The key trade-off is between the level of discretion Ministers have to require overseas investors to meet higher standards than domestic investors and the compliance effort created for investors. • An important consideration is the extent to which the nationality of investor raises concerns over how they will behave in relation to sensitive features and whether protections are required over and above those for domestic investors.
Business assets: scope Increase the screening threshold of significant business investments from \$100m to \$150m	<ul style="list-style-type: none"> • In terms of protections, there is a judgement about what screening threshold equates to capturing investments (and only those investments) that are considered genuinely 'significant' to New Zealand. • <i>[Withheld disclose prematurely decisions to change or continue policies relating to the entering into of overseas trade agreements]</i>
Offer back of special land to the Crown Remove the requirement to offer riverbed to the Crown before sale to an overseas person	<ul style="list-style-type: none"> • The key trade-off is between the value placed simply on the ownership of riverbed, and the complexity and compliance costs the offer back procedure requires. • Importantly, the issues of public access can be addressed, to varying degrees, through the 'benefit' tests.
Increases in ownership/control once approved Remove screening for investors who increase their level of ownership/control in an investment that was previously approved	<ul style="list-style-type: none"> • The key considerations are the compliance costs caused by screening increases in existing ownership shares and any concerns raised by moving from a minority to a majority stake without screening.
Definition of an overseas person: exemptions Exempt New Zealand linked repeat investors	<ul style="list-style-type: none"> • The main judgement to make is whether firms with strong links to New Zealand are likely to act in a similar way to New Zealand controlled firms. • Exemptions would be bound in under some FTAs and thus are not able to be reversed. However this is low risk since only a few investors would be exempt.
Strategic assets: Replace current factor with a 'substantial harm test'	<ul style="list-style-type: none"> • The key considerations are the likelihood that there will be investments that raise concerns that cannot be addressed under the current screening regime. • Providing definitions and caveats on the use of any new test, investor certainty is improved, but at a cost of less flexibility and discretion for Ministers.

6. I recommend we agree to package one or something close to it. The reduction in compliance costs and increased certainty it provides for investors would be a significant improvement to the regime. At the same time, the regime would ensure that screening remains for the most sensitive New Zealand assets.

BACKGROUND

About the Act

7. The Overseas Investment Act 2005 (“the Act”) regulates investments by overseas persons in sensitive New Zealand assets. Broadly, an “overseas person” is an individual who is not a citizen or ordinarily resident, or a business that is 25% or more owned or controlled by individuals who are overseas persons.

8. Three categories of sensitive assets are covered by the regime: significant business assets, sensitive land and fishing quota. Significant business investments by overseas investors of over \$100 million are screened. Investors must show that they have business acumen and experience, financial commitment and good character (the ‘investor test’).

9. Overseas investments in land are screened if the land is considered sensitive under the Act. Examples include non-urban land exceeding five hectares (“non-urban land”), any foreshore and seabed, land on certain islands, and land held for conservation purposes. Investors must pass the investor test and must also demonstrate that the investment will benefit New Zealand (assessed against a number of factors), and, in the case of non-urban land, that the benefit will be ‘substantial and identifiable’.

About the review

10. In February 2009 the Government agreed to a regulatory review programme for this year, which includes reviewing the Act and Overseas Investment Regulations 2005 [CAB Min (09) 6/5A refers]. In July 2009 the Government agreed to adopt a medium-term economic agenda based on six pillars [CAB Min (09) 24/7 refers]. Improving the regulatory environment for business is one of these pillars, and the review of the Act is one component.

11. Aspects of the screening regime that are outside the scope of the review include: fishing quota (covered by the Fisheries Act 1996), and organisational and implementation issues.

12. The initial review proposals were considered by Cabinet in August [CAB Min (09) 27/12 refers]. Since then officials have undertaken further analysis and consultation. The revised proposals contained in this paper differ from the previous one in the following ways:

New proposals added	<ul style="list-style-type: none">• Exemptions for New Zealand linked investors, and some trustee company and portfolio entity investments where the underlying beneficiaries are New Zealanders• Improvements to the process for offering special land to the Crown
Proposals removed	<ul style="list-style-type: none">• Removing the requirement to advertise farmland on the open market• Changes to the purpose of the Act• Removing land adjoining wahi tapu or historic heritage from screening and narrowing the definition of non-urban land
Proposals altered	<ul style="list-style-type: none">• For the offer back of special land to the Crown there is now a choice between removing riverbed only or no change (previously the proposal was to remove the requirement to offer back all types of special land)
Proposals worked up in more detail	<ul style="list-style-type: none">• Substantial harm test (previously called the national interest reserve power)• Sensitive land hurdle (more options have been developed in the RIS and choices are provided in the Cabinet paper)

COMMENT

Problem definition

13. I consider that the overseas investment screening regime is imposing costs on investors over and above what is necessary to protect New Zealand's sensitive assets. This is both inefficient and also likely to be deterring investment into New Zealand. There is anecdotal evidence that the costs and uncertainties associated with the regime are making overseas investors cautious about investing in New Zealand, or, in some cases, putting them off completely. Given New Zealand's reliance on foreign capital, I regard it as timely and important to ensure that the Act is made as simple as possible, while ensuring that sensitive assets continue to be protected.

14. There are three main characteristics of the screening regime that are causing this problem:

- the complexity and cost of preparing and assessing applications;
- the uncertainty the Act creates for investors; and
- the costly conditions of consent often imposed on investors.

Complexity and cost

15. The complexity of the application process creates large compliance costs for investors in terms of understanding the Act and preparing investment applications. These costs include the time taken to prepare applications, the cost of delays to business plans while applications are prepared and considered, and the financial cost of legal fees and consultants.

16. These problems are most acute for sensitive land screening. Land applications make up 85% of all applications since 2001/02. They are large and complex, requiring 27 factors to be addressed, and in the past have taken on average 70 days to assess, though the target is now 50 days. There are also some land types which are screened that are not particularly sensitive, which adds unnecessary cost for investors

17. The table below provides an indication of these compliance costs and is based on information from the Overseas Investment Office and law firms who represent investors.

*Application costs**

	Business applications	Land applications**
Time costs		
Time to prepare application	~5 days	3-6 weeks
Time to assess application***	40 days	50 days
Dollar costs		
Application fees	\$13,000	\$19,000-22,000
Legal fees**	\$15,000-\$20,000	\$25,000-\$200,000
Other expertise** (eg surveyors, consultants)	N/A	minimal to \$100,000

*Cost per application, costs are estimates only and vary by the complexity of the application.

**Highly dependent on complexity of the application

***OIO's targeted time – recent assessment times have been below this.

Uncertainty

18. The second main problem with the regime is the uncertainty it creates for investors. For example, Ministers' can change by regulation the factors which must be used to assess an investment in sensitive land, used most recently in relation to Auckland Airport. Uncertainty is also created by Ministers' ability to determine whether the factors have been 'adequately' addressed by the investor.

Conditions of consent

19. Ministers' ability to impose conditions on an investment in sensitive land in order to gain consent is an additional source of compliance costs. Some of these conditions go well above what a domestic investor may be required to do, and, while they can create additional benefits for New Zealand, they also impose costs for investors.

International comparisons

20. New Zealand has a relatively restrictive screening regime compared to other OECD countries, a number of which do not have any formal investment screening. The OECD highlighted the screening regime as an area for improvement (or removal) in its 2009 economic survey of New Zealand. The table below summarises New Zealand's openness to overseas investment as measured by a variety of studies:

Index	What it measures	New Zealand ranking
OECD's FDI Regulatory Restrictiveness Index	Extent of equity restrictions, screening requirements and operational restrictions on foreigners	15 th most restrictive out of 42 countries (and 10 th in the OECD)
Index of Economic Freedom	Includes a comparison of investment freedom across countries	New Zealand scored 80/100 in terms of openness, compared with an average of 48.8 over all countries
World Economic Forum Enabling Trade Report	Includes a survey-based assessment of countries' openness to foreign participation, including the business impact of rules on FDI	56 th out of 121 in terms of the business impact of FDI rules
IMD World Competitiveness Yearbook	Includes a survey-based measure of how free foreign investors are to acquire control in domestic companies	24 th most open out of 57 countries in 2009

21. I consider that the Act can be simplified, and the above compliance costs reduced, while retaining adequate protections for sensitive New Zealand assets.

Proposed changes

22. This paper has been prepared under the new Regulatory Impact Analysis process [CAB Min (09) 38/7A refers]. In particular, note that the Regulatory Impact Statement (RIS) has been prepared by Treasury and that it contains all options considered and the accompanying impact analysis. In this Cabinet paper, I set out my recommended option and the reasons for that choice. In two cases, I propose a choice between two options. In other cases split recommendations are provided where they are supported by other agencies. For the remaining proposals, this paper deliberately does not cover alternative options, so as not to duplicate what is in the RIS. This Cabinet paper is designed to be read in conjunction with the RIS.

23. This paper and the RIS include qualitative and quantitative assessments of the impact of each proposal against five criteria used throughout the review. A rating of 'high' means

the proposal is likely to have a large or significant impact, a 'medium' rating indicates a moderate impact, and a 'low' rating indicates a small or no impact.

Definition of an overseas person: exemptions (p.35 in Regulatory Impact Statement)

24. The Act allows exemptions from screening under the Act to be made for a variety of purposes to exempt specific investors or types/classes of investments. I propose to introduce two new types of exemption:

- an exemption for investors who have repeatedly invested in New Zealand and have strong links to New Zealand (such as local headquarters or incorporation); and
- an exemption for transactions where at least 75% of the underlying beneficial owners are New Zealanders but are made through certain overseas-owned trustee companies and investment funds (such as portfolio entity funds).

25. I consider that repeat investors with strong links to New Zealand, who have previously met the criteria specified under the Act, provide significant economic benefit to New Zealand. Therefore I consider that it is warranted to reduce the level of scrutiny applied to their investments, subject to their meeting a number of specified criteria demonstrating the strength of their links to New Zealand and examining their ownership and control.

26. A number of safeguards would be in place, including an application process that allows conditions to be imposed, regular reviews by the Overseas Investment Office and the ability to revoke the exemption if an investor is acting contrary to the conditions imposed. The New Zealand linked repeat investor category would apply to a relatively small number of investors, but the exemption would have a significant impact for them in reducing the compliance costs of continuing to invest in New Zealand.

27. I consider that the rationale for screening transactions where the beneficial owners are New Zealanders is weak, since the entity making the investment is doing so on behalf of its New Zealand beneficial owners. This exemption is unlikely to have a significant impact overall, but for those investment entities making investments who have a significant proportion of New Zealand beneficial owners, the reduction in compliance costs would be significant.

Change in compliance costs	Impact on investor certainty	Impact on protections	FTA impacts	Risks
Medium - 7-10 fewer applications per year with compliance cost savings of between \$150,000 and \$900,000.	Medium – exempt investors no longer subject to review.	Low - fewer transactions are subject to review, but exempted firms and transactions are closely linked to New Zealand.	Low - There is a risk that new exemptions could not be reversed for FTA partners, but this would only apply to a minimal number of investors.	Low - avoidance mitigated by regular review. Exemptions for trustee companies may be less effective than expected if beneficiaries cannot be identified.

Significant business assets: scope (p.40 in Regulatory Impact Statement)

28. I propose that the monetary threshold for screening of significant business assets should be increased from \$100 million to \$150 million, because:

- the threshold is arguably the most visible part of the screening regime and some movement would send a positive signal to investors that New Zealand is open for business and reduce compliance costs for investors;

- a threshold of \$150 million would not substantially alter the ability to screen significant New Zealand companies;
- Australia recently raised its screening threshold from A\$100 million to A\$219 million for private business investors, so for New Zealand not to move as well could be seen unfavourably by investors; and
- some movement in the threshold would be a counterweight to including the new substantial harm test in the business hurdle (which could be seen as de-liberalising).

29. *[Withheld - disclose prematurely decisions to change or continue policies relating to the entering into of overseas trade agreements].*

Change in compliance costs	Impact on investor certainty	Impact on protections	FTA impacts	Risks
Low - around 4 fewer applications per year with compliance cost savings of around \$100,000 pa.	Low - does not impact.	Low - fewer (but less sensitive) transactions subject to review.	Medium - could not be reversed for FTA partners. <i>[Withheld - disclose prematurely decisions to change or continue policies relating to the entering into of overseas trade agreements].</i>	Low - straightforward change to implement and raises no obvious avoidance risks.

Sensitive land: scope (p.47 in Regulatory Impact Statement)

30. I propose that the definition of sensitive land be narrowed, to exclude types that are not particularly sensitive, by:

- increasing the area threshold for non-urban land from 5 to 10 hectares; and
- removing screening for land adjoining local parks and reserves (while continuing to screen land adjoining regional and national parks, wildlife reserves and government purpose reserves used for wildlife purposes).

31. My rationale for excluding the above land types is that they are less sensitive than other land captured under the Act (such as land adjoining sports and recreation fields) and that costs on investors purchasing small and less sensitive New Zealand land would be reduced. However, the change will mean that some land adjoining large local parks and reserves, such as botanic gardens, will no longer be screened. The vast majority of sensitive land types would remain unchanged and land falling in the above categories that has other sensitivities (for example, any land that adjoins the foreshore) would continue to be screened.

Change in compliance costs	Impact on investor certainty	Impact on protections	FTA impacts	Risks
Raise non-urban area threshold to 10ha				
Medium -	Low - no significant	Low - small land	Medium - could not	Low - straight forward to

approximately 10 fewer applications per year with compliance cost savings in the order of \$1.7m pa.	impact expected.	purchases will not be screened, but large purchases remain subject to review.	be reversed for FTA partners.	implement and is unlikely to have unintended effects.
Remove screening for land adjoining local parks/reserves				
Medium - up to 16 fewer applications per year, compliance cost savings around \$2.8 million.	Medium - reduced uncertainty over whether the land is subject to screening.	Low - some loss in the ability to screen investments but land <i>adjoining</i> local parks unlikely to be sensitive. National parks retained.	Medium - could not be reversed for FTA partners.	Low - there may be some local parks and reserves that are considered to be of equal sensitivity to regional parks.

Sensitive land: hurdle (p.56 in Regulatory Impact Statement)

32. I propose to replace the existing 'benefit' test for sensitive land with a simpler test. I propose a choice between two options: either the 'narrow benefit' test or the 'targeted benefit' test.

33. The main differences between the two options are that:

- the narrow benefit test provides ministerial discretion only over requiring adequate walking access;
- the targeted test also includes consideration of protection for indigenous fauna and vegetation, wildlife and historic heritage (including wāhi tapu);
- the narrow benefit test is the simplest and creates the least compliance for investors, while the targeted benefit test maintains more flexibility for Ministers to consider a range of factors.

34. Neither test would require investors to show economic benefits. As such Ministers would lose an opportunity to scrutinise investments on a case by case basis to check for economic benefit. I consider that such scrutiny is not necessary because:

- the economic benefits achieved through screening are things that businesses will do regardless (such as expanding employment or exports) because of commercial incentives, and they will not commit to doing them if it is not already in their interest; and
- general business legislation provides adequate protection where an investor's interest may not align with the national interest.

35. Relative to the status quo, both the narrow and targeted benefit tests would be simpler and more predictable for investors. Both tests remove the requirement for investments in non-urban land to meet the higher hurdle of 'substantial and identifiable' benefit. The targeted test is a relatively smaller change from the status quo and would retain a large amount of flexibility for Ministers. The narrow test is a more significant change, with greater benefits for investors but a corresponding loss of flexibility for Ministers.

36. Both tests allow Ministers to consider whether maintaining *existing* protections (e.g. a walking access easement) is sufficient to create benefit. This will assist where an asset is

being sold from one overseas investor to another and it becomes difficult to show additional benefit each time.

37. A 'simplified benefit test' is provided as a third option in the RIS, which is much closer to the status quo and includes an assessment of economic benefits. I do not consider that this option would go far enough to reduce compliance costs.

Change in compliance costs	Impact on investor certainty	Impact on protections	FTA impacts	Risks
Simplified benefit test				
Medium - the time taken to assess applications will drop by roughly 8%, although this will vary by application type. Preparation effort reduced by 15-20%.	Medium - uncertainty over whether exiting benefits can be counted is removed. Uncertainty remains over Ministers ability to weight factors on a case by case basis.	Low - the test retains Ministers' ability to impose conditions in the same areas as the status quo. "Substantial and identifiable" benefit is no longer required for non-urban land applications.	Low - New Zealand has reserved the right to alter the criteria/factors (both upwards or downwards) used to assess investments in sensitive land.	Low - the main risk is that the proposal will have less impact on compliance costs than expected because of its similarity to the current test. The proposal is unlikely to create other risks such as avoidance.
Targeted benefit test				
Medium - time taken to assess applications will drop by roughly 15% (OIO estimate). Preparation effort reduced by 30-35%.	Medium - if factors are not relevant, they do not need to be addressed. No requirement to provide 'extra' benefits elsewhere to compensate.	Medium - Ministerial discretion and oversight of economic benefits is removed, but ability to consider environmental and social factors is retained.	Low - New Zealand has reserved the right to alter the criteria (both upwards and downwards) used to assess investments in sensitive land.	Low - proposal could have less impact on compliance costs than expected. May raise concerns that there is insufficient oversight.
Narrow benefit test				
High - time taken to assess applications will drop by roughly 20% (OIO estimate). Preparation effort reduced by 35-40%.	High - uncertainty is removed, other than the level of walking access that will be required by Ministers.	High - Ministerial discretion removed across all factors other than walking access. Investors still required to identify sensitive sites.	Low - New Zealand has reserved the right to alter the criteria (both upwards and downwards) used to assess investments in sensitive land.	High - may raise concerns that there is insufficient oversight being applied to overseas investment.

Offer back of special land to the Crown (p.63 in Regulatory Impact Statement)

38. I propose to either remove the current requirement to offer riverbed to the Crown before sale to an overseas person (while maintaining the requirement for the other types of special land, namely foreshore, seabed and lakebed), or to retain this requirement for all types of special land. In either case, I propose simplifying the process, as discussed in the following section.

39. The main judgements are:

- the extent to which the Crown values ownership of riverbed *per se* as opposed to public access or usage (which is addressed separately under the benefit test in relation to walking access); and

- whether the value placed on Crown ownership of riverbed is sufficient to justify the high compliance costs faced by vendors and prospective overseas investors.

40. Removing the requirement to offer riverbed to the Crown would significantly reduce compliance costs for applications involving riverbed. Riverbed is the most common type of special land offered to the Crown and the process is the most costly, as determining ownership of riverbeds is often a difficult task. Even with the process improvements proposed below, the process would remain costly.

41. The trade-off is that the Crown would lose an opportunity to acquire ownership of riverbeds. Ownership is one way of providing for public access and usage, and active management of the bed, but these benefits could also be achieved to varying degrees under the benefit tests. Riverbed could potentially be used in Treaty Settlement negotiations but this should not be a primary reason for retaining the provision given that the land can only be used if the land happens to be sold to an overseas investor, and may cover only part of a river.

Change in compliance costs	Impact on investor certainty	Impact on protections	FTA impacts	Risks
High - removing this requirement will reduce assessment effort for applications with special land by 90% (OIO estimate). Preparation effort reduced by around 20%.	Medium - uncertainty over whether the Crown will accept the offer of riverbed is removed.	Medium - riverbed ownership can provide for public access or usage but this can also be achieved under the benefit test (walking access). Main loss is the value attributed to ownership.	Low - in FTAs to date New Zealand has reserved the right to alter the criteria (both upwards and downwards) used to assess investments in sensitive land.	Medium - public ownership and control of riverbeds is highly valued by some groups.

Process of offer back of special land to the Crown (p.67 in Regulatory Impact Statement)

42. I propose a number of changes that would resolve many of the current uncertainties with the process of offering special land to the Crown before purchase by an overseas investor. These changes would not alter the current policy intent of the offer back requirement.

43. The main reasons for the changes are that:

- the current drafting raises a number of uncertainties around the definitions of special land;
- the process of offering and acceptance of special land is not clearly specified and a number of situations are not covered; and
- the process by which the land is vesting in Crown ownership is not specified, creating administrative difficulties.

44. The changes would improve clarity of the process of offering special land, reducing the time taken to assess applications with no impact on the policy intent of the special land process.

Change in compliance costs	Impact on investor certainty	Impact on protections	FTA impacts	Risks
Medium - process improvements will reduce assessment effort for applications with special land by 5% (OIO estimate). Preparation effort reduced by around 40%.	Medium - the proposals should provide significantly greater clarity of the process of offering special land.	Low - the proposals are intended to have no impact on the policy intent of special land acquisitions.	Low - proposals are intended to have no impact on the policy intent and therefore no impact on international obligations.	Low - the main risk is that the proposals will have less impact on compliance costs than expected. The proposals are unlikely to create other risks such as avoidance.

Policy change by regulation (p.71 in Regulatory Impact Statement)

45. I propose to remove the ability to add by regulation to the factors that must be considered when assessing a sensitive land application.

46. The rationale for this proposal is that a change to the factors that investments must meet has the potential to be a significant policy change that should be made by primary legislation, subject to parliamentary scrutiny.

47. This change would improve predictability for investors by ensuring that the basis on which their investment is assessed will not change without a reasonable lead time. The trade-off is a loss of flexibility for Ministers to act quickly in response to particular investment applications. This ability was last used in 2008 with the addition of a new factor immediately prior to the considering the Canada Pension Plan Investment Board application to acquire Auckland International Airport. Similar actions would not be possible if the clause allowing this is removed. Instead legislative change would be required.

Change in compliance costs	Impact on investor certainty	Impact on protections	FTA impacts	Risks
Low - no direct impact.	High - significant improvement in certainty as assessment factors will not change at short notice.	Medium - loss of Ministerial flexibility to react quickly to particular investments or to make policy shifts.	Low - New Zealand has reserved the ability to alter the factors used to assess investments in sensitive assets.	Low - future investment may raise concerns that the benefit test cannot address. May be mitigated by the substantial harm test.

Substantial harm test (p.77 in Regulatory Impact Statement)

48. I propose to add an additional criterion to the test used to assess investments in significant business assets and sensitive land to allow the Minister of Finance to decline an investment in significant business assets or sensitive land where the investment is likely to cause substantial harm to New Zealand. This would replace the current strategic assets clause. Substantial harm would be defined so as to include public order, public health and safety and essential security interests, where the latter would encompass actions which would threaten economic capacity that is critical for New Zealand's economic well-being.

49. This criterion would be subject to a number of constraints and would replace the current 'strategic assets' factor that applies only to investments in sensitive land.

50. My rationale for proposing this additional test is that:

- the current strategic assets provision is vague, not well understood, potentially highly restrictive, and only applies to investments in sensitive land;
- I see a case for having a 'backstop' for rare and extreme circumstances but with a very high hurdle to avoid misuse; and
- the test should align as much as possible with international practice, which is the case for the substantial harm test.

51. The impact of this change would be to remove the uncertainty surrounding the current strategic assets factor in the land test while maintaining, and in the case of business assets, increasing, flexibility for Ministers. The new test may create some uncertainty for investors, but the stringent conditions that must be met for the test to be used should help mitigate this.

52. The test does involve risks:

- The deliberately high hurdle for use may mean that it is difficult to apply the test to some cases where there is an investment that creates strong public interest.
- *[Withheld - maintain the effective conduct of public affairs through the free and frank expression of opinions].*
- New Zealand's trading partners may view this test as a de-liberalising measure that goes against our commitments to not introduce new types of screening.

Change in compliance costs	Impact on investor certainty	Impact on protections	FTA impacts	Risks
Low - the investor impact is more directly related to certainty.	Medium - test provides more certainty than the status quo by defining key terms and outlining how the test is applied. However, wide scope still leaves some room for interpretation by Ministers.	Low - the test would increase coverage compared to the current strategic assets test as it covers both business and land investments and not just infrastructure assets.	Low - New Zealand has reserved the ability to alter (both upwards and downwards) the factors used to assess investments in sensitive assets.	Medium – there are risks of legal challenge, that the high hurdle may make application difficult, and that it could be seen as a de-liberalising measure.

Increases in ownership/control once approved (p.89 in Regulatory Impact Statement)

53. I propose to remove the requirement for investors to obtain consent to increase their *existing* level of ownership or control in a significant business asset or sensitive land. For example, if an overseas person is granted consent to buy a 30% stake in a significant business asset, this proposal would mean that they could then increase their stake, even to 100%, without being re-screened. At present, the only relief for overseas investors is an exemption permitting a 5% creep over a 5 year period.

54. The rationale for this change is that the investor has already met the investor test (including good character and business acumen) and the test for sensitive land if applicable. Consequently, re-screening for an increase in the investor's share of the same investment is unlikely to provide a different result. This is the case even if the investor's share increase involves them moving from being a minority to a majority shareholder.

55. It is also costly to require investors to apply for consent each time they wish to increase their share of ownership or control. This change would not remove the requirement for investors to seek consent before investing in *another* sensitive asset.

Change in compliance costs	Impact on investor certainty	Impact on protections	FTA impacts	Risks
Medium - up to 17 fewer applications per year with compliance cost savings of between \$500,000 and \$5 million.	Low - not applicable.	Low - some transactions are no longer screened, but screening provides little additional benefit.	Medium this change will be irreversible for our FTA partners.	Medium - public concerns may arise about investors moving from minority to majority stakes without screening.

Sovereign Wealth Funds (p.81 in Regulatory Impact Statement)

56. I propose that there continue to be no additional screening requirements for investments by Sovereign Wealth Funds because I consider that the existing screening process and the added substantial harm test are sufficient

Possible packages and summary of impacts

57. The changes outlined above (and the additional options in the RIS) are largely independent, and can be adopted separately. As such, there is a wide range of possible packages that could be adopted. For illustrative purposes, the table below outlines two possible packages.

58.

Common changes (both packages)	
<ul style="list-style-type: none"> Narrow the scope of sensitive land that is screened by raising the threshold for non-urban land from 5 to 10 hectares, and exclude land adjoining local parks and reserves Simplify process of offering special land to the Crown Remove the ability to make substantive policy change by regulation Introduce a substantial harm test to allow Ministers, in exceptional circumstances, to decline an investment if it is likely to cause substantial harm, and remove the current strategic assets factor Exempt some trustee company and portfolio entity investments 	
Package 1 (more change)	Package 2 (less change)
<ul style="list-style-type: none"> Replace the current benefit test for sensitive land with a narrow benefit test Increase the screening threshold of significant business investments from \$100m to \$150m Remove the requirement to offer riverbed to the Crown before sale to an overseas person Remove screening for investors who increase their level of ownership/control in an investment that was previously screened Exempt New Zealand linked repeat investors 	<ul style="list-style-type: none"> Replace the current benefit test for sensitive land with a simplified benefit test, close to the status quo For all other areas, maintain the status quo

59. The expected impact of the packages are summarised in the table below in aggregate terms. Care needs to be taken in adding together the expected impacts because of double counting – for example creating new investor exemptions would remove some applications that would also be removed by changing the scope of sensitive land. Totals have been reduced by a factor of 20% as a result, although this is subject to uncertainty.

	Package 1 (more change)	Package 2 (less change)
Change in compliance costs	The proposals are expected to reduce application numbers by between 44 per year (around 20%), with total compliance cost savings of between \$4.3 million and \$7.6 million per annum. As well as reducing application numbers, the effort to prepare and assess applications is expected to drop by around 40-50% for investors and 40-45% for the OIO.	The proposals are expected to reduce application numbers by around 28 (around 15%), with total compliance cost savings of between \$3.8 million and \$5.1 million per annum. The effort to prepare applications reduced by around 15-20% and OIO effort to assess applications reduced by around 10-15%.
Impact on investor certainty	The proposals are expected to result in a moderate improvement in investor certainty. In general the proposals will improve certainty but the addition of the substantial harm test will create some additional uncertainty (but is an improvement relative to the existing 'strategic assets' factor).	The proposals are expected to result in a small improvement in investor certainty due to the removal of the ability to make policy change by regulation. However, the addition of the substantial harm test will create some additional uncertainty.
Impact on protections	The proposals are expected to have a moderate to high impact on existing protections offered by the Act. Depending on the preferred option for the sensitive land hurdle, Ministerial discretion to apply conditions to investments could be significantly reduced.	The proposals are expected to have a low impact on existing protections. The changes to the land scope are minimal and the simplified benefit test for sensitive land is close to the status quo.
FTA impacts	The proposals are expected to have a moderate impact in terms of FTA issues. A number will not be reversible for investments from our FTA partners, [<i>Withheld - disclose prematurely decisions to change or continue policies relating to the entering into of overseas trade agreements</i>].	The proposals are expected to have a low impact on FTA issues. The land scope changes will not be reversible for our FTA partners. [<i>Withheld - disclose prematurely decisions to change or continue policies relating to the entering into of overseas trade agreements</i>].
Risks	The proposals in general have a low to moderate risk in terms of creating avoidance or unintended effects. The two main risks are that the proposals have less effect than expected on compliance costs, and that some of the proposals may raise concerns about whether there is sufficient oversight applied to investments.	The proposals have low risks. There is a small risk that the public may have concerns about the reduction in land scope, however this is minimal. There is also a risk that investors will see the substantial harm test as a de-liberalising measure.

60. I recommend we agree to package one or something close to it. In my view, the total impact of the package one changes would be highly desirable because:

- Lowering compliance costs and increasing certainty would help restore confidence in the New Zealand screening regime, address concerns that the current regime is deterring some investment, and demonstrate that New Zealand is open for business.
- The impact on protections would not fundamentally alter the ability for the Government to have oversight of the most sensitive New Zealand assets. In particular:
 - the most sensitive land and businesses will still be screened (about 70% of what is currently screened);
 - the hurdle for approval will require meeting the existing investor test, a new 'substantial harm test' for exceptional circumstances, and (in the case of land) continued discretion for Ministers to require adequate walking access, along with the ability to acquire foreshore, seabed, and lakebed

(and potentially riverbed as well), and the requirement to advertise farmland on the open market; and

- other legislation, such as the Resource Management Act, the Wildlife Act, and the Walking Access Act, continue to provide a base level of protection for sensitive features that apply to all investors (acknowledging that some of these protections are voluntary).
- *[Withheld - maintain the effective conduct of public affairs through the free and frank expression of opinions].*

CONSULTATION

61. This review was led by Treasury, in consultation with Land Information New Zealand, and the Overseas Investment Office. The following government departments and agencies were consulted in the preparation of this Cabinet paper and the attached Regulatory Impact Statement:

Ministry of Economic Development, Ministry of Foreign Affairs and Trade, Ministry of Fisheries, Ministry of Agriculture and Forestry, Ministry for Culture and Heritage, Te Puni Kōkiri, Department of Labour, Department of Conservation, Ministry for the Environment, Department of Internal Affairs, Investment New Zealand, the Walking Access Commission and the Historic Places Trust. The Department of Prime Minister and Cabinet has been informed of the proposals.

62. In addition, a Technical Reference Group was established to assist with the development and review of the policy proposals. This Group consists of partners from five law firms who have detailed knowledge of the operation of the Overseas Investment Act. The following firms were represented on the Group: Bell Gully, MinterEllisonRuddWatt, Simpson Grierson, ChapmanTripp and RussellMcVeagh.

63. The Regulatory Impact Statement (p.93) outlines how comments from the consultation process have been incorporated and where there is outstanding disagreement.

AGENCY COMMENTS

Ministry for Culture and Heritage and Historic Places Trust

64. The Ministry for Culture and Heritage and the Historic Places Trust support the simplified and targeted benefit tests over the narrow benefit test. The narrow benefit test removes opportunities for historic heritage protection under the Overseas Investment Act.

Ministry of Foreign Affairs and Trade

65. *[Withheld - maintain the effective conduct of public affairs through the free and frank expression of opinions and to avoid prejudicing the security or defence of New Zealand or the international relations of the Government of New Zealand].*

Ministry of Agriculture and Forestry

66. MAF has concerns about the relative weight the proposals give to national benefit from foreign investment compared with certainty for foreign investors. In MAF's view the proposals give excessive weight to the pursuit of certainty for a foreign investor seeking investment approval and insufficient weight to the promotion of national benefit from foreign investment.

67. The purpose of the Act is 'to acknowledge that it is a privilege for overseas persons to own or control sensitive New Zealand assets'. MAF considers economic benefit is the main reason for allowing overseas investment in New Zealand. The proposed removal of the benefit test is in conflict with the purpose of the Act. Retaining an effective benefit test would supersede the need to introduce a Substantial Harm test.

68. The proposed changes to the Act are broadly outlined in the RIS and cabinet paper. MAF considers that Departments should be provided with the opportunity to consider the detailed proposals prior to the final legislation paper.

Department of Conservation

69. The Department of Conservation considers that, on the basis of its experience with cases to date, the application of the narrow benefit test would not result in some of the types of public benefits that have been achieved in past cases. The Department also considers that removal of the requirement to offer-back riverbeds would significantly reduce the benefits achieved for the public. The Department believes that which parks are considered relevant in identifying sensitive land should be based on their values and the purpose for which they are held, rather than being determined solely by which agency administers them. The RIS shows that there would be little or no loss of compliance cost benefit with a size threshold included.

Treasury

70. Treasury does not see a strong policy rationale for screening overseas investment at all on the basis that the underlying policy concerns tend to occur regardless of the investor's nationality. Many developed countries do not have a screening regime. If other legislation provides insufficient protection, amending that legislation would be better targeted and likely to impose lower economic cost than a screening regime.

71. Treasury considers that the 'more change' package would meet the objective of the review. The package would make material reductions in economic costs, while protections would still be in place for (among other things) walking access, farm land advertising, and the ability to acquire foreshore and seabed, plus the 'substantial harm' test for exceptional circumstances.

Overseas Investment Office

72. The Overseas Investment Office prefers the simplified benefit test over the narrow or targeted benefit tests. It does not support extending the definition of overseas person by exempting New Zealand linked overseas investors. There are uncertainties around whether this exemption will be within the purpose to the Act, and uncertainties around how the criteria may be applied and the monitoring effort required will increase, rather than reduce assessment times. The Overseas Investment Office does not support the proposal not to screen investors who increase their ownership or control holdings, after consent had been granted for the initial acquisition.

FINANCIAL IMPLICATIONS

73. There are no direct financial implications for the Crown arising from this paper. However the proposed changes to the screening regime are expected to reduce the number and complexity of investment applications. As a result, there is likely to be scope to reconsider the balance between fees charged to overseas investors, funding requirements for the Overseas Investment Office, and application processing times.

74. Cabinet recently agreed to increase the fees charged to overseas investors to fully recover costs, but noted that the fees would be reassessed once changes from the review have been operational [EGI Min (09) 13/2 refers]. I therefore propose a report back to reassess fees by 28 February 2011, once the new regime has been in operation for around six months.

LEGISLATIVE IMPLICATIONS

75. The policy proposals will require amendments to the Overseas Investment Act 2005 and the Overseas Investment Regulations 2005. At present there is no place on the 2010 legislation programme for amending the Overseas Investment Act 2005.

76. I expect a Bill to be ready for introduction to Parliament in mid February 2010. If issues of substance arise in the course of drafting I will refer these back to Cabinet, but I propose that decisions about minor or technical issues be delegated to me. Allowing six months for the Select Committee to report back, I would expect the Bill to be reported back to the house in mid August 2010.

77. Given the above considerations, a category 2 priority is sought in order to pass the Bill in 2010.

REGULATORY IMPACT ANALYSIS

Regulatory Impact Analysis Requirements

78. The Regulatory Impact Analysis requirements apply to the proposals in this paper and a Regulatory Impact Statement has been prepared and is attached to this paper.

Quality of the Impact Analysis

79. The Regulatory Impact Statement (RIS) for this proposal was prepared and assessed under the RIA requirements that apply from 2 November 2009. The Regulatory Impact Analysis Team (RIAT) has reviewed the RIS prepared by the Treasury and associated supporting material, and considers that, given the constraints imposed on the scope of the analysis by the Terms of Reference for the Review of the Overseas investment screening regime, the information and analysis summarised in the RIS meet the quality assurance criteria.

Consistency with Government Statement on Regulation

80. I have considered the analysis and advice of my officials, as summarised in the attached Regulatory Impact Statement and I am satisfied that, aside from the risks, uncertainties and caveats already noted in this Cabinet paper, the regulatory proposals recommended in this paper:

- are required in the public interest;
- will deliver the highest net benefits of the practical options available; and

- are consistent with the commitments in the Government Statement on Regulation.

OTHER IMPLICATIONS

81. There are no human rights, Treaty, gender or disability implications associated with this paper.

PUBLICITY

82. I propose that this Cabinet paper (with appropriate withholdings) and the attached Regulatory Impact Statement be released publicly once Cabinet has taken policy decisions on the review. I also propose to release a communications document at the same time to explain why the options endorsed by Cabinet are the preferred ones. The release of this documentation will allow the public to consider the changes before the Bill is considered by Select Committee.

83. I will make a media statement when I release these documents to outline the next steps in the process.

84. Any changes to this legislation are likely to attract significant public debate, particularly the introduction of a substantial harm test, the changes to the sensitive land test and removing the requirements to offer riverbed to the Crown. The timely release of the above documents will help to provide the rationale for the changes, but I still expect there to be a large amount of comment on the proposals.

85. *[Withheld - maintain the current constitutional conventions protecting the confidentiality of advice tendered by ministers and officials].*

REVIEW

86. I propose to report back to Cabinet after any changes have been operational for six months with an evaluation of how effective the changes have been. This evaluation will assess how the changes have affected application numbers, the time taken to assess applications, and the operation of the new sensitive land test. The evaluation will also include feedback from law firms on how they view the changes. The report back will also include an assessment of whether the fees charged to overseas investors are correctly set to recover the Overseas Investment Office's costs, and an assessment of how part or all of the application process can be moved to an 'on-line' internet based system.

RECOMMENDATIONS

87. I recommend that the Committee:

1. **note** that in February 2009, Cabinet agreed to review the Overseas Investment Act and Regulations as part of the Government's regulatory review programme for 2009 [CAB Min (09) 6/5A refers];
2. **note** that one of the six pillars of the Government's medium-term economic agenda is improving the regulatory environment for business, and reviewing the Overseas Investment Act is one component [CAB Min (09) 24/7 refers];
3. **agree** that the Overseas Investment Act and Regulations be amended to simplify the regime and reduce compliance costs while ensuring that the most sensitive New Zealand assets are adequately protected;

Definition of an overseas person: exemptions

4. **note** that the Overseas Investment Regulations allow Ministers to exempt any transaction, person, interest or assets from the requirement for consent and to impose conditions on the exemption and to revoke it at any time;
5. **EITHER** [supported by Treasury]
 - 5.1. **agree** that a new set of criteria be established to allow Ministers to exempt New Zealand linked repeat investors from screening, if Ministers consider that such an investor is highly likely to make future investments that would benefit New Zealand, having regard to the purpose of the Act and to the following criteria:
 - 5.1.1. Prior successful applications under the Act, with no previous applications having been declined (a compulsory criterion);
 - 5.1.2. Local incorporation;
 - 5.1.3. Local headquarters;
 - 5.1.4. New Zealand majority control of the Board;
 - 5.1.5. Dispersed overseas shareholdings (no cornerstone investor);
 - 5.1.6. Have a long history of operations in New Zealand;
 - 5.1.7. Listed on the New Zealand Stock Exchange; and
 - 5.1.8. There are no other considerations that mean an investor should not be exempted;
 - OR** [supported by the Ministry of Agriculture and Forestry and the Overseas Investment Office]
 - 5.2. **agree** not to establish a new set of criteria that would allow Ministers to exempt New Zealand linked repeat investors from screening;
6. **note** that any exemptions would be subject to regular review to ensure their continued suitability;
7. **note** that the Minister of Finance would approve exemptions for significant business asset applicants, and exemptions from sensitive land screening would also need approval from the Minister for Land Information;

8. **agree** to create exemptions for certain trustee company and portfolio entity investments, where at least 75% of beneficial owners are New Zealand citizens or ordinarily resident in New Zealand;

Significant business assets: scope

9. **EITHER** [supported by Treasury]
 - 9.1. **agree** that the screening threshold for significant business investments be raised from \$100 million to \$150 million;

OR [supported by the Ministry of Foreign Affairs and Trade]

 - 9.2. **agree** that the current screening threshold for significant business investments of \$100 million be retained;
10. *[Withheld - maintain the current constitutional conventions protecting the confidentiality of advice tendered by ministers and officials];*
11. *[Withheld - maintain the current constitutional conventions protecting the confidentiality of advice tendered by ministers and officials];*
12. **note** that any unilateral increase in the screening threshold will not be able to be reversed in future for certain trading partners (Singapore, Chile and Brunei);

Significant business assets: hurdle

13. **agree** to retain the existing 'investor test' for investments in significant business assets;
14. **note** that the proposed substantial harm test outlined in recommendations 24-26 will apply to investments in significant business assets;

Sensitive land: scope

15. **agree** that the area threshold for non-urban land be increased from five to ten hectares;
16. **EITHER** [supported by Treasury]
 - 16.1. **agree** that land adjoining local parks and reserves not be screened;

OR [supported by the Department of Conservation]

 - 16.2. **agree** that land adjoining local parks and reserves that are greater than 80 hectares continue to be screened;
17. **agree** that the regulator no longer be required to keep a list of reserves, parks and other areas, the land adjoining which is sensitive;
18. **agree** that land adjoining National Parks, reserves held under the Wildlife Act, and Government Purpose Reserves held under the Reserves Act for the purposes of wildlife management that exceed 0.4 hectares continue to be screened and added to Schedule One of the Overseas Investment Act;

19. **note** that changes to the scope of sensitive land that is screened will not be able to be reversed in future for certain trading partners (Singapore, Chile and Brunei);
20. **note** that the majority of categories of sensitive land will be unchanged;

Sensitive land: hurdle

21. **agree** that the criteria for investments in sensitive land should continue to include the 'investor test' that is also applied to investments in significant business assets;
22. **note** that the proposed substantial harm test outlined in recommendations 28-29 will apply to investments in sensitive land;
23. **EITHER** [supported by the Department of Conservation, Ministry for Culture and Heritage, Historic Places Trust, and the Overseas Investment Office]
 - 23.1. **agree** that the current benefit test in section 16(1)(e)(ii) and (iii) of the Act be removed and replaced with a new 'simplified benefit' test that:
 - 23.1.1. considers whether the investment will, or is likely to, result in economic benefits to New Zealand by introducing new technology or skills, increasing efficiency or productivity, retaining or creating jobs, increased exports and or the introduction of additional investment for development purposes;
 - 23.1.2. considers whether there will be adequate mechanisms in place for protecting or enhancing:
 - a) areas of significant indigenous vegetation;
 - b) significant habitats of indigenous fauna and significant habitats of trout, salmon, wildlife protected under section 3 of the Wildlife Act 1953, and game as defined in section 2(1) of that Act;
 - c) walking access; and
 - d) historic heritage within the relevant land;
 - 23.1.3. considers whether refusing or accepting the application for consent will, or is likely to, adversely affect New Zealand's image overseas as an investment destination or its trade or international relations;
 - 23.1.4. considers whether the overseas investment will, or is likely to, result in further investment in New Zealand, enhance the ongoing viability of other overseas investments in New Zealand, or is from an overseas investor who has previously undertaken investments of benefit to New Zealand;
 - 23.1.5. considers whether the overseas investment will, or is likely to, result in other consequential benefits to New Zealand;
 - 23.1.6. removes the requirement that investors in non-urban land exceeding 5 hectares must show substantial and identifiable benefit;

23.1.7. explicitly allows the maintenance of existing protections to be considered as part of the benefit assessment;

OR [supported by Ministry for Culture and Heritage and Historic Places Trust]

23.2. **agree** that the current benefit test in section 16(1)(e)(ii) and (iii) of the Act be removed and replaced with a new 'targeted benefit' test that:

23.2.1. imposes requirements on overseas investors over and above domestic investors in relation to environmental and social factors, by requiring that they demonstrate that:

- a) there will be adequate mechanisms in place for protecting or enhancing areas of significant indigenous vegetation;
- b) there will be adequate mechanisms in place for protecting or enhancing significant habitats of indigenous fauna and significant habitats of trout, salmon, wildlife protected under section 3 of the Wildlife Act 1953, and game as defined in section 2(1) of that Act;
- c) there will be adequate mechanisms in place for maintaining or enhancing walking access;
- d) there will be adequate mechanisms in place for protecting or enhancing historic heritage (including wāhi tapu) within the relevant land;

23.2.2. explicitly allows the maintenance of existing protections to be considered as part of the benefit assessment.

OR [supported by Treasury]

23.3. **agree** that the current benefit test in section 16(1)(e)(ii) and (iii) of the Act be removed and replaced with a new 'narrow benefit' test that:

23.3.1. improves overseas investors' awareness of sensitive features on the relevant land and their obligations under other legislation, by requiring that they:

- a) detail sensitive features on the relevant land that relate to historic heritage (including wāhi tapu), indigenous vegetation, salmon and trout habitat and other protected wildlife, and walking access;
- b) sign a certificate stating they are aware that the relevant land contains sensitive features and that New Zealand legislation has provisions to protect these features;

23.3.2. imposes a requirement on overseas investors over and above domestic investors to continue existing, and enhance, public walking access, by requiring that they:

- a) demonstrate that there will be, in the judgement of the Ministers of Finance and Land Information, adequate mechanisms in place for providing, protecting, or enhancing walking access, where appropriate and practicable;

23.3.3. explicitly allows the maintenance of existing protections to be considered as part of the benefit assessment;

23.3.4. for all other sensitive features, relies on other relevant legislation to provide protection;

AND (recommended by the Ministry of Agriculture and Forestry)

23.3.5. direct officials to report back with a narrow benefit test that allows for the assessment of economic benefits;

24. **note** that recommendations 22.2 and 22.3 do not require overseas investors to demonstrate that their investments will have economic benefits for New Zealand (unless the MAF recommendation is adopted), while recommendation 22.1 retains economic benefits as a factor for consideration when assessing benefit;

Offer back of special land to the Crown

25. **EITHER** [supported by Treasury]

25.1. **agree** to remove riverbed as a category of special land to be offered to the Crown (while continuing the requirement for foreshore, seabed and lakebed);

OR [supported by the Ministry of Agriculture and Forestry and Department of Conservation]

25.2. **agree** to retain riverbed as a category of special land;

Process of offer back of special land to Crown

26. **agree** to clarify the process for offering special land to the Crown, with no impact on the underlying policy intent, by:

26.1. defining the categories of 'special land' in the Act (rather than across the Act and Regulations);

26.2. defining special land to include *ad medium filum aquae* interests;

26.3. defining 'bed' as it relates to riverbed and lakebed in the Act to be consistent with the definition of 'foreshore and seabed' in the Act so as to include the air space and water space above the bed and the subsoil, bedrock and other matters below the bed;

26.4. providing that, if the exact location of the riverbed or lakebed moves over time that the Crown's ownership interests in the bed will also move;

26.5. excluding natural rivers that have been artificially widened to exceed 3 metres from the definition of special land;

- 26.6. specifying that the offer back process will not be triggered where the acquisition is a leasehold interest, or the acquisition is of less than a 50% or more ownership or control interest in the land or the securities of the landowner;
- 26.7. specifying the criteria in the Act to which Ministers must have regard to when determining whether the Crown should waive or accept its right to acquire the special land;
- 26.8. specifying that failure of the Crown to accept an offer within the time limit specified in Regulations will mean the Crown will be deemed to have waived its right to acquire the special land;
- 26.9. specifying that any acceptance of an offer of special land or waiver of the right to acquire special land by the Crown is without prejudice to any existing Crown rights or interests in the special land;
- 26.10. giving the Crown a choice of whether to survey the land to establish its value or to dispense with the survey process;
- 26.11. providing for a more flexible valuation process and methodology;
- 26.12. specifying that the Crown may put a caveat on the adjacent land title in relation to an agreement entered into for the acquisition of *ad medium filum aquae* land;
- 26.13. specifying that riverbed and lakebed acquired will become Crown Land under the Land Act 1948;
- 26.14. creating an automatic vesting provision for riverbed and lakebed so that a separate instrument of conveyance is not required;
- 26.15. specifying that if separate parcels of land are created by the removal of special land, the parcels may not be disposed of separately;

Policy change by regulation

- 27. **agree** that substantive policy changes to the overseas investment regime can only be made by primary legislation, by removing the ability to add to the factors used to assess sensitive land applications by regulation;

Substantial harm test

- 28. **agree** to add an additional criterion to the significant business asset test and sensitive land test that allows an investment to be declined where it will, or is likely to, result in substantial harm to New Zealand by threatening public order, public health and safety, or essential security interests;
- 29. **agree** that in exercising the substantial harm criterion the relevant Minister(s) must:
 - 29.1. have credible evidence to show that in the Minister(s) view, the investment is likely to result in substantial harm;

- 29.2. consider whether the substantial harm that may be posed by the investment can be addressed under other legislation;
 - 29.3. have regard to whether its use will breach any of New Zealand's international obligations;
 - 29.4. follow due process as set out in regulations; and
 - 29.5. table a summary of the reasons for the use of this criterion in the House as soon as practicable after making the decision;
30. **EITHER** [supported by Treasury]
- 30.1. **agree** that the decision to exercise the substantial harm criterion rest with the Minister of Finance in relation to business decisions, and the Ministers of Finance and Land Information in relation to land decisions, in consultation with other Ministers, consistent with the existing process in the Act;
- OR** [supported by the Ministry of Agriculture and Forestry]
- 30.2. **agree** that the decision to exercise the substantial harm criterion rest with the Minister of Finance, in conjunction with at least two other senior Ministers;
31. **agree** that the terms 'public order', 'public health and safety' and 'essential security interests' be defined in the Act and would encompass actions which would threaten economic capacity that is critical for New Zealand's economic well-being;

Increases in ownership/control once approved

32. **EITHER** [supported by Treasury]
- 32.1. **agree** that investors who have already been screened and subsequently increase their existing level of ownership or control in a significant business asset or sensitive land no longer be screened;
- OR** [supported by the Ministry of Agriculture and Forestry and the Overseas Investment Office]
- 32.2. **agree** to retain screening for investors who increase their existing level or ownership or control in a significant business asset or piece of sensitive land;
33. **note** that overseas investors who wish to acquire a new business or piece of sensitive land (including land adjoining the original piece of land) will continue to be screened;

Sovereign Wealth Funds

34. **EITHER** [supported by Treasury]
- 34.1. **agree** that there continue to be no additional screening requirements for investments by Sovereign Wealth Funds;

OR [supported by the Ministry of Agriculture and Forestry]

- 34.2. **direct** officials to develop an additional screening test for investments by Sovereign Wealth Funds to be considered at the time draft legislation is considered by the Cabinet;

Fishing Quota

35. **note** that screening of fishing quota is outside the scope of this review and is not affected by the review proposals;

Legislative process

36. **note** that a Bill is required to amend the Overseas Investment Act 2005 and consequential amendments will be required to the Overseas Investment Regulations;
37. **agree** to add the Overseas Investment Bill to the 2010 legislative programme with a priority of category 2 (must be passed in 2010);
38. **invite** the Minister of Finance to instruct the Parliamentary Counsel Office to draft the required changes to the legislation as outlined in this paper;
39. **authorise** the Minister of Finance to take decisions on minor policy issues that arise as the Bill is drafted;

Publicity

40. **agree** that this Cabinet paper (with appropriate withholdings) and the attached Regulatory Impact Statement be publicly released;
41. *[Withheld - maintain the current constitutional conventions protecting the confidentiality of advice tendered by ministers and officials];*

Report back

42. **invite** the Ministers of Finance and Land Information to report back to Cabinet Economic Growth and Infrastructure Committee within six months of any changes being implemented with:
 - 42.1. an assessment of whether the fees charged to overseas investors are correctly set to fund the Overseas Investment Office to assess applications in a reasonable timeframe;
 - 42.2. an evaluation of how the changes to the screening regime have affected application numbers, assessment times, the operation of the new sensitive land test, and feedback from law firms on the changes from an investor's perspective; and

42.3. details of how part or all of the application process can be moved to an 'on-line' internet based system.

Hon Bill English
Minister of Finance

Date: