

## Treasury Report: Overseas Investment review: near final policy document and Cabinet paper

<b>Date:</b>	17 July 2009	<b>Report No:</b>	T2009/1692
--------------	--------------	-------------------	------------

### Action Sought

	Action Sought	Deadline
Minister of Finance (Hon Bill English)	<p><b>Indicate</b> any changes you would like made to the Cabinet paper and policy document at your meeting with Treasury at 4.30pm on Tuesday 21 July.</p> <p><b>Lodge</b> the Cabinet paper and policy document at Cabinet Office by 10am Thursday 23 July for consideration at EGI on Wednesday 29 July.</p> <p><b>Consult</b> your Ministerial colleagues on the proposed changes.</p>	Thursday 23 July
Associate Minister of Finance (Hon Simon Power)	<b>Note</b> the contents of this report.	Thursday 23 July

### Contact for Telephone Discussion (if required)

Name	Position	Telephone		1st Contact
Nic Blakeley	Acting Manager, International	[withheld – privacy]	[withheld – privacy]	✓
[withheld – privacy]	Analyst, International	[withheld – privacy]	[withheld – privacy]	

### Minister of Finance's Office Actions (if required)

Refer a copy of this report to the Ministers for Land Information and Regulatory Reform for their information.

**Enclosure:** Yes ([EGI paper:1303456](#), [Policy document:1268418](#))

## **Treasury Report: Overseas Investment review: near final policy document and Cabinet paper**

---

### **Executive Summary**

---

The attached draft Cabinet paper and policy document for the overseas investment review are nearly ready to lodge at Cabinet Office for consideration by the Economic Growth and Infrastructure committee (EGI) on Wednesday 29 July. You are meeting with officials at your regular Treasury meeting at 4.30pm on Tuesday 24 July to discuss the draft papers.

#### **Many of the proposed changes have broad support.**

We have consulted with government agencies and the Technical Reference Group. There is broad agreement with many of the proposed changes, including removing the ability to make policy change by regulation, reducing the scope of what is considered sensitive land, and removing explicit reference to strategic assets.

#### **Some reservations have been raised.**

*[Withheld - disclose prematurely decisions to change or continue policies relating to the entering into of overseas trade agreements].* RIAT has made a preliminary assessment that the analysis is inadequate on the grounds of not making the case for screening at all, not quantifying the likely benefits, and not adequately summarising consultation. We are working with RIAT to see if these issues can be addressed.

#### **The proposed change to the sensitive land test is highly contentious.**

The proposed change is a shift from a subjective benefit test, which allows Ministers considerable discretion and leverage, to a more objective test that requires only minimally more from overseas investors than would be required of domestic investors. The Officials' Economic Growth and Infrastructure committee (OEGI) considered that this would be a significant shift that should be highlighted for Ministers.

Some agencies, such as MAF, DOC, and the Walking Access Commission, are concerned that the change goes too far. Both MAF and the Walking Access Commission have inserted comments in the Cabinet paper and MAF supports an alternative recommendation to defer the paper. The concerns centre on two main reasons:

- Ministers would lose the 'leverage' which currently allows them to extract considerable benefits from overseas investors, such as walking access and heritage protection, above what would otherwise be provided; and
- the proposed test relies largely on protections in domestic legislation which may result in overseas investors providing less in the way of walking access, conservation, and so on, because they do not share the same social norms.

Other agencies, such as MfE, are comfortable with the concept of applying the same standards to both overseas investors and domestic investors.

On the other side, members of the Technical Reference Group and Investment New Zealand have been supportive of the intent of the change, and in some cases consider it does not go far enough. RIAT, and has questioned whether the case is made to have an Act targeted at these concerns at all.

Concerns have also been raised about the workability of some of the proposals put forward. Where appropriate, we have removed some recommendations which no longer seem practicable. We are continuing to work with relevant agencies to ensure the test for sensitive land is workable.

**The legislative timeframes to pass the Bill by year end are very tight.**

Passing the Bill by the end of the year is possible, but tight. The process for public written submissions would be a maximum of 6 weeks. There is likely to be considerable public interest in the Bill, and a relatively short process may increase the risk of public criticism of the process.

## Recommended Action

---

We recommend that you:

- a **indicate** any changes you would like made to the Cabinet paper and policy document before it is lodged at the Cabinet Office, at your meeting with officials at 4.30pm on Tuesday 24 July;
- b **lodge** the Cabinet paper with attached policy document at the Cabinet Office by Thursday 23 July for consideration at EGI on Wednesday 29 July;
- c **consult** with your Ministerial colleagues on the proposed changes;
- d **refer** a copy of this report to the Ministers for Land Information and Regulatory Reform for their information.

*Agree/disagree.*

**Nic Blakeley**

Acting Manager, International  
for Secretary to the Treasury

Hon Bill English  
**Minister of Finance**

## **Treasury Report: Overseas Investment review: near final policy document and Cabinet paper**

---

### **Purpose of Report**

---

1. The Cabinet paper and policy document for the overseas investment review are near completion. This report outlines the changes that have been made following consultation, the areas that are still contentious, and the process from here.

### **Analysis**

---

#### **The Cabinet paper and policy document are now at a near final stage.**

2. The enclosed Cabinet paper and policy document are at a near-final draft stage. The papers are on track to be lodged by 10am Thursday 23 July for consideration by Cabinet Economic Growth and Infrastructure committee (EGI) on Wednesday 29 July.
3. We will continue to work on drafting aspects of both documents over the next week to incorporate a large number of comments that we have received as far as possible. We envisage making some further non-substantive drafting changes to the policy document ahead of its public release.

#### **Government agencies and the Technical Reference Group have been consulted.**

4. We have received comments from government agencies and the Technical Reference Group on a number of areas. There is a large degree of agreement across government on many aspects:
  - exempting permanent residents from screening;
  - removing the ability to add additional factors by regulation;
  - reducing the sensitive land scope: changes to non-urban land and section 37; and
  - removing explicit reference to strategic assets.
5. RIAT has provided a preliminary assessment of inadequate on the grounds that:
  - the underlying concerns of New Zealanders have not been sufficiently identified;
  - the likely benefits have not been quantified; and
  - the results of consultation have not been adequately indicated.
6. We are working with RIAT to address these issues as far as possible over the next few days.

#### **The Cabinet paper and policy document have been modified in some areas.**

7. Some of the recommendations have changed as a result of consultation. The substantive policy changes which have been made since we last reported to you are set out in the table below. The table sets out the issue, how it has changed and why the change was made.

Issue	Previous proposal	Current proposal	Reason for change
Test for sensitive land	An objective test where the investor must show compliance with relevant Acts.	An objective test where the investor must negotiate in good faith with the Walking Access Commission, the Historic Places Trust and the Department of Conservation about how to protect sensitive features.	Consultation indicated that prospective investors will very rarely have all the information they require to offer up a full compliance programme before they have purchased the relevant land. Investors would therefore be reluctant to show compliance with relevant Acts. More clarity was required as to what is expected of investors..
Ownership/control	Rely only on the level of overseas <i>control</i> when assessing whether a body corporate, partnership or trust is an overseas person.	Rely on both ownership <i>and</i> control when assessing whether a body corporate, partnership or trust is an overseas person (i.e. the status quo).	Through consultation it became clear that, while we want to target <i>control</i> , the difficulty with limiting the regime in this way is that a significant ownership interest usually does deliver a degree of practical and commercial control of an enterprise.
Definition of non-urban land	Narrow the definition of non-urban land to include only farm land.	Narrow the definition of non-urban land to include only farm land and forestry.	Feedback indicated that many people consider forestry blocks to be just as sensitive as farm land and should be included.

Other drafting changes in the policy document have been made (reflected in the Cabinet paper) to reflect the various concerns of departments, which has altered the balance of argumentation in some areas. In particular:

- The paper is more up front about the shift in approach from a regime that considers overseas investment a privilege, and therefore provides for concessions from overseas investors above what would apply to domestic investors, to a regime that provides safeguards largely by ensuring compliance with other legislation.
- There is a greater acknowledgement of the risk that overseas persons may provide a lower level of protection for sensitive features than New Zealand owners provide in accordance with social norms and behaviours. This is mitigated by the requirement that overseas investors identify the sensitive features on their land and negotiate with the relevant government agencies around their protection.

### Outstanding areas of contention

8. In some areas, government agencies have outstanding concerns with the proposed approach. The most substantive concerns are outlined in the table below. The table sets out the issue, the concern that has been raised by stakeholders, and a possible response to those concerns.

Issue	Concern	Counter-argument
Changing the test for sensitive land from the current subjective benefit test to the proposed 'objective' test.	That the extra 'leverage' that the OIA provides (for things such as walking access and heritage protection) will be lost.	The recommended hurdle still addresses key community concerns about access and usage, but relies on domestic legislation and moral suasion via negotiation with the relevant agency to do this.
	That the effective provision of public benefit will be less, due to overseas persons not having the same social norms.	This risk is mitigated by requiring overseas investors to identify the sensitive features on their land and to negotiate in good faith with the Walking Access Commission, Historic Places Act and Department of Conservation over their protection.
	The net benefit test gives Ministers decision-making discretion that offers a low risk of judicial review.	The flipside to less Ministerial discretion is improved predictability and certainty for investors.
Raising the business screening threshold.	<i>[Withheld - disclose prematurely decisions to change or continue policies relating to the entering into of overseas trade agreements.]</i> Thresholds will be 'locked in', reducing future policy flexibility.	The flipside is the economic benefits from having a higher threshold, and sending a signal that New Zealand is "investor friendly". <i>[Withheld - disclose prematurely decisions to change or continue policies relating to the entering into of overseas trade agreements.]</i>
Changing the purpose statement.	The new purpose reflects a large shift from discrimination against foreigners to near equivalence.	The new purpose reflects the <i>benefits</i> of overseas investment which are currently omitted. It also reflects the inherently discriminatory nature of the Act.
Requirement to advertise farm land or farm land securities on open market.	New Zealand farmers who wish to acquire farm land or farmland securities will no longer know that farm land or farm land securities are available for purchase.	Screening is better targeted at land <i>usage</i> rather than ownership. This requirement is unlikely to change the final outcome of the transaction as the vendor is still able to contract with whomever he or she wishes, and it creates delays to the consent process.
Remove screening for land that <i>adjoins</i> land with heritage sites/ heritage orders/ wahi tapu areas.	The setting of a historic place is important and changes to sites adjacent to historic places can impact on heritage values.	The RMA provides some protection for historic sites, especially when the use of the adjoining land is changing. Screening this land will bring little additional benefit under the proposed objective test.
Increase in ownership/ control once initial consent granted.	Some members of the public will be concerned that an overseas person gaining consent at a low level of ownership could then dramatically increase their ownership share.	The investor has already passed a test targeted at their <i>usage</i> of the asset, and additional screening is unlikely to provide a different result to the initial screening. Investors will still have to seek consent before investing in <i>another</i> sensitive asset.

## Next steps

### Consultation with Ministerial colleagues

9. You may wish to discuss the proposed changes with your Ministerial colleagues, in particular, the Ministers of Trade, Conservation, Agriculture, Forestry, Arts Culture and

Heritage, and Regulatory Reform. You may also wish to speak to some other parties represented in parliament about the proposals.

### **Cabinet consideration**

10. The timeframe for Cabinet consideration was originally the end of June, but later extended to the end of July due to the complexity of the review. To meet this timeframe, the paper should be lodged by 10am Thursday 23 July, for consideration by Cabinet Economic Growth and Infrastructure committee (EGI) on Wednesday 29 July.

### **Legislative process**

11. The legislative timeframes required to pass the Bill by the end of the year are tight, but achievable. Below is an indicative timetable:

Week of (Monday)	6-week submissions	5-week submissions	4-week submissions
3-Aug	Cabinet confirms EGI	EGI	EGI
10-Aug		Cabinet confirms EGI	CBC
17-Aug	LEG		Cabinet confirms CBC
24-Aug	Cabinet confirms LEG Bill introduced		
31-Aug		LEG (at CBC)	
7-Sep	1 <sup>st</sup> reading	Cabinet confirms LEG Bill introduced	LEG
14-Sep		1 <sup>st</sup> reading	Cabinet confirms LEG Bill introduced
21-Sep			1 <sup>st</sup> reading
28-Sep			
5-Oct			
12-Oct			
19-Oct	Submissions due Fri 23 <sup>rd</sup> (6 weeks from Thu 10-Sep)	Submissions due Fri 23 <sup>rd</sup> (5 weeks from Thu 17-Sep)	Submissions due Fri 23 <sup>rd</sup> (4 weeks from Thu 24-Sep)
26-Oct	FEC- oral submissions	FEC – oral submissions	FEC – oral submissions
2-Nov			
9-Nov	FEC – oral submissions?*	FEC – oral submissions?*	FEC – oral submissions?*
16-Nov	FEC – consideration of departmental report	FEC – consideration of departmental report	FEC – consideration of departmental report
23-Nov	FEC – deliberation	FEC – deliberation	FEC – deliberation
30-Nov			
7-Dec	Reported back to the House 2 <sup>nd</sup> reading Committee of the Whole	Reported back to the House 2 <sup>nd</sup> reading Committee of the Whole	Reported back to the House 2 <sup>nd</sup> reading Committee of the Whole
14-Dec	Finish committee stage 3 <sup>rd</sup> reading	Finish committee stage 3 <sup>rd</sup> reading	Finish committee stage 3 <sup>rd</sup> reading
21-Dec			

\*Depends if the Finance and Expenditure committee (FEC) sits during the second recess week, since it is not school holidays

12. The table above presents three options, which differ in the length of time given to submitters to lodge submissions. The minimum timeframe for submissions is generally 6 weeks. The 6-week submissions scenario is optimistic as it is based on EGI coming to a decision on the 29 July, and Cabinet confirmation the following week on 3 August. It also leaves only two weeks between Cabinet confirmation and consideration by the Legislation committee (LEG), for Parliamentary Council Office (PCO) to draft the Bill.

## Risks

---

### Process and timeframe

13. Passing the Bill by the end of the year is achievable, but tight. Delays in getting Cabinet approval will shorten the public consultation process. Meeting the legislative timeframe also depends on the overall legislative programme and FEC's timetable.
14. This risk can be managed as far as possible by ensuring that Cabinet has sufficient information to make the decision, including any additional information sought, by Treasury working with PCO early to start drafting the Bill, and by discussions with the chair of FEC and Leader of the House over the timeframes.

### Public consultation

15. Overseas investment in New Zealand is an issue that many sectors of the public have very strong views about. There is likely to be considerable interest in the changes that Cabinet agrees to and a large number of written and oral submissions to Select Committee. The Government is also likely to be criticised from not having consulted the public earlier in the process. The likelihood of having a relatively short Select Committee process increases this risk.
16. Those sectors of the public that have seen the benefits of the current condition-setting regime (such as Fish and Game New Zealand) are particularly likely to make submissions to select committee. Other members of the public, for example rural communities and iwi, may argue that their rights to ownership of New Zealand land will be diminished by the changes.
17. This risk can be mitigated by public release of the Cabinet paper and policy document, to ensure that information is in the public domain explaining the rationale for the changes. Your speech opportunities could also help frame the debate.

### Sensitive land test

18. The most contentious proposed change is to the land test, but in our view it is one of the most crucial areas of change to simplify the regime. The test is likely to change through the Cabinet and parliamentary process and there is a risk that the changes result in a test that is not significantly simpler than the status quo.
19. This risk can be mitigated by ensuring that we have backup options that are still better than the status quo, but may impose greater requirements on overseas investors than the current proposal.

### Strategic assets

20. The current recommendations are to remove explicit reference to strategic assets from the regime. If this changes through the Cabinet process, the additional work to prepare a suitable alternative may introduce delays into the process.



21. This risk could be mitigated by Ministers discussing this aspect as early as possible.