

Please note: some information has been withheld as not related to the Overseas Investment Amendment.

There are further documents from the week beginning 10 December, which are still undergoing consultation. These will be published as soon as possible.

	Date	Title	Redactions
1.	27 October 2017	Aide Memoire Draft Cabinet Papers on Trade, TPPA and Overseas Home Buyers	S9(2)(f)(iv)
2.	27 October 2017	[Draft 1 Cabinet Paper]100 Day Commitment Banning Overseas Speculators from Buying Existing Houses	S9(2)(h) S6(a) S9(2)(j) S9(2)(f)(iv) S6(c) S9(2)(g)(i)
3.	27 October 2017	[Draft 2 Cabinet Paper]100 Day Commitment Banning Overseas Speculators from Buying Existing Houses	S9(2)(h) S6(a) S9(2)(j) S9(2)(f)(iv) S6(c) S9(2)(g)(i)
4.	13 October 2017	[TR]100 Day Commitment Banning Overseas Speculators from Buying Existing Houses	S9(2)(k) S9(2)(a)
5.	13 October 2017	[Final Cabinet Paper]100 Day Commitment Banning Overseas Speculators from Buying Existing Houses	S9(2)(h) S6(a) S9(2)(j) S9(2)(f)(iv) S6(c) S9(2)(g)(i)
6.	3 November 2017	[TR including attachment of Draft TR] Overseas Buyers of Existing Homes: Draft Detailed Design Proposals	S9(2)(g)(i) S9(2)(k) S9(2)(a) S9(2)(h) S6(a) S9(2)(j) S6(e)(vi)
7.	7 November 2017	[TR] Banning Overseas Buyers of Existing Homes: Detailed Design Proposals	S9(2)(k) S9(2)(a) S6(a) S9(2)(h) S9(2)(j) S9(2)(g)(i) S9(2)(f)(iv) S6(c) S6(b)(i)

8.	10 November 2017	[TR] Banning Overseas Buyers of Existing Homes: Further Detailed Design Proposals	S9(2)(k) S9(2)(a) S9(2)(g)(i) S9(2)(h) S9(2)(f)(iv) S6(a) S6(e)(vi)
9.	17 November 2017	[TR] Banning Overseas Buyers of Existing Home: Design Details Report #3	S9(2)(k) S9(2)(a) S6(a) S9(2)(f)(iv) S9(2)(h) S9(2)(g)(i) S9(2)(j)
10.	24 November 2017	[TR] Draft Cabinet Legislation Committee Paper Banning Overseas Buyers of Existing Homes	S9(2)(k) S9(2)(a) S6(a) S9(2)(j) S9(2)(f)(iv) S9(2)(g)(i)
11.	24 November 2017	[Draft Cabinet Paper] Overseas Investment Amendment Bill: Approval for Introduction	S6(a) S9(2)(h) S9(2)(j) S9(2)(f)(iv)
12.	30 November 2017	[TR] Overseas Buyers Ban: Cabinet Legislation Committee Paper for Lodgement	S9(2)(k) S9(2)(a) S6(a) S9(2)(j) S9(2)(f)(iv) S9(2)(g)(i) S9(2)(h)
13.	30 November 2017	[Cabinet Paper] Overseas Investment Amendment Bill: Approval for Introduction	S6(a) S6(e)(vi) S9(2)(j) S9(2)(f)(iv) S9(2)(h)
14.	30 November 2017	Draft Departmental Disclosure Statement	S6(a) S9(2)(j)
15.	30 November 2017	Regulatory Impact Statement	S6(a) S6(c) S9(2)(h) S9(2)(j) S9(2)(g)(i)
16.	31 October 2017	[Cabinet Minute] CAB-17-MIN-0489	N/A

Reference: T2017/2371 IM-0

Date: 27 October 2017

To: Minister of Finance (Hon Grant Robertson)
Associate Minister of Finance (Hon David Parker)

Deadline: None
(if any)

Aide Memoire: Draft Cabinet Papers on Trade, TPPA, and Overseas Home Buyers

This note attaches near final drafts of a set of related papers for Cabinet on Tuesday on 31 October:

- Not Relevant [REDACTED]
- Banning overseas buyers from buying existing homes
- Not Relevant [REDACTED]

We have co-ordinated the drafting of the Overseas buyers paper and we have been consulted on the other two papers, which were co-ordinated by MFAT.

When reading the overseas buyers of residential property papers we have three key points we suggest you consider:

Costings for the overseas buyers of residential property

The Overseas buyers of residential property paper provides initial estimates of the costs associated with implementing this policy [REDACTED] s9(2)(f)(iv). We have worked with Land Information New Zealand in the last two days to reach this estimate, but it is important to note that the figure is highly speculative – in our view likely erring on the side of being high – due to the fact we have not agreed the design detail.

It will be important to reach a robust figure through the subsequent delegated Ministers process.


Framing of the purpose of the overseas buyer paper

We have reframed the most recent draft of this paper to reflect more of the policy goal of banning foreign ownership. We note it will be important for international audiences, and potentially international obligations, that the policy goals of improving housing affordability remain prominent.

Not Relevant



Steve Cantwell, Principal Advisor,  ^{s9(2)(k)}

Thomas Parry, Team Leader, International,  ^{s9(2)(k)}

Cabinet
Cabinet Business Committee

100 Day Commitment: Banning Overseas Speculators from Buying Existing Houses

Proposal

- 1 This paper seeks Cabinet agreement to legislative changes intended to deliver our 100 day commitment to ban overseas speculators from buying existing houses. ^{s9(2)(h)}

Executive Summary

2 XX

Background

- 3 As a Government, we welcome foreign investment in new, productive assets which add to the productivity of our economy. We also welcome those who have been granted residence and who live here and contribute to our country. Purchases of homes by foreign nationals not resident in New Zealand, which do not add to the stock of existing houses, do not add to our economy.
- 4 Our objective is to ensure that New Zealanders have the right to buy our houses and to ensure that foreigners who are not resident in New Zealand cannot own residential property. This will prevent non-resident foreign nationals from buying and occupying prime land – thereby preventing New Zealanders from owning it.
- 5 A by-product of this policy is that in periods when the housing market is out of equilibrium and foreign capital is flowing into New Zealand seeking to buy houses, there will be less upward pressure on house prices.

6 ^{s6(a)}

7

s9(2)(h)

8

The existing Overseas Investment Act (OIA) “...acknowledges that it is a privilege for overseas persons to own sensitive New Zealand assets” but does not recognise the special status of residential property, despite the central role that home ownership plays in establishing strong New Zealand families and communities. The proposed changes are intended to correct this, by restricting ownership of existing residential property (including residential land) to New Zealand citizens and permanent residents.

Criteria for assessing options

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To implement this policy, there are three key questions for us to consider:

- What is the best **delivery mechanism** for the ban?
- **Who** should be eligible to buy houses?
- **Which houses** should be subject to the ban?

10

I propose three criteria to assess the effectiveness of different options for implementing the ban. These are:

- **Policy effectiveness:** that the ban is effective, has the coverage we want, minimises any unintended consequences, and provides a mechanism for overseas investors to build new houses for sale where this supports housing supply without adding to demand.
- **Compliance with New Zealand’s international obligations:** s9(2)(h)
[Redacted text]
- **Minimising compliance and administration costs:** Supported by clear and simple rules that fit in with existing regulatory frameworks and land sale processes.

11

A key consideration for this policy is how quickly a ban could take effect, given our commitment to implement the policy by Christmas. [or is the commitment to introduce legislation by Christmas?]

Option Analysis

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Officials have considered a range of options for delivering a ban on overseas speculators in the New Zealand housing market. This paper considers two main packages of options.

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A package approach has been used because there are interrelationships between the different policy components, though there is scope to mix and match components to certain degree if we prefer.

14

The packages are summarised in the table below.

Table 1: Two options for delivering a ban

	Option one	Option Two
<i>Delivery option</i>	Overseas investment screening regime	Eligibility check by conveyancing agents
	+	+
<i>Who should be eligible to buy houses?</i>	s6(a)	
	+	+
<i>What houses should be subject to the ban?</i>	Residential land – either with an existing residence or zoned for residential housing <u>‘New Builds’ exempt</u> (definition to be determined later)	

Option one: Overseas investment screening regime package

15 This option would use the overseas investment screening regime to implement the ban. It would require changes to the definition and criteria for “sensitive land” in the Overseas Investment Act (OIA). This would utilise existing features of the OIA, including its definitions of “overseas persons” (which capture non-residents as well as corporate and other structures controlled by overseas investors) and the screening regime, which requires overseas investors to obtain government consent before acquiring certain investments, including defined “sensitive land”.

16 s9(2)(h)

17 s6(a) + s9(2)(j)

18 s9(2)(h)

s9(2)(h)

19

s9(2)(j)

- 20 Another advantage of this option is that the screening process provides an effective mechanism for assessing exemptions for new builds (as per our stated policy).

Who should be eligible?

- 21 Under this option the Overseas Investment Act definition of overseas person would be used, which captures all persons who are not New Zealand citizens or “ordinarily resident” in New Zealand.³

s6(a)

22

s6(a)

- 23 Using the existing Overseas Investment Act definition, along with an exemption power, removes any potential complexity in the legislative regime – having definitions for different components of the screening regime.

Which houses should be captured?

- 24 In order to avoid complexity and unintended consequences I recommend the definition is based on the character of the land, rather than the house. The definition would be residential housing and bare land zoned as residential under the relevant unitary or district plan. Officials are further exploring the options in this area but there are existing definitions in other regimes that could be utilised, to assist in providing clarity. For example, the income tax definition of residential land, and the classification of residential under the Rating Valuation Rules.

Option two: Eligibility check by conveyancing agents package

- 25 An alternative to screening is to require conveyancing agents to undertake an eligibility check on housing transactions. This would require changes to the Land Transfer Act.
- 26 Conveyancing agents undertake the land title transfer process for almost all land transactions, and could therefore be a checkpoint for ensuring compliance. If a buyer was ineligible to purchase a property then it would be unlawful for the conveyancing agent to action the land transfer.
- 27 An eligibility check would subject overseas persons and New Zealand buyers to the same process, and therefore the costs imposed by the check would be borne by all property

s9(2)(j)

s6(a)

buyers, not just overseas persons. The costs of a check could be minimised by aligning it with existing processes for conveyancing agents.

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s9(2)(h)

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The existing land title transfer process only records legal interests, meaning that beneficial ownership would not be captured and avoidance of the ban would be relatively easy. Changing the way the process works would carry risks to the land transfer system. Significant consultation with conveyancing professionals would also be required for this option as they would be responsible for implementing the ban.

Who should be eligible to buy houses?

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s9(2)(h)

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This option is less amenable to an exemption for new builds, since its design is based on a check that is quick and easy to perform and applies to all transactions.

Which houses should be captured?

33

As per option one, in terms of which houses should be subject to the ban, either one of two options could be used: the Income Tax definition of residential land or all land classified as residential under the Rating Valuation Rules ([refer paragraph xx](#)).

Comparison of options

s9(2)(h)

s9(2)(h)



34 On balance, officials strongly favour option one

s9(2)(h)



35 In terms of the question about which houses should be subject to the ban, both the Income Tax definition of residential land and the rating valuation rules have similar breadth of coverage. They both capture residential housing as well as bare land zoned for residential development. Officials recommend that Cabinet agrees to proceed with this broad definition of coverage.

Approach to managing international relationships

36

s6(a)



s9(2)(h)



a)

s6(a)

b)

c)

Next steps

Issues requiring further work

37 A number of issues require further work by officials prior to the introduction of a Bill. These include:

a) **What residential property is covered:** Issues to deal with here include the treatment of mixed-use buildings (e.g. a commercial and residential building, or hotel containing some apartments), incidental residential property (e.g. a large farm with workers accommodation), and the application to bare land that might, or might not, be developed for residential use. Residential buildings or land can also be held in corporate structures where the shares rather than underlying land is traded.

b) **The scope of the exemption for new builds:** Issues include designing the exemption so it supports increased housing supply, rather than diverting overseas investor demand to new houses, and the treatment of empty land the investor undertakes to develop in future.

c)

s6(a) + s9(2)(h)

d) **Application of the good character test for new builds:** At present overseas investors in sensitive land are subject to a “good character” test, while overseas investors in non-land “significant business assets” are not. There is a question whether investors in new builds should be subject to that test, which includes checks for good character, and business acumen.

e) **Longer-term non-permanent visitors:** Holders of longer-term visas but not permanent residency, e.g. student and work visas, are currently “overseas persons” and hence their investments screened under the OIA screening regime. Consideration needs to be given as to whether we want house purchases by these visitors to be screened, and if not, the nature of any exemption for them.

f) **Resourcing and implementation:** The OIO currently screens 150 sensitive land applications a year. Based on the Australia example, the overseas speculator ban is

likely to require a significant increase in resource to vet applications, monitor obligations (eg. the requirement to build a house once land is purchased) and carry out rigorous enforcement to ensure we have compliance with the ban.

It would be possible to design a cost recovery regime that ensures at least part of the ongoing costs of the screening regime would be borne by overseas persons applying for screening, rather than New Zealanders.

Penalties and enforcement: Recent enforcement work undertaken by the Overseas Investment Office uncovered significant non-compliance. The Overseas Investment Act currently includes a penalties regime, however it is not designed for this type of policy. Monitoring may be required to ensure that foreign investors (and their agents or associates) are meeting their obligations and not structuring around any ban.

Given the screening regime machinery is triggered by investor-initiated applications, a strengthened system of disclosures and penalties on investors (and potentially other participants in the sales transaction) may also be desirable.

Timing: it will be possible to pass the required legislation under urgency by Christmas, but new systems, resources and training will need to be in place before it can be fully implemented. Officials will provide further advice on any parts of the regime that could be implemented by Christmas and options for potential interim arrangements, and on when a fully effective ban could be in place.

- 38 I recommend that these decisions be delegated to a group of Ministers consisting of the [Prime Minister, Deputy Prime Minister, Minister of Finance, and Associate Minister of Finance, Hon David Parker] to allow officials sufficient time to proceed with drafting the legislation necessary to implement [or introduce] the ban by Christmas.
- 39 I will report to the Cabinet Business Committee on [11 December] with a draft Bill, [to be introduced and taken through all stages by 14 December].

Consultation

- 40 The following departments have been consulted on this policy: Land Information New Zealand, Ministry of Business, Innovation and Employment, Ministry of Foreign Affairs and Trade, Ministry of Justice and Overseas Investment Office. The Department of Prime Minister and Cabinet and Te Puni Kokiri have been informed.

Financial Implications

- 41 Limited analysis has been undertaken on implementing Option one – an overseas investment screening regime for the purchase of residential of houses by an exempt party. Based on a scan of other regulatory systems (which include costs associated with education, assessment of applications, monitoring and compliance functions), the financial implications for LINZ to implement Option one is estimate to be up to ^{s9(2)(f)(iv)} over the initial two years. The following table provides a breakdown of the costs:

Funding Components		\$m (excl GST)		
		2017/18	2018/19	Total
OPEX	Implementation	s9(2)(f)(iv)		
	Operation			
	Operating Total			
CAPEX	Software and associated other items			
	System Maintenance			
	Capital Total			
TOTAL funding				

42

s9(2)(f)(iv)

Human Rights

43

s9(2)(h)

- 44 A final view as to whether the proposals appear to be consistent with the Bill of Rights Act will be possible once the legislation has been drafted. Officials from the Ministry of Justice and The Treasury will work together on this issue to improve consistency with the Bill of Rights Act.

Legislative Implications

- 45 Implementing the proposed ban will require changes to the Overseas Investment Act (and its regulations).

Regulatory Impact Analysis

- 46 Under the provisions for Regulatory Impact Analysis set out in the Cabinet Manual, departments are expected to provide systematic analysis and advice, in the form of a Regulatory Impact Assessment (RIA), to inform Ministerial decision-making at Cabinet on proposals for regulatory action such as this. The information is intended to reduce the likelihood that good alternatives or important impacts and risks are not identified and considered, and is generally published when legislative proposals become public to indicate the robustness of the policy process.
- 47 Due to time constraints in this case, the Treasury has been unable to prepare a RIA to inform Ministerial decisions sought in this paper. Consequently the Cabinet's RIA requirements have not been met. Further detailed design decisions still need to be taken, however, and a RIA will be produced by the Treasury to inform Ministerial decisions on the final design.

Publicity

- 48 [to come]

Recommendations

49 The Associate Minister of Finance, Hon David Parker, recommends that the Committee:

Policy

- 1 Note that Labour's 100 day commitments include "Ban overseas speculators from buying existing houses".
- 2

s9(2)(h)
- 3

s6(c)
- 4 Agree that the screening regime changes include provisions enabling overseas investors to invest in the construction of new residential property houses, in some situations.
- 5

s6(a)
- 6

s6(c)
- 7 Note that further decisions are required on a range of detailed and technical issues.
- 8 Agree that Treasury will provide some form of regulatory impact analysis to help inform Ministerial decisions on the remaining policy details

Legal

- 9 invite Associate Minister of Finance, Hon David Parker to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above proposals by amendments to the Overseas Investment Act (including its regulations).
- 10 authorise a group of Ministers consisting of the [Prime Minister, Deputy Prime Minister, Minister of Finance, and Associate Minister of Finance, Hon David Parker] with power to act on further detailed policy matters that need to be addressed to enable the legislation to be drafted.
- 11 invite Associate Minister of Finance, Hon David Parker to present a draft bill to Cabinet on or before date x for introduction by date y.

Publicity

- 12 agree that announcement of the policy be...

Implementation

- 13 s9(2)(g)(i) [REDACTED]
- 14 **note** that giving effect to recommendation 13 will likely require a new regulation making power;
- 15 s9(2)(g)(i) [REDACTED]
- 16 **authorise** joint Ministers (Minister of Finance, Associate Minister of Finance (Hon David Parker) and Minister for Land Information) to determine the final amount, up to s9(2)(f)(iv) [REDACTED] of the capital injection and/or to agree the necessary changes to appropriations to give effect to decisions taken under recommendation 15;
- 17 s9(2)(g)(i) [REDACTED]
- 18 **note** that the proposal will be fiscally neutral across the forecast period;
- 19 **agree** that Cabinet will confirm ongoing funding implications, based on the details agreed by joint Ministers.

Authorised for lodgement

Hon XX

Minister for X

Chair
Cabinet Business Committee

100 Day Commitment: Banning Overseas Buyers from Buying Existing Homes

Proposal

1. This paper seeks Cabinet agreement to legislative changes intended to deliver our 100 day commitment to ban overseas buyers from buying existing homes. ^{s9(2)(h)} [REDACTED]
[REDACTED] Therefore decisions and implementation of this need to proceed rapidly.

Executive Summary

2. This paper delivers on our 100 Day Plan priority to ban overseas buyers from purchasing New Zealand homes. The increasing concentration of wealth in the hands of a small proportion of the world's population means that New Zealanders are at risk of being priced out of homes in their own country. I propose to use the Overseas Investment Office screening regime to ensure that only New Zealanders, ^{s6(a)} [REDACTED]
[REDACTED] We will exempt those who are developing property to on-sell it or to let it.
3. ^{s9(2)(h)} [REDACTED]
4. I propose that the Prime Minister, the Deputy Prime Minister, the Minister of Finance, the Associate Minister of Finance, Hon David Parker, and the Minister of Land Information be delegated power to act to refine the details of the proposal and approve legislation for introduction. I will report to the

Cabinet Business Committee no later than 11 December with a draft Bill for introduction.

Background

5. ^{s6(a)} [REDACTED] reflects our view that we want a housing market that is a New Zealand market, with prices shaped by New Zealand-based buyers, not an international one. Since the global financial crisis those with large trade surpluses or concentrations of wealth have invested unprecedented sums in other countries. This includes buying New Zealand homes for lifestyle or investment, which prices these homes on a wealthy international market rather than the domestic New Zealand market.
6. The good investment returns on residential property also encourages domestic over-investment in the sector, distorting domestic New Zealand investment patterns. This misdirection of capital from productive sectors contributes to New Zealand's productivity drought, while high housing values contribute to household indebtedness by requiring buyers to borrow more in order to secure a home, or by providing a source of growing household wealth that can be readily borrowed against.
7. ^{s6(a)} [REDACTED] is therefore expected to make homes more affordable for New Zealand buyers, including first home buyers, and directly and indirectly support our efforts to build a more productive economy, by helping redirect capital to more productive uses, and by reducing household indebtedness.
8. As a Government, we welcome foreign investment in new, productive assets which add to the productivity of our economy. We also welcome those who have been granted residence and who live here and contribute to our country. Purchases of homes by foreign nationals not resident in New Zealand, which do not add to the stock of existing houses, do not add to our economy.
9. ^{s6(a)} [REDACTED]
10. A by-product of this policy is that in periods when the housing market is out of equilibrium and foreign capital is flowing into New Zealand seeking to buy houses, there will be less upward pressure on house prices.

11. ^{s6(a)} [REDACTED]

12. ^{s9(2)(h)} [REDACTED]
13. The existing Overseas Investment Act (OIA) “...acknowledges that it is a privilege for overseas persons to own sensitive New Zealand assets” but does not recognise the special status of residential property, despite the central role that home ownership plays in establishing strong New Zealand families and communities. ^{s6(a) + 9(2)(j)} [REDACTED]

Criteria for assessing options

14. To implement this policy, there are three key questions for us to consider:
- What is the best **delivery mechanism** for the ban?
 - **Who** should be eligible to buy houses?
 - **Which houses** should be subject to the ban?
15. I propose three criteria to assess the effectiveness of different options for implementing the ban. These are:
- **Policy effectiveness:** that the ban is effective, has the coverage we want, minimises any unintended consequences, and provides a mechanism for overseas investors to build new houses for sale where this supports housing supply without adding to demand.
 - **Compliance with New Zealand’s international obligations:** ^{s9(2)(h)} [REDACTED]
 - **Minimising compliance and administration costs:** Supported by clear and simple rules that fit in with existing regulatory frameworks and land sale processes.

16. A key consideration for this policy is how quickly a ban could take effect, given our commitment to implement the policy by Christmas. [or is the commitment to introduce legislation by Christmas?]

Option Analysis

17. Officials have considered a range of options for delivering a ban on overseas speculators in the New Zealand housing market. This paper considers two main packages of options.

18. A package approach has been used because there are interrelationships between the different policy components, though there is scope to mix and match components to a certain degree if we prefer.

19. The packages are summarised in the table below.

Table 1: Two options for delivering a ban

	Option one	Option Two
<i>Delivery option</i>	Overseas investment screening regime	Eligibility check by conveyancing agents
<i>Who should be eligible to buy houses?</i>		
<i>What houses should be subject to the ban?</i>	Residential land – either with an existing residence or zoned for residential housing <u>‘New Builds’ new builds exempt</u> (detail to be determined later)	

Option one: Overseas investment screening regime package

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s9(2)(h)

21.

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23.

24.

25.

s9(2)(h)

Who should be eligible?

26.

s6(a) + s9(2)(h)

27.

28. Using the existing OIA definition, along with an exemption power, limits additional complexity in the legislative regime – having definitions for different components of the screening regime.

Which houses should be captured?

29. In order to avoid complexity and unintended consequences I recommend the definition is based on the character of the land, rather than the house. The definition would be residential housing and bare land zoned as residential under the relevant unitary or district plan. Officials are further exploring the options in this area but there are existing definitions in other regimes that could be utilised, to assist in providing clarity. For example, the income tax definition of residential land, and the classification of residential land under the Rating Valuation Rules.

s6(a)

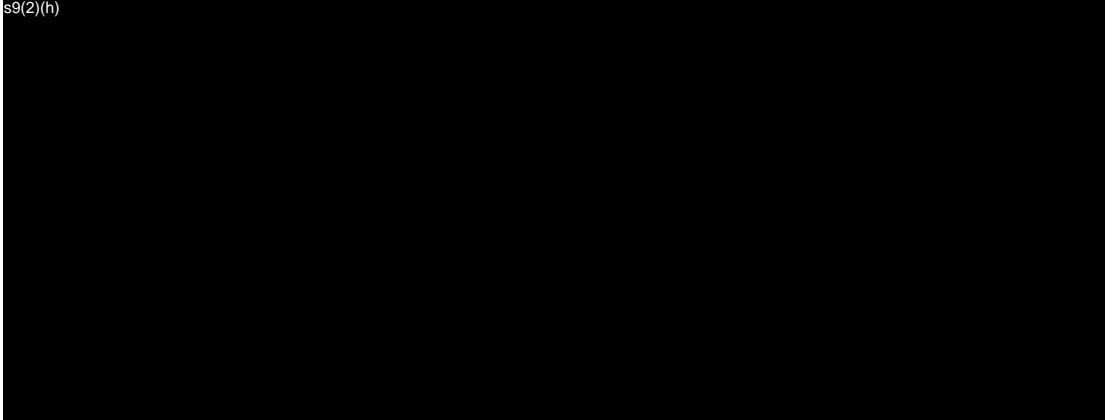
Option two: Eligibility check by conveyancing agents package

30. An alternative to screening is to require conveyancing agents to undertake an eligibility check on housing transactions. This would require changes to the Land Transfer Act (or an alternative new piece of legislation) requiring a certificate that the new beneficial owner is not an overseas person for the sales transfer to proceed.

s9(2)(h)

31. Conveyancing agents undertake the land title transfer process for almost all land transactions, and could therefore be a checkpoint for ensuring compliance. If a buyer was ineligible to purchase a property then it would be unlawful for the conveyancing agent to action the land transfer. Other stakeholders, such as banks, would also help ensure compliance as they would likely require proof that a purported owner of a property was legally entitled to own it before they would lend money against the property.

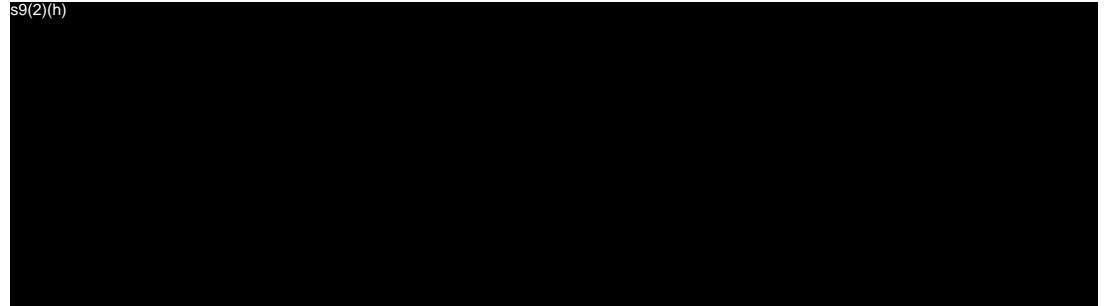
32. An eligibility check would subject overseas persons and New Zealand buyers to the same process, and therefore the costs imposed by the check would be borne by all property buyers, not just overseas persons. The costs of a check could be minimised by aligning it with existing processes for conveyancing agents.

33. ^{s9(2)(h)} 

34. The existing land title transfer process only records legal interests, meaning that at present beneficial ownership is not captured, avoidance of the ban would be relatively easy. Changes could be made to address this, such as requiring declarations from the solicitor acting for the purchaser that the beneficial owner is not a foreign buyer. However changing the way the process works would carry risks to the land transfer system. Significant consultation with conveyancing professionals would also be required for this option as they would be responsible for implementing the ban.

35. If option 1 is agreed, features of Option 2 may still be adopted as part of the compliance and enforcement machinery of Option 1.

Who should be eligible to buy houses?

36. ^{s9(2)(h)} 

37.

s9(2)(h)

38. This option is less amenable to an exemption for new builds, since its design is based on a check that is quick and easy to perform and applies to all transactions.

Which houses should be captured?

39. As per option one, in terms of which houses should be subject to the ban, either one of two options could be used: the Income Tax definition of residential land or all land classified as residential under the Rating Valuation Rules (refer paragraph xx).

Comparison of options

s9(2)(h)

s9(2)(h)

s9(2)(h)

40. On balance, officials strongly favour option one s9(2)(h)

41. In *terms* of the question about which houses should be subject to the ban, both the Income Tax definition of residential land and the rating valuation rules have similar breadth of coverage. They both capture residential housing as well as bare land zoned for residential development. Officials recommend that Cabinet agrees to proceed with this broad definition of coverage but with details to be confirmed by delegated Ministers.

Approach to managing international relationships

42.

s6(a), s9(2)(h) + s9(2)(j)

a)

s6(a), s9(2)(h) + s9(2)(j)

b)

c)

s9(2)(h)

Next steps

Issues requiring further work

43. A number of issues require further work by officials prior to the introduction of a Bill. *These include:*

a. **What residential property is covered:** Issues to deal with here include the treatment of mixed-use buildings (e.g. a commercial and residential building, or hotel containing some apartments), incidental residential property (e.g. a large farm with workers accommodation), and the application to bare land that might, or might not, be developed for residential use. Residential buildings or land can also be held in corporate structures where the shares rather than underlying land is traded.

b. **The scope of the exemption for new builds:** Issues include designing the exemption so it supports increased housing supply, rather than diverting overseas investor demand to new houses, and the treatment of empty land the investor undertakes to develop in future.

c.

d. **Application of the good character test for new builds:** At present overseas investors in sensitive land are subject to a “good character” test, while overseas investors in non-land “significant business assets” are not. There is a question whether investors in new builds should be subject to that test, which includes checks for good character, and business acumen.

e. **Longer-term non-permanent visitors:** Holders of longer-term visas but not permanent residency, e.g. student and work visas, are currently “overseas persons” and hence their investments screened under the OIA screening regime. Consideration needs to be given as

to whether we want house purchases by these visitors to be screened, and if not, the nature of any exemption for them. My current view is that students are here to study, so should not be exempted from the changes to the screening regime, but consideration should be given to the treatment of people in New Zealand on longer-term work visas.

- f. **Resourcing and implementation:** The OIO currently screens 150 sensitive land applications a year. Based on the Australia example, the overseas speculator ban is likely to require a significant increase in resource to vet applications, monitor obligations (eg. the requirement to build a house once land is purchased) and carry out rigorous enforcement to ensure we have compliance with the ban.

It would be possible to design a cost recovery regime that ensures at least part of the ongoing costs of the screening regime would be borne by overseas persons applying for screening, rather than New Zealanders.

- g. **Penalties and enforcement:** Recent enforcement work undertaken by the Overseas Investment Office uncovered significant non-compliance. The Overseas Investment Act currently includes a penalties regime, however it is not designed for this type of policy. Monitoring may be required to ensure that foreign investors (and their agents or associates) are meeting their obligations and not structuring around any ban.

Given the screening regime machinery is triggered by investor-initiated applications, a strengthened system of disclosures and penalties on investors (and potentially other participants in the sales transaction) may also be desirable.

- h. **Timing:** it will be possible to pass the required legislation under urgency by Christmas, but new systems, resources and training will need to be in place before it can be fully implemented. Officials will provide further advice on any parts of the regime that could be implemented by Christmas and options for potential interim arrangements, and on when a fully effective ban could be in place.

- 44. I recommend that these decisions be delegated to a group of Ministers consisting of the Prime Minister, Deputy Prime Minister, Minister of Finance, Associate Minister of *Finance*, Hon David Parker and the Minister of Land Information to allow officials sufficient time to proceed with drafting the legislation for introduction by Christmas.
- 45. I will report to the *Cabinet* Business Committee on 11 December with a draft Bill, to be introduced and taken through all stages by 14 December, if this is possible to do so not under urgency.

Consultation

46. The following departments have been consulted on this policy: Land Information New Zealand, Ministry of Business, Innovation and Employment, Ministry of Foreign Affairs and Trade, Ministry of Justice and Overseas Investment Office. The Department of Prime Minister and Cabinet and Te Puni Kokiri have been informed.

Financial Implications

47. Limited analysis has been undertaken on implementing Option one – an overseas investment screening regime for the purchase of residential of houses by an exempt party. Based on a scan of other regulatory systems (which include costs associated with education, assessment of applications, monitoring and compliance functions), Land Information New Zealand estimate that implementing this policy will require around §9(2)(f)(iv) in capital and operating expenses over two years. This estimate is based on processing 300 applications per year for the new build exemption starting from mid-December 2017. This excludes any funding for litigation to enforce the regime.
48. The following table provides a breakdown of these costs:

Funding Components		\$m (excl GST)		
		2017/18	2018/19	Total
OPEX	Implementation	§9(2)(f)(iv)	<div></div>	<div></div>
	Operation			
	Operating Total			
CAPEX	Software and associated other items			
	System Maintenance			
	Capital Total			
TOTAL funding				

49. §9(2)(g)(i)

Human Rights

50. §9(2)(h)

51. A final view as to whether the proposals appear to be consistent with the Bill of Rights Act will be possible once the legislation has been drafted. Officials from the Ministry of Justice and The Treasury will work together on this issue to improve consistency with the Bill of Rights Act and advise on the application of the Bill of Rights Act and Human Rights Act to non-resident non-citizens.

Legislative Implications

52. Implementing the proposed ban will require changes to the Overseas Investment Act (and its regulations).

Regulatory Impact Analysis

53. Under the provisions for Regulatory Impact Analysis set out in the Cabinet Manual, departments are expected to provide systematic analysis and advice, in the form of a Regulatory Impact Assessment (RIA), to inform Ministerial decision-making at Cabinet on proposals for regulatory action such as this. The information is intended to reduce the likelihood that good alternatives or important impacts and risks are not identified and considered, and is generally published when legislative proposals become public to indicate the robustness of the policy process.
54. Due to time constraints in this case, the Treasury has been unable to prepare a RIA to inform Ministerial decisions sought in this paper. Consequently the Cabinet's RIA requirements have not been met. Further detailed design decisions still need to be taken, however, and a RIA will be produced by the Treasury to inform Ministerial decisions on the final design.

Publicity

55. s6(a)

Recommendations

9 The Associate Minister of Finance, Hon David Parker, recommends that the Committee:

1. **note** that Labour's 100 day commitments include "Ban overseas buyers from buying existing homes";

Policy

2. s9(2)(h) + s9(2)(j)
[Redacted]
3. s9(2)(j)
[Redacted]
4. s6(a)
[Redacted]
5. **agree** that the screening regime changes include provisions enabling overseas investors to invest in the construction of new residential property for on-sale or letting, in some situations;
6. s6(a)
[Redacted]
7. s6(a)
[Redacted]
8. **note** that the use of the existing Overseas Investment Act definitions of "ordinarily resident" (in New Zealand) and "overseas person" will mean that people temporarily resident in New Zealand without permanent residence will be "overseas persons" for the purposes of the OIA, and so subject to the enhanced residential property screening regime;
7. **note** that further decisions are required on a range of detailed and technical issues;
8. **agree** that Treasury will provide a regulatory impact analysis to help inform Ministerial decisions on the remaining policy details;

Legal

- 9 **invite** Associate Minister of Finance, Hon David Parker to issue drafting instructions to the Parliamentary Counsel Office to give effect

to the above proposals by amendments to the Overseas Investment Act (including its regulations);

- 10 **authorise** a group of Ministers consisting of the [Prime Minister, Deputy Prime Minister, Minister of Finance, and Associate Minister of Finance, Hon David Parker] with power to act on further detailed policy matters that need to be addressed to enable the legislation to be drafted;
- 11 **invite** Associate Minister of Finance, Hon David Parker to present a draft bill to Cabinet on or before **date x for introduction by date y;**

Publicity

- 12 **agree** that announcement of the policy be...

Implementation

- 13 s9(2)(g)(i) [REDACTED]
- 14 **note** that giving effect to recommendation 13 will likely require a new regulation making power;
- 15 s9(2)(g)(i) [REDACTED]
- 16 **note** Land Information New Zealand estimate that implementing this policy will require around s9(2)(i)(v) [REDACTED] in capital and operating expenses over two years;
- 17 **authorise** joint Ministers (Minister of Finance, Associate Minister of Finance (Hon David Parker) and Minister for Land Information) to determine the final amount of the capital injection and/or to agree the necessary changes to appropriations to give effect to decisions taken under recommendation 15;
- 18 **note** the Fiscal Plan, consistent with our Budget Responsibility Rules will ensure that the Government is delivering a sustainable operating surplus across an economic cycle and reduce the level of net core Crown debt to 20% of GDP within the next five years;
- 19 **note** that these financial implications will be managed against the operating and capital funding set out in the Fiscal Plan;

- 20 **note** that where costs exceed these financial implications, the additional impact on operating balance before gains and losses and net core Crown debt will need to be managed;
- 21 **agree** that Cabinet will confirm ongoing funding implications, based on the details agreed by joint Ministers.

Authorised for lodgement

Hon XX

Minister for X

DRAFT

Treasury Report: 100 Day Commitment: Banning Overseas Speculators from Buying Existing Houses

Date:	31 October 2017	Report No:	T2017/2364
		File Number:	IM-5-1

Action Sought

	Action Sought	Deadline
Associate Minister of Finance (Hon David Parker)	Note the attached Cabinet Paper (100 Day Commitment: Banning Overseas Buyers from Buying Existing Houses).	Tuesday 31 October 2017

Contact for Telephone Discussion (if required)

Name	Position	Telephone	1st Contact
Steve Cantwell	Principal Advisor	s9(2)(k)	N/A
Thomas Parry	Team Leader		s9(2)(a)

Actions for the Minister's Office Staff (if required)

Return the signed report to Treasury.

The Cabinet Paper has been lodged by s9(2)(a)

Note any feedback on the quality of the report

Enclosure: Yes

(attached)

Treasury Report: 100 Day Commitment: Banning Overseas Speculators from Buying Existing Houses

Executive Summary

The Cabinet Paper 100 Day Commitment: Banning Overseas Buyers from Buying Existing Houses has been created in consultation with yourself, Land Information New Zealand, Ministry of Business, Innovation and Employment, Ministry of Foreign Affairs and Trade, Overseas Investment Office, Ministry of Justice, and Inland Revenue Department.

This Cabinet Paper was lodged 30 October 2017, for Cabinet 31 October 2017.

Recommended Action

We recommend that you:


- a **note** the attached Cabinet Paper (100 Day Commitment: Banning Overseas Buyers from Buying Existing Houses).

Thomas Parry
Team Leader, International

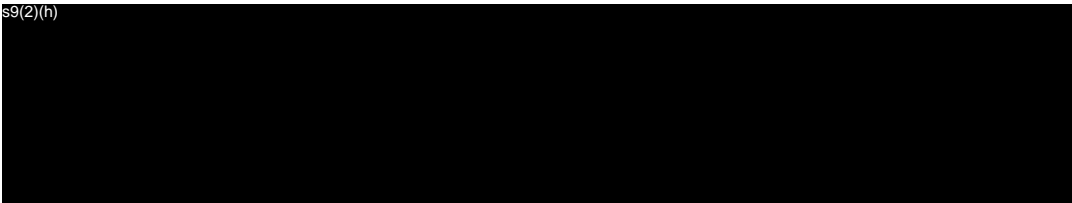
Hon David Parker
Associate Minister of Finance

Office of the Associate Minister of Finance
Chair, Cabinet


100 Day Commitment: Banning Overseas Buyers from Buying Existing Homes Proposal

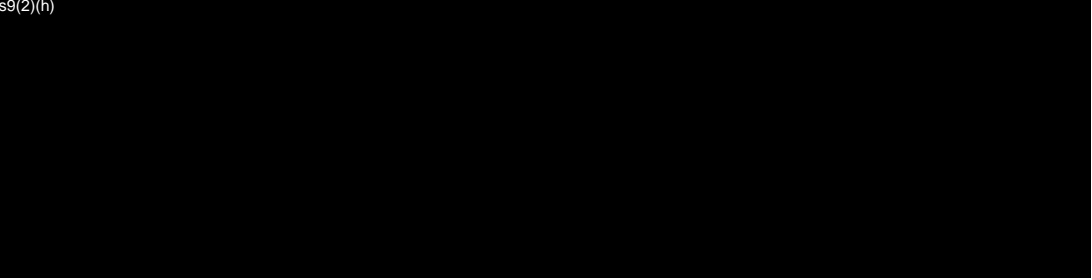

1. This paper seeks Cabinet agreement to legislative changes intended to deliver our 100 day commitment to ban overseas buyers from buying existing homes. ^{s9(2)(h)}
 Therefore decisions and implementation of this policy need to proceed rapidly.

Executive Summary

2. This paper delivers on our 100 Day Plan priority to ban overseas buyers from purchasing existing New Zealand homes. I propose to use the Overseas Investment Office screening regime to ensure that only New Zealanders, Australians and those with a resident visa who are ordinarily resident in New Zealand will be able to purchase existing homes here. We will exempt those who are building homes to on-sell it or to let it.
3. ^{s9(2)(h)}

4. I propose that the Prime Minister, the Deputy Prime Minister, the Minister of Finance, the Associate Minister of Finance, Hon David Parker, and the Minister of Land Information be delegated power to act to refine the details of the proposal and approve legislation for introduction. I will report to the Cabinet Business Committee no later than 11 December with a draft Bill for introduction.

Background

5. As a Government, we welcome foreign investment in new, productive assets which add to the productivity of our economy. We also welcome those who have been granted residence and who live here and contribute to our country. Purchases of homes by foreign nationals not resident in New Zealand, which do not add to the stock of existing houses, do not add substantially to our economy.
6. Our objective is to ensure that New Zealanders have the right to buy our houses and to ensure that foreigners who are not resident in New Zealand cannot own residential property. This will prevent non-resident foreign nationals from outbidding New Zealanders. Australia has adopted a similar policy.
7. The proposed ban on overseas buyers buying existing homes reflects our view that we want a housing market that is a New Zealand market, with prices shaped by New Zealand-based buyers, not an international one. Since the global financial crisis those with large trade surpluses or concentrations of wealth have invested unprecedented sums in other countries. This includes buying New Zealand homes for lifestyle or investment. The extra demand from wealthy international investors influences the domestic New Zealand market. The effect of this policy is that in periods when the housing market is out of equilibrium and foreign capital would otherwise be flowing into New Zealand seeking to buy houses, there will be less upward pressure on house prices.
8. Current settings also contribute to the distortion of wider domestic New Zealand investment patterns, misdirecting capital away from productive sectors thereby contributing to New Zealand's productivity drought. High housing prices contribute to household indebtedness by requiring first home buyers to borrow more in order to secure a home.
9. Banning foreign buyers of existing homes is therefore expected to make homes more affordable for New Zealand buyers at some times in the property market cycle, including for first home buyers, while also supporting our efforts to build a more productive economy, by helping redirect capital to productive uses.
10. s6(a) 

11. Australia exempts New Zealanders from their domestic ban on foreign house buyers. Our policy has been, broadly, that if you have the right to live in New Zealand permanently, you should have the right to buy here. Australian citizens and permanent residents have the right to live here, and accordingly we propose to reciprocate and exempt Australians.
12. ^{s9(2)(h)} 
13. ^{s6(a), s9(2)(h) + s9(2)(j)} 
14. The existing Overseas Investment Act (OIA) “...acknowledges that it is a privilege for overseas persons to own sensitive New Zealand assets” but does not recognise the special status of residential property, despite the central role that home ownership plays in establishing strong New Zealand families and communities. The proposed changes are intended to correct this, by restricting ownership of existing residential property (including residential land) to New Zealand citizens and permanent residents.

Criteria for assessing options

15. To implement this policy, there are three key questions for us to consider:
- What is the best **delivery mechanism** for the ban?
 - **Who** should be eligible to buy houses?
 - **Which houses** should be subject to the ban?
16. I propose three criteria to assess the effectiveness of different options for implementing the ban. These are:
- **Policy effectiveness:** that the ban is effective, has the coverage we want, minimises any unintended consequences, and provides a mechanism for overseas investors to build new houses for sale where this supports housing supply without adding to demand.

- **Compliance with New Zealand's international obligations:**

s9(2)(h)

- **Minimising compliance and administration costs:** Supported by clear and simple rules that fit in with existing regulatory frameworks and land sale processes.

17. A key consideration for this policy is how quickly a ban could take effect, given our 100 days commitments.

Option Analysis

18. Officials have considered a range of options for delivering a ban on overseas buyers in the New Zealand housing market. This paper considers two main packages of options.

19. A package approach has been used because there are interrelationships between the different policy components, though there is scope to mix and match components to a certain degree if we prefer.

20. The packages are summarised in the table below.

Table 1: Two options for delivering a ban

	Option One	Option Two
<i>Delivery option</i>	Overseas investment screening regime	Eligibility check by conveyancing agents
<i>Who would be eligible to buy houses?</i>	s6(a) + s9(2)(j)	
<i>What houses would be subject to the ban?</i>	<div>+</div> <div>+</div> Residential land – either with an existing residence or zoned for residential housing <u>'New Builds' new builds exempt</u> (detail to be determined later)	

Option one: Overseas investment screening regime package

21.

s6(a), s9(2)(h) + s9(2)(i)

22.

23.

24.

s9(2)(h)

25. ^{s9(2)(h)} [REDACTED]

26. Another advantage of this option is that the screening process provides an effective mechanism for assessing exemptions for new builds (as per our stated policy).

Who should be eligible?

27. Under this option the OIA definition of overseas person would be used, which captures all persons who are not New Zealand citizens or “ordinarily resident” in New Zealand. ^{s6(a)} [REDACTED]

28. ^{s6(a)} [REDACTED]

29. Using the existing OIA definition, along with an exemption power, limits additional complexity in the legislative regime – having definitions for different components of the screening regime.

Which houses should be captured?

30. In order to avoid complexity and unintended consequences I recommend the definition is based on the character of the land, rather than the house. The definition would be residential housing and bare land zoned as residential under the relevant unitary or district plan. Officials are further exploring the options in this area but there are existing definitions in other regimes that could be utilised, to assist in providing clarity. For example,

^{s9(2)(h)} [REDACTED]

^{s6(a)} [REDACTED]

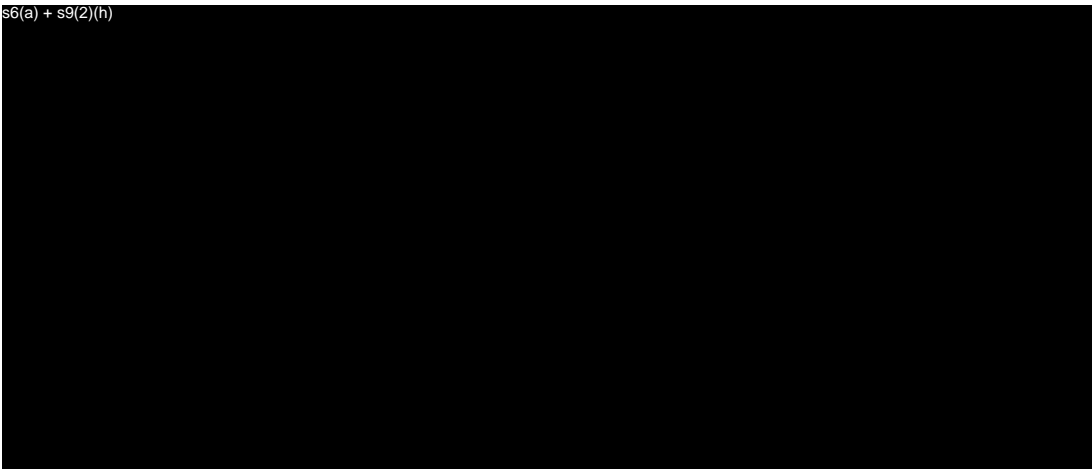
the income tax definition of residential land, and the classification of residential land under the Rating Valuation Rules.

31. At this stage I intend that foreign purchases of farms that include farm houses will be considered under the sensitive land rules for farms of more than 5ha, rather than proposed residential, rules. The sensitive land rules will also be considered (along with other issues) in a separate paper addressing our coalition commitment to strengthen the OIA.
32. I also intend that housing incidental to other property assets (e.g. factories, commercial buildings, and hotels or motels) such as worker accommodation or a caretaker's or manager's residence be exempt.

Option two: Eligibility check by conveyancing agents package

33. An alternative to screening is to require conveyancing agents to undertake an eligibility check on housing transactions. This would require changes to the Land Transfer Act (or an alternative new piece of legislation) requiring a certificate that the new beneficial owner is not an overseas person for the sales transfer to proceed.
34. Conveyancing agents undertake the land title transfer process for almost all land transactions, and could therefore be a checkpoint for ensuring compliance. If a buyer was ineligible to purchase a property then it would be unlawful for the conveyancing agent to action the land transfer. Other stakeholders, such as banks, would also help ensure compliance as they would likely require proof that a purported owner of a property was legally entitled to own it before they would lend money against the property.
35. An eligibility check would subject overseas persons and New Zealand buyers to the same process, and therefore the costs imposed by the check would be borne by all property buyers, not just overseas persons. The costs of a check could be minimised by aligning it with existing processes for conveyancing agents.

36. s6(a) + s9(2)(h)



37. The existing land title transfer process only records legal interests, meaning that at present beneficial ownership is not captured. Changes could be made to address this, such as requiring declarations from the solicitor acting for the purchaser that the beneficial owner is not a foreign buyer. Significant consultation with conveyancing professionals would also be required for this option. A screening mechanism would still be needed for new-builds if option2 was chosen.
38. If option 1 is agreed, features of Option Two may still be adopted as part of the compliance and enforcement machinery of Option One.

Who should be eligible to buy houses?

39.

s9(2)(h)

40.

41. This option is less amenable to an exemption for new builds, since its design is based on a check that is quick and easy to perform and applies to all transactions.

Which houses should be captured?

42. As per option One, in terms of which houses should be subject to the ban, either one of two options could be used: the Income Tax definition of residential land or all land classified as residential under the Rating Valuation Rules.

Table 2: Comparison of options

s9(2)(h)



43. On balance, officials strongly favour option one

s9(2)(h)



s9(2)(h)



44. In terms of the question about which houses should be subject to the ban, both the Income Tax definition of residential land and the rating valuation rules have similar breadth of coverage. They both capture residential housing as well as bare land zoned for residential development. Officials recommend that Cabinet agrees to proceed with this broad definition of coverage but with details to be confirmed by delegated Ministers.

Approach to managing international relationships

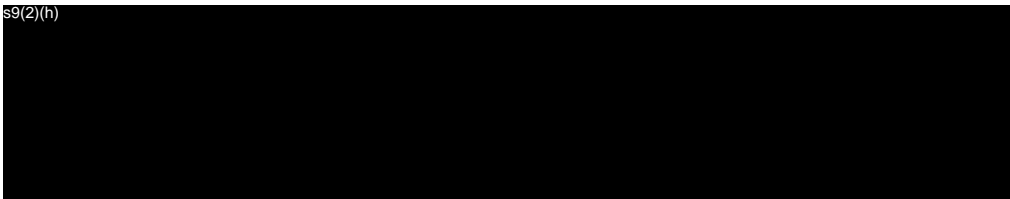
45. s6(a), s9(2)(h) + s9(2)(j)
- a) s6(a), s9(2)(h) + s9(2)(j)
- b) s6(a), s9(2)(h) + s9(2)(j)
- c) s6(a), s9(2)(h) + s9(2)(j)
46. s6(a)

Next steps

Issues requiring further work

47. A number of issues require further work by officials prior to the introduction of a Bill. These include:
- a. **What residential property is covered:** Issues to deal with here include the treatment of mixed-use buildings (e.g. a commercial and residential building, or hotel containing some apartments), incidental residential property, and the application to bare land that might, or might not, be developed for residential use. Residential buildings or land can also be held in corporate structures where the shares rather than underlying land is traded, as occurs with other assets affected by existing sensitive land rules.

- b. **The scope of the exemption for new builds:** Issues include designing the exemption so it supports increased housing supply, rather than diverting overseas investor demand to new houses, and the treatment of empty land the investor undertakes to develop in future.

c. ^{s9(2)(h)} 

- d. **Application of the good character test for new builds:** At present overseas investors seeking consent under the OIA are subject to a “good character” test. There is a question whether investors in new builds should be subject to that test, which includes checks for good character, and business acumen.
- e. **Longer-term non-permanent visitors:** Holders of longer-term visas but not permanent residency, e.g. student and work visas, are currently “overseas persons” and hence their investments screened under the OIA screening regime. Consideration needs to be given as to whether we want house purchases by these visitors to be screened, and if not, the nature of any exemption for them. My current view is that students are here to study, so should not be exempted from the changes to the screening regime, but consideration should be given to the treatment of people in New Zealand on longer-term work visas.
- f. **Resourcing and implementation:** The Overseas Investment Office (OIO) currently screens 150 sensitive land applications a year. Based on the Australia example, the overseas buyer ban is likely to require a significant increase in resource to vet applications, monitor obligations (eg. the requirement to build a house once land is purchased) and carry out rigorous enforcement to ensure we have compliance with the ban.

It would be possible to design a cost recovery regime that ensures at least part of the ongoing costs of the screening regime would be borne by overseas persons applying for screening, rather than New Zealanders.

- g. **Penalties and enforcement:** Recent enforcement work undertaken by the OIO uncovered significant non-compliance. The OIA currently includes a penalties regime, however it is not designed for this type of policy. Monitoring may be required to ensure that foreign investors

(and their agents or associates) are meeting their obligations and not structuring around any ban.

Given the screening regime machinery is triggered by investor-initiated applications, a strengthened system of disclosures and penalties on investors (and potentially other participants in the sales transaction) may also be desirable.

- h. **Timing:** it will be possible to pass the required legislation under urgency by Christmas, but new systems, resources and training will need to be in place before it can be fully implemented. Officials will provide further advice on any parts of the regime that could be implemented by Christmas and options for potential interim arrangements, and on when a fully effective ban could be in place.
48. I recommend that these decisions be delegated to a group of Ministers consisting of the Prime Minister, Deputy Prime Minister, Minister of Finance, Associate Minister of Finance, Hon David Parker and the Minister of Land Information, to allow officials sufficient time to proceed with drafting the legislation for introduction by Christmas.
49. I will report to the Cabinet Business Committee on 11 December with a draft Bill, to be introduced and ready to be taken through all stages by 14 December if necessary. Further consideration will be given to whether it is possible to do this without resort to urgency.

Consultation

50. The following departments have been consulted on this policy: Land Information New Zealand, Ministry of Business, Innovation and Employment, Ministry of Foreign Affairs and Trade, Ministry of Justice; Inland Revenue and Overseas Investment Office. The Department of Prime Minister and Cabinet and Te Puni Kokiri have been informed.

Financial Implications

51. Limited analysis has been undertaken on implementing Option one – an overseas investment screening regime for the purchase of residential homes by an exempt party. Based on a scan of other regulatory systems (which include costs associated with education, assessment of applications, monitoring and compliance functions), Land Information New Zealand estimate that implementing this policy will require around s9(2)(f)(iv) in capital and operating expenses over two years. This estimate is based on processing 300 applications per year for the new build exemption starting from mid-December 2017. This excludes any funding for litigation to enforce the regime.

52. The following table provides a breakdown of these costs:

Funding Components		\$m (excl GST)		
		2017/18	2018/19	Total
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	Operation			
	Operating Total			
CAPEX	Software and associated other items			
	System Maintenance			
	Capital Total			
TOTAL funding				

53. s9(2)(g)(i)

Human Rights

54. s9(2)(h)

55. A final view as to whether the proposals appear to be consistent with the Bill of Rights Act will be possible once the legislation has been drafted. Officials from the Ministry of Justice and The Treasury will work together on this issue to improve consistency with the Bill of Rights Act and advise on the application of the Bill of Rights Act and Human Rights Act to non-resident non-citizens.

Legislative Implications

56. Implementing the proposed ban will require changes to the OIO (and its regulations).

Regulatory Impact Analysis

57. Under the provisions for Regulatory Impact Analysis set out in the Cabinet Manual, departments are expected to provide systematic analysis and advice, in the form of a Regulatory Impact Assessment (RIA), to inform Ministerial decision-making at Cabinet on proposals for regulatory action such as this. The information is intended to reduce the likelihood that good alternatives or important impacts and risks are not identified and considered, and is generally published when legislative proposals become public to indicate the robustness of the policy process.
58. Due to time constraints in this case, the Treasury has been unable to prepare a RIA to inform Ministerial decisions sought in this paper. Consequently the Cabinet's RIA requirements have not been met. Further detailed design decisions still need to be taken, however, and a RIA will be produced by the Treasury to inform Ministerial decisions on the final design.

Publicity

59. As many details of how the overseas buyer ban will be implemented are yet to be finalised, I propose that public announcements on this be limited to:
- confirming that legislation implementing the ban will be introduced before Christmas;
 - that the OIA regime will be used as the mechanism to implement the ban;
 - that there will be an exemption for overseas investors building new properties for on-sale or letting (in some circumstances); and
 - that detailed design will be worked through in the coming weeks.

60. ^{s9(2)(h) + s9(2)(j)} [REDACTED]

61. ^{s6(a)} [REDACTED]

Recommendations

62. The Associate Minister of Finance, Hon David Parker, recommends that the Committee:

1. **note** that Labour's 100 day commitments include "Ban overseas buyers from buying existing homes";

Policy

2. s9(2)(h) [Redacted]
3. s9(2)(h) [Redacted]
4. s9(2)(i)(iv) [Redacted]
5. s9(2)(i) [Redacted]
6. s6(a) [Redacted]
7. **agree** that the screening regime changes include provisions enabling overseas investors to invest in the construction of new residential property for on-sale or letting, in some situations;
8. s6(a) [Redacted]
9. s6(a) [Redacted]
10. s9(2)(h) + s9(2)(i) [Redacted]

11. **note** that the use of the existing OIA definitions of “ordinarily resident” (in New Zealand) and “overseas person” will mean that people temporarily resident in New Zealand without permanent residence will be “overseas persons” for the purposes of the OIA, and so subject to the enhanced residential property screening regime;
12. **note** that further decisions are required on a range of detailed and technical issues;
13. **agree** that Treasury will provide a regulatory impact analysis to help inform Ministerial decisions on the remaining policy details;

Legal

14. **invite** Associate Minister of Finance, Hon David Parker to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above proposals by amendments to the OIA (including its regulations);
15. **authorise** a group of Ministers consisting of the Prime Minister, Deputy Prime Minister, Minister of Finance, Associate Minister of Finance, Hon David Parker and the Minister of Land Information with power to act on further detailed policy matters that need to be addressed to enable the legislation to be drafted;
16. **invite** Associate Minister of Finance, Hon David Parker to present a draft bill to Cabinet Business Committee on or before 11 December 2017;

Publicity

17. **agree** that announcement of the policy be made after cabinet has made its decision.
18. **note** that many details of how the overseas buyer ban will be implemented are yet to be finalised;
19. **note** that the paper agrees the following points, which could be noted publicly:
 - a) confirming that legislation implementing the Overseas buyer ban will be introduced before Christmas;
 - b) the ban will be use the Overseas Investment Act regime;
 - c) there will be an exemption for new build properties purchased for on-sale or letting in some circumstances;
 - d) the detailed design will be worked through in the coming weeks; and

e)

s6(a)

20. **note** officials could provide detailed talking points, on request;

Implementation

21.

s9(2)(g)(i)

22. **note** that giving effect to recommendation 21 will likely require a new regulation making power;
23. **authorise** joint Ministers (Minister of Finance, Associate Minister of Finance (Hon David Parker) and Minister for Land Information) to take decisions around design, implementation and associated charges;
24. **note** Land Information New Zealand estimate that implementing this policy will require around s9(2)(i)(v) in capital and operating expenses over two years;
25. **authorise** joint Ministers (Minister of Finance, Associate Minister of Finance (Hon David Parker) and Minister for Land Information) to determine the final amount of the capital injection and/or to agree the necessary changes to appropriations to give effect to decisions taken under recommendation 15;
26. **note** the Fiscal Plan, consistent with our Budget Responsibility Rules will ensure that the Government is delivering a sustainable operating surplus across an economic cycle and reduce the level of net core Crown debt to 20% of GDP within the next five years;
27. **note** that these financial implications will be managed against the operating and capital funding set out in the Fiscal Plan;
28. **note** that where costs exceed these financial implications, the additional impact on operating balance before gains and losses and net core Crown debt will need to be managed; and

29. **agree** that Cabinet will confirm ongoing funding implications, based on the details agreed by joint Ministers.

Authorised for lodgement
Hon David Parker
Associate Minister of Finance



THE TREASURY
Kaitohutohu Kaupapa Rawa

Treasury Report: Overseas Buyers of Existing Homes: Draft Detailed Design Proposals

Date:	3 November 2017	Report No:	T2017/2427
		File Number:	IM-5-1-1

Action Sought

	Action Sought	Deadline
Associate Minister of Finance (Hon David Parker)	<p>Note the attached working draft of a Joint Ministers paper on detailed design.</p> <p>Indicate any feedback you have on the attached detailed design proposals.</p> <p>Advise whether you would like to meet with officials to discuss the content on Monday 6 November.</p> <p>Note we intend to finalise the attached advice and provide to the group of delegated on Tuesday 7 November.</p>	Monday 6 November 2017

Contact for Telephone Discussion (if required)

Name	Position	Telephone	1st Contact
s9(2)(g)(i)		s9(2)(k) wk) N/A	
		(mob)	
Thomas Parry	Team Leader	s9(2)(k) wk) s9(2)(a)	✓
		(mob)	

Actions for the Minister's Office Staff (if required)

Return the signed report to Treasury.

Note any
feedback on
the quality of
the report

Enclosure: Yes (attached)

Treasury Report: Overseas Buyers of Existing Homes: Draft Detailed Design Proposals

On Tuesday 31 October Cabinet agreed to proceed with introducing a ban on overseas buyers of existing homes [CAB Min 17/0489 refers]. Cabinet also agreed that a delegated group of Ministers would confirm detailed policy design.

This report attaches a working draft of the first detailed design paper for delegated Ministers. We are providing you with a draft now so you can provide us with your feedback on the direction of travel before you leave for APEC meetings in Vietnam.

We are available to meet with you on Monday 6 November to discuss this draft. We currently intend to provide finalised advice on these matters to the delegated Ministers group on Tuesday 7 November, to allow time for the drafting process.

We note that as we continue to engage on the analytical detail of this policy, it may be that aspects of our advice do shift – particularly as new technical issues are raised. We are working as an interagency group following a process that will allow an iterative conversation with yourself, other delegated Ministers, and PCO. The intention is that this will lead to Cabinet consideration of legislation for introduction in early December.

Recommended Action

We recommend that you:

- a **note** the attached working draft of a Joint Ministers paper on detailed design
- b **Indicate** any feedback you have on the attached detailed design proposals
- c **Advise** whether you would like to meet with officials to discuss the content on Monday 6 November
- d **Note** we intend to finalise the attached advice and provide to the group of delegated on Tuesday 7 November

Thomas Parry
Team Leader, International

Hon David Parker
Associate Minister of Finance

Treasury Report: Banning Overseas Buyers of Existing Homes: Detailed Design Proposals

Date:	[Date Sent]	Report No:	T2017/2389
		File Number:	IM-5-1

Action Sought

	Action Sought	Deadline
Prime Minister (Rt Hon Jacinda Ardern)		
Deputy Prime Minister (Rt Hon Winston Peters)		
Minister of Finance (Hon Grant Robertson)		
Minister of Housing and Urban Development (Hon Phil Twyford)		
Associate Minister of Finance (Hon Dr David Clark)		
Associate Minister of Finance (Hon David Parker)		
Minister for Land Information (Hon Eugenie Sage)		

Contact for Telephone Discussion (if required)

Name	Position	Telephone	1st Contact
Robbie Taylor	Senior Analyst, International	s9(2)(k) wk) N/A (mob)	✓
Thomas Parry	Team Leader, International Team	s9(2)(a) wk) (mob)	

Actions for the Minister's Office Staff (if required)

Return the signed report to Treasury.

[Check: is any other action required? e.g. referring a copy to another Minister or send a letter]

Note any
feedback on
the quality of
the report

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Enclosure: No/Yes (attached) OR Yes (iManage links)

DRAFT

Treasury Report: Banning Overseas Buyers of Existing Homes: Detailed Design Proposals

Executive Summary

[Add content here]

Recommended Action

We recommend that you:

a **agree** to...

Agree/disagree.

b **refer** to the Minister of...

Refer/not referred.

Thomas Parry
Team Leader, International Team

Hon Grant Robertson
Minister of Finance

Treasury Report: Banning Overseas Buyers of Existing Homes: Detailed Design Proposals

Purpose of Report

115. This report seeks decisions from the group of Ministers with power to act on deciding the details of the ban on overseas buyers buying existing homes agreed by Cabinet on 31 October 2017. This includes proposals on scope (what property, and what buyers, are caught), how the restrictions will operate, compliance, enforcement, timing and implementation, and advice on international treaty implications.

Background

2. On 31 October Cabinet agreed to ban overseas buyers of existing homes, and agreed that a “group of Ministers consisting of the Prime Minister, Deputy Prime Minister, Minister of Finance, Associate Minister of Finance, Hon David Parker and the Minister of Land Information with power to act on further detailed policy matters that need to be addressed to enable the legislation to be drafted”. (Cab minute CAB-17-MIN-0489 refers).
3. This report seeks decisions on that detailed design. We have used the three criteria used in the last Cabinet paper to evaluate options. Those criteria are policy effectiveness, compliance with New Zealand’s international obligations, and minimising compliance and administration costs.
4. Another important consideration that stems from the tight timeline for introduction of legislation is efficiency of policy and legislative design, and implementation. Therefore we have looked to draw on existing legislation, regulation, processes and so on to the greatest extent this can be done while meeting the above three evaluation criteria.

Structure of Report

5. This report provides analysis and recommendations on the following sets of design issues:
 - What property will be caught by the ban;
 - What buyers will be caught;
 - How the ban or restrictions will operate;
 - Compliance and enforcement
 - Timing and implementation
 - International treaty implications.
 - [ensure this order matches the order the issues end up in the report]
6. It concludes with information on financial implications, next steps and consultation.

The Issue

7. A clear definition of “residential property” is important so the property covered by the ban can be easily determined. This reduces risks that the ban will upset property sales – for example if an overseas person enters into an agreement to purchase a property (that they believe is not residential property), only to subsequently find out that the property is classified as “residential” meaning the sale cannot be finalised.
8. There is no suitable definition of “residential land” in the Overseas Investment Act at present. Such a definition needs to be created.

Options

9. We have considered four options for defining “residential property”.

Option A – using the Rating Valuation Rules

10. Under this option, residential property would be properties classified in the relevant council’s District Valuation Roll as either “residential” or “lifestyle”.
11. These classifications are performed according to the Rating Valuations Rules, which are issued by the Valuer-General under the Rating Valuations Act. These rules require councils to assign a “property category” to each property based on its highest and best use (which can be different from its actual use).
12. Residential property is defined in the Rules as “residential land of a domestic type”. Lifestyle property is land that is larger than an ordinary residential allotment, generally in a rural area, and where the predominant use is for a residence. Farming the land in the traditional sense is non-economic.

Option B – using the Income Tax definition of residential property

13. Under this option, residential property would be all properties that meet the definition of “residential land” in the Income Tax Act. This definition specifies that “residential land” is:
 - i land that has a dwelling on it;
 - ii land for which the owner has an arrangement that relates to erecting a dwelling;
 - iii bare land that may be used for erecting a dwelling under rules in the relevant operative district plan;
14. Land used predominately as business premises or is farmland is excluded from being “residential land”.
15. This definition is used in the 2-year brightline rule and in the residential land withholding tax rules.

Option C – Zoning basis definition

16. Residential property would be all properties that are zoned as residential in the relevant proposed or operative district plan.

Option D – Definition based on intention of use

17. Under this option, a property would be classified as “residential property” if it is purchased by a person who intends to use the land.
18. In contrast to the options above, the classification of a property would not turn on the characteristics of the land itself, but rather on how that land is intended to be used. This means, for example, that a large farm would be classified as “residential property” if it is purchased by a person with no intention to actively farm the land. Similarly, a house would not be classified as “residential property” if it is purchased by a person who intends to operate a business from the property.

Option analysis

19. We have considered the above options against the criteria of policy effectiveness, minimising compliance and administration costs, and meeting our international obligations.

Policy effectiveness

20. We do not consider that option D (intention of use) would be an effective option. How a person intends to use a property is hard to determine – it is difficult to challenge a person’s claimed intention. For example, an overseas purchase could purchase a house claiming an intention of running a business from it but never actually start a business activity. The fact that the overseas person did not start a business activity would not prevent them from claiming they had a genuine intention of doing so at the time the property was purchased.
21. We note that a key reason for the introduction of the 2-year brightline test for property sales was introduced because determining a person’s intention (in that case, intention to sell a property) is very difficult.
22. We also do not consider that option C (zoning based definition) would be totally effective. This is because it may not capture all types of property that would be generally considered residential – for example, lifestyle blocks on the urban fringe – may not be zoned residentially.
23. We have considered whether it would be possible to solve this problem by extending this option to cover land where its zoning allows for the construction of a dwelling. In this case it would be necessary to carve-out farmland and businesses from the definition of “residential land” as it is often permissible to construct a dwelling on a farm or business premises. With these modifications, this option becomes effectively option B (the Income Tax definition).
24. We consider that both options A (Rating Valuation Rules) and B would fully meet the criterion of policy effectiveness. Under both, residential property is broadly defined, capturing both suburban properties and more urban-fringe properties such as lifestyle blocks. Similarly, both options exclude land where residential housing is not its primary function (such as farms and commercial properties that include a residential premise¹).

¹ Where a property has mixed uses (for example, an office building with apartments on top), it will generally be split into different titles that can be sold separately. In this case, the apartments would be classified as a “residential property” while the office space of the building would not be. Consideration of whether a mixed-use property is primarily used for residential housing is necessary only where the property must be purchased as a whole package.

Minimising compliance and administration costs

25. We consider that option A would have the lowest compliance and administration costs.
26. As discussed above, options A and B are similar in terms of the types of property covered. The main difference between these options is whose judgement is used in determining whether a property is “residential land”. In most situations it will be clear whether or not property is residential land, but there will be marginal cases – commercial property with substantial residential housing on it, or a small rural property where it is questionable whether it can be economically farmed – where it is unclear whether a property is better classified as residential or as something else. In these cases judgement is required.
27. Under option A, this judgement is carried out by the relevant council’s valuation provider² when determining how to classify the property for ratings purposes. Under option B, this judgement would be carried out by the purchaser (or seller) of the property.
28. Under option A, an offshore person could check the categorisation of a property they are and know definitively whether they are entitled to purchase it.³ Option B requires the purchaser to come to a view as to the correct classification of the property, which may come at a cost and could delay some property transactions.
29. Similarly, option A would be the easiest option to administer and enforce – the categorisation of the property at the time of purchase can be determined by checking the relevant council’s District Valuation Roll. Disputes over whether how a property should be best categorised could not arise.
30. We consider that option D would have relatively high administration costs. Ensuring that overseas only purchase properties where they *genuinely* intend to use it for a non-residential purpose have a non-residential would be hard; proving a person had an intention different to what they claim is a difficult, requiring careful investigation and running a potentially lengthy dispute process.

Meeting international obligations

31. s9(2)(h)

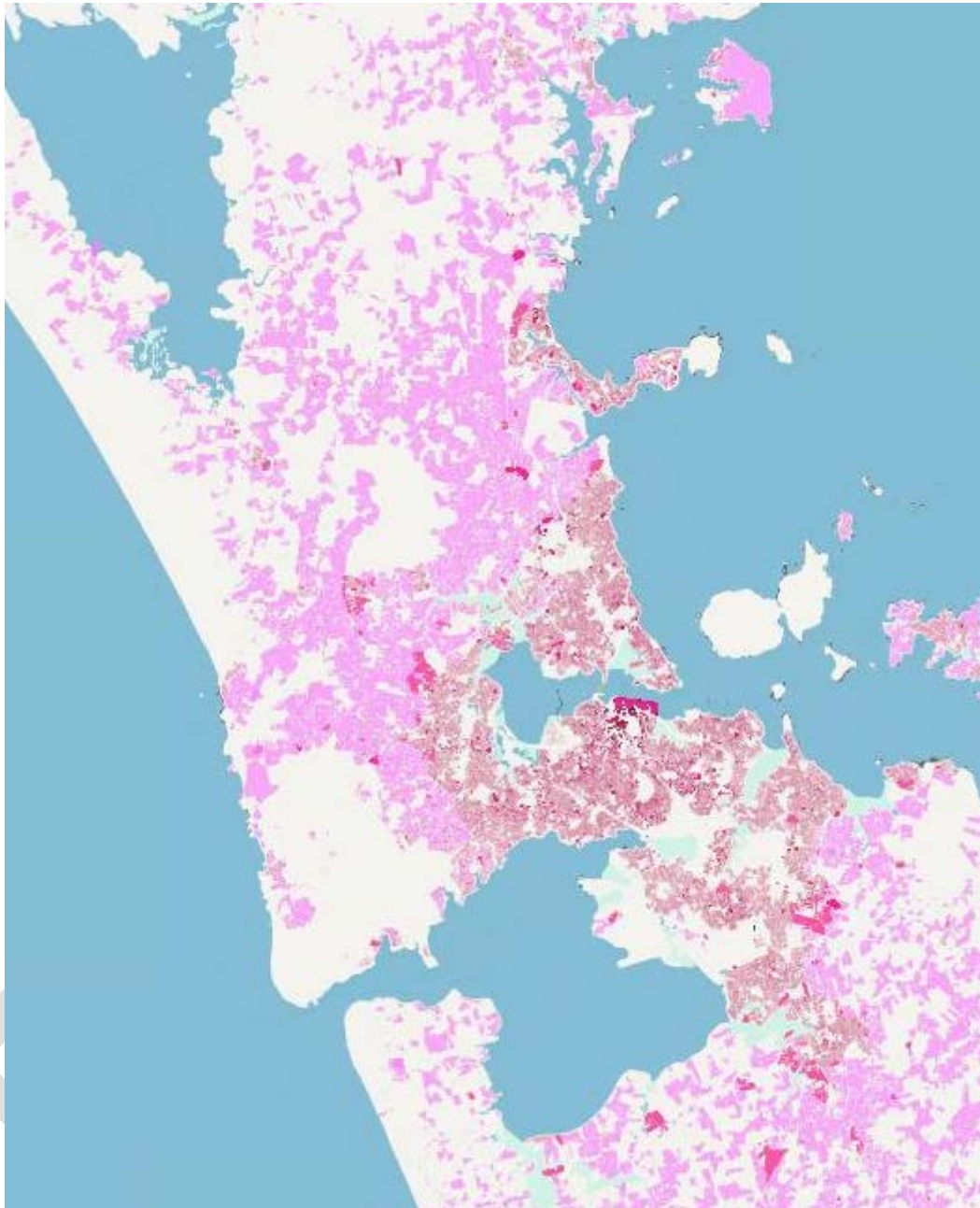
Preferred Option

32. Our preferred option is option A – to define residential land as land that has a property category in the relevant council’s District Valuation Roll as either “residential” or “lifestyle” under the Rating Valuation Rules. We consider that this option best achieves the policy objectives of effectiveness, minimising compliance costs, and being consistent with our international obligations. It covers a broad range of residential-type properties, carves out non-residential property, and whether a property is “residential property” can easily be determined by prospective purchases (and the Overseas Investment Office).
33. Running against this, option B is already used in the context of residential property transactions (such as when considering if the 2-year brightline rule applies). Adopting option A would introduce another definition of “residential property” to be considered when property is being sold. However, given the simplicity of the option, and the importance of a clear rule in this context, we still consider it the best option.

² The company the council uses to assess property values for rating purposes, such as QV New Zealand.

³ A property’s classification can be obtained from websites such as property-guru.co.nz (for a fee).

34. The map below illustrates the effect of this option – the red- and pink-shaded areas are properties that have a classification of either residential or lifestyle in the District Valuation Roll (and would therefore be classified as “residential property”).



35. While this is a new use for the District Valuation Roll, we note that it is designed to underpin a form of taxation (Council rates). Because of this, each council's Roll is audited periodically by the Valuer General to ensure national consistency and registered valuers are required to maintain it.
36. We also note that a property owner can object to how their property has been classified on the Roll – for example, if a property has been classified as lifestyle but would be better classified as pastoral. An objection does not mean that the classification will necessarily be changed, however; it just means that the relevant councils' valuation provider will consider what its classification should be.

37. This definition of “residential land” should capture most non-business properties that are not currently classified as sensitive under the Overseas Investment Act (i.e. suburban housing and rural properties that are smaller than 5 hectares). This can be seen in the map above; the classification is fairly extensive, covering a large range of properties.
38. However, there will be a small gap of properties smaller than 5 hectares (so not subject to screening) that could be used predominately for a residential purpose, but that will not be categorised as “residential” or “lifestyle” in the District Valuation Roll (and therefore not classified as “residential” under our preferred option). These properties are unlikely to exist near large cities (most small rural sections near a large city will be classified as “lifestyle”), but could be found elsewhere such as on the outskirts of small towns.
39. We do not consider that this is a significant issue. Most property that will be used primarily for a residential purpose will be captured by our recommend option – particularly near large cities.
40. If this were a significant concern, it would be possible to expand the definition of “residential property” to capture more types of property that are smaller than 5 hectares (for example, it could be expanded to apply to non-urban property of a farming-type classification that is smaller than 5 hectares⁴). However, this would increase the complexity of the rule and increase the chance of overreach (i.e. preventing non-residents from purchasing property not intended to be used primarily for residential purposes). Given that we do not anticipate this being a significant issue, we do not recommend this modification.

Issues for further consideration

41. Regulation making power
 - i A mechanism to change what is categorised as residential property by Order in Council may be required. The Ratings Valuation Rules are set by the Valuer General and could change from time to time (though such changes are infrequent; high-level property classifications have stayed unchanged since the 80s).
 - ii In addition, may need to be able to capture types of property that would ordinarily be considered “residential” but are not captured by the definition above – example being flat owning companies (purchases of apartments owned by a flat owning company do not involve a title transfer).
42. Treatment of residential property that contains “special land” (such as foreshore, seabed, riverbed, lakebed)
43. Treatment of companies that have an interest in residential land
 - i In some circumstances transfers in the ownership of shares in a company that owns sensitive land is treated as an “overseas investment in sensitive land” (and therefore subject to approval by the Overseas Investment Office). Question is how this should operate if a company owns residential land (especially, for example, if residential property is incidental to the company's operations).
44. Whether rules are required if a property's classification changes from non-residential to residential

⁴ The arable, dairy, forestry, horticultural and pastoral property classifications.
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The Issue: Who should be able to buy an existing home without OIO approval

45. We understand the broad objective of this policy is to prevent overseas buyers from buying existing homes in New Zealand. We seek policy guidance with respect to the application of the rules to various groups of buyers:

New Zealand citizens

46. We understand the intention is that New Zealand citizens will be able to purchase homes without OIO screening, regardless of where they reside. We have not explore alternative options on this basis but could do so if requested by Ministers.

Holders of residence class visas

47. We understand the intention is that citizens of other countries that hold residence class visas (including permanent residents) be able to buy a home in New Zealand without OIO consent.⁵ Is the intention that New Zealand residence class visa holders living outside of New Zealand be subject to OIO screening if they buy a home in New Zealand? This will be the outcome if the existing OIA definitions of “overseas persons” are applied to residential land.

Holders of temporary entry class visas

48. You have asked for advice on how holders of temporary entry class visas should be dealt with ^{s6(a)} [REDACTED]. Temporary entry class covers a broad category, including international student and working holiday scheme visas, which are less likely to have an intention to reside in New Zealand based on their visa status, as well as those on Essential Skills and Work to Residence visas that are on a pathway to permanent residence.
49. This category of visa holders would be subject to screening under the definition of “overseas person” applied under the OIA at present. The use of this definition for residential land investments would mean that temporary entry class visa holders would be prevented from purchasing homes in New Zealand. This is in contrast to the situation under the OIA for other classes of sensitive land, which would allow them to purchase provided they met the criteria for consent in the Act. However, we anticipate that most persons on temporary entry class visas for work purposes (e.g. Essential Skills and Work to Residence) would be unlikely to want to purchase a home in New Zealand until their residence status is confirmed.
50. One option to ensure that holders of temporary entry class visas were not completely prevented from purchasing homes in New Zealand ^{s6(a)} [REDACTED] would be to allow the purchase of a home following screening by the OIO to assess whether the person intends to reside in New Zealand indefinitely. This subjective assessment is currently part of the definition of “ordinarily resident in New Zealand” in the Act for residence class visa holders.

⁵ Residence class visas include permanent residents and holders of other visas that provide a legal right to reside indefinitely in New Zealand, including investor migrants, global impact visa holders and skill migrants.

The Issue: Clarifying the definition of “ordinarily resident in New Zealand” for natural persons

51. The existing definition of “ordinarily resident in New Zealand” requires an investor to judge whether they are ‘residing in New Zealand with the intention of residing there indefinitely’. This is a difficult test to apply. In the OIO’s experience, investors and their advisors apply the test poorly, tending to judge themselves to be ordinarily resident (and thus entitled to invest without undergoing screening) when in fact they are not. The increased volume of regulated transactions that will result from the residential ban will increase the effect of this problem.
52. The OIO would like to change the definition of “overseas person” in the Act to make it easier to apply, better reflect how the definition is applied in practice and reduce the scope for disputes with investors. Possible changes would create clearer tests for investors and the OIO to apply, making it easier to determine when an investor is permitted to invest or must undergo screening. This is particularly important for residential land, where screening may in effect mean someone is prevented from purchasing property.

Option 1: Establish a bright line test solely based on visa status

53. One option would be to create a test solely based on visa status which would permit all holders of New Zealand residence class visas to invest without consent. The benefit of this would be simplicity to apply.
54. It would allow persons that have the right to reside in New Zealand indefinitely to purchase residential property, while removing the right to purchase residential property in New Zealand from all other persons. It would also allow those that have entered New Zealand on residence class visas which put them on a pathway to permanent residence (e.g. Investor migrants⁶, Global Impact Visas and Skilled Migrants) to purchase residential property without going through screening. This would avoid making New Zealand a less attractive destination for high value and skilled migrants.
55. However, it would allow holders of residence class visa holders that were are not resident or were no longer resident in New Zealand to purchase residential property, this could include a large number of persons that have no intention of ever residing in New Zealand indefinitely. MBIE advises that around 10-15% of resident visa holders leave New Zealand within five years of obtaining a residence class visa. It is unclear whether this meets the policy effectiveness criteria for assessing options for the ban.

Option 2: Establish a bright line test based on visa status and actual residence

56. An alternative option would be to consider a person’s visa status as well as their length of stay in New Zealand. The holder of a residence class visa could purchase a home if they had been in New Zealand for a defined period of time. An existing test used in the OIA and also familiar in tax law of 183 days or more in aggregate in the preceding 12 month period could be adopted.

⁶ Allowing investor migrant category visa holders to purchase residential property in New Zealand would not prevent the Government from making changes to those visa categories.

57. The benefits of this approach are that it would provide a clear test for those that have already demonstrated a long-term commitment to New Zealand, i.e. permanent residents, and a clear way of assessing whether others that have the legal right to reside in New Zealand indefinitely have the right to invest. It removes the subjective assessment of intention to reside under the current definition, which creates ambiguity and disagreements between the OIO and investors. Further, the OIO advises that the establishment of a clear 183 day test would not materially differ than the test it applies in practice currently.
58. However, the use of this test could be considered to reduce the scope of the existing definition of “overseas person” to prevent someone that is “domiciled” in New Zealand but doesn’t meet the 183 day test from being able to invest. An example could be someone that is a New Zealand permanent resident that has lived in New Zealand for 10 years, and considers New Zealand his or her home, but which is temporarily outside of the country on sabbatical or an overseas assignment. It would also not allow residence class visa holders legally entitled to reside in New Zealand and other visa holders on a pathway to residence from purchasing residential property. They would be able to rent, however.

59. s9(2)(h)

Preferred Option

60. Our preferred option is to adopt Option 2 for residential land applications only.
61. This would involve the establishment of bright line test for residence class visa holders based on an objective assessment of their time in New Zealand. A test for this could be presence in New Zealand for at least 183 days in aggregate in the preceding 12 months;
62. We consider this option to reflect the best combination of the three policy criteria we are using:
- i Policy effectiveness: the ban would be targeted on those with no demonstrated or intended commitment to residence in New Zealand, while minimising unintentional capturing others.
 - ii s9(2)(h) + s9(2)(j)
 - iii Minimising compliance and administration costs: This option creates objective tests for the majority of natural persons, making it easier to apply by investors and regulators than the existing definition of “ordinarily resident in New Zealand”.
63. But note that this option would preclude persons on temporary entry visas from purchasing homes in New Zealand to live in. Allowing this people to invest after screening (e.g. to assess an intention to reside) could be a way of dealing with this.

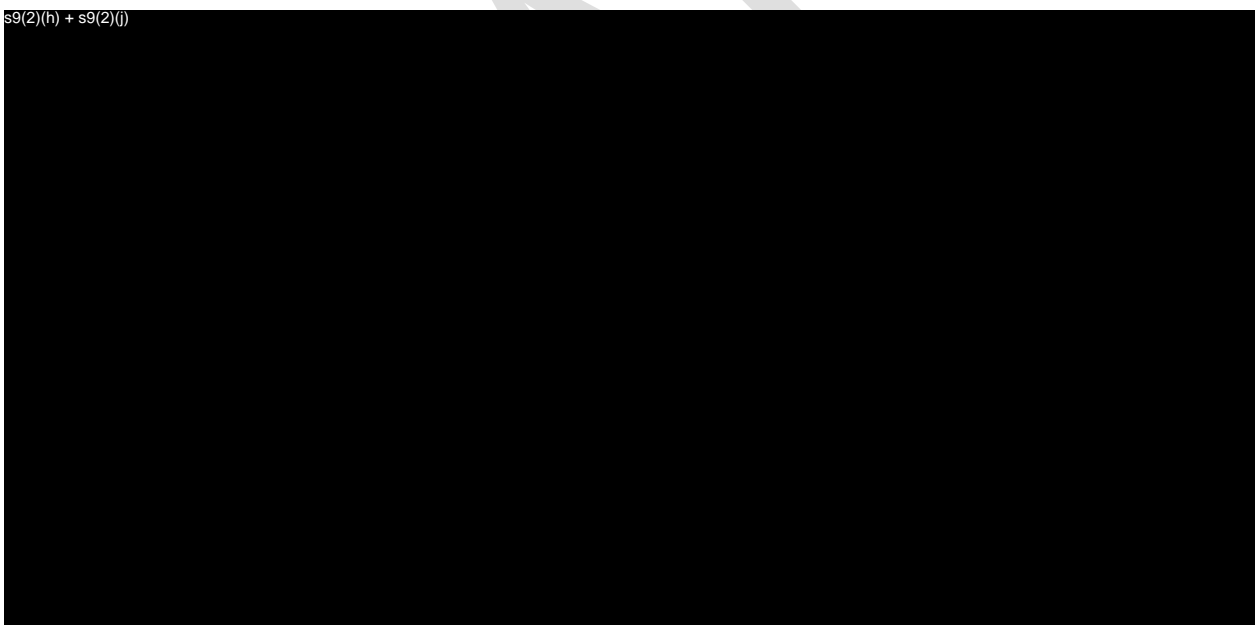
The Issue: Mixed nationality relationships

64. A New Zealander and their overseas person spouse do not require consent to acquire assets under the existing OIA rules, provided the assets are relationship property. We propose that these existing rules continue to apply in respect of the residential ban.

s6(a)



s9(2)(h) + s9(2)(j)



How should applications be screened?

71. [to come.]

International Considerations

72. s9(2)(j)

73. [more content to come, being drafted by MFAT, expected on Monday.]

Compliance & Enforcement

74. Recent enforcement work undertaken by the OIO uncovered issues with overseas people purchasing property without consent, including the use of associates to disguise overseas ownership. The work highlighted how the current mechanisms and tools under the OIA are inadequate to provide effective enforcement of the overseas investment rules. These limitations will be highlighted or magnified by the residential ban.
75. Limitations in the areas of service of documents, information-gathering powers, voluntary disposal (ie before Court action), the quantification of civil penalties, the liability of third parties and the role of the conveyancing agents require consideration in order to ensure that enforcement mechanisms and tools will support the effective implementation of the residential ban.
76. Further improvements could be made to the enforcement provisions in the OIA to ensure they are more effective however, this paper concentrates on the key issues that would support an effective ban without imposing unnecessary cost or other burdens.

The Issue: Service

77. Under the OIA, consent holders must provide a New Zealand address for service. Any documents (including proceedings) that the OIO needs to serve on a consent holder can be served at the address that the consent holder provides (s 54).
73. However, a foreign investor that does not apply for consent will not have provided the OIO with an address for service. In that case, the OIO must serve documents on the investor in their own jurisdiction or seek an order for substituted service from the Court. In addition to the expense and delay involved in serving documents personally on an investor in a foreign jurisdiction, it has been argued that service of a New Zealand process in some foreign jurisdictions is a breach of the law of those foreign jurisdictions.
74. It is anticipated that the number of foreign investors that the OIO will need to serve documents on once the OIA is amended will increase significantly. The service issue will limit how effectively the ban can be enforced and increase the cost of its enforcement.

75. The issue of service on people overseas is not unique and a number of recent pieces of legislation have provided for service by electronic means and/or to physical addresses (for instance, under the District Court Act 2016). Given the overseas person has an asset within the New Zealand jurisdiction, and given the purpose of the OIA, a legislative option which provides for further service mechanisms would assist to address the service issue.

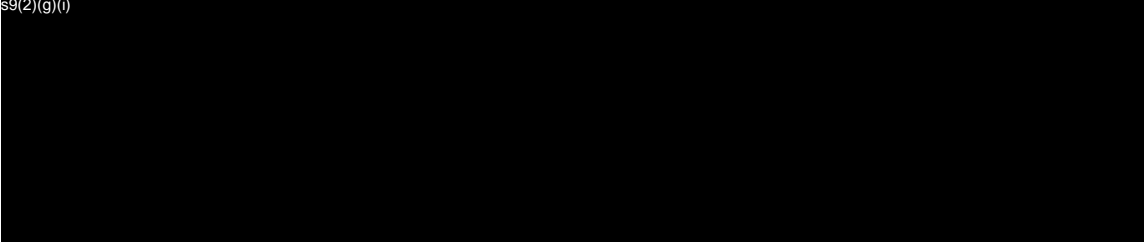
Options

76. An option is to keep the status quo in relation to service. This would provide the greatest assurance that documents come to the attention of the foreign investor, because the documents would (generally-speaking) have to be served personally on the foreign investor (or an officer, if the foreign investor is a corporate). This is to be weighed against the expense and delay of the status quo and the risk that court proceedings for a breach of the OIA could not progress as a result of the service issues the OIO could encounter.
77. Alternatively, the amendment Bill could provide for a number of alternative mechanisms. Guidance can be taken from The methods of service that can be used under the District Courts Act 2016 (s 208), including provision for service on a recipient who has a known electronic address, as well as providing for the possibility of sending or leaving the document at the relevant property. This would remove a significant delay and cost barrier to compliance and enforcement action by OIO. It comes with the risk that a document served by one of these methods does not actually come to the attention of the foreign investor.

Preferred Option

78. The preferred option is to change the OIA to allow for service using alternative mechanisms to personal service such as service at a known electronic address or at the address of the property which is the subject of the proceedings.

The Issue: Information-gathering powers

79. Under the OIA, the OIO can, if it has reason to suspect that a person has committed an offence under the OIA, require a person to provide information or documents that may furnish evidence in relation to that offence (s 41). This threshold is relatively high, when compared to other regulators.
80. ^{s9(2)(g)(i)} 
81. The residential ban may incentivise foreign investors to try to disguise the overseas ownership of a residential property, for example by having an associate purchase the property on their behalf. The threshold required in order to exercise the information gathering power could limit how effectively the OIO can enforce the ban.
82. Other regulators also have the power to require a person to attend an interview to give evidence where it is necessary or desirable for the regulator to carry out its powers and functions. The OIO does not have these powers under the OIA.

Options

83. An option is to keep the status quo in relation to the information-gathering power. However, this limits OIO's ability to investigate ownership of residential property in many cases, which would limit the effectiveness of the policy overall.
84. Another option is to provide OIO with powers of investigation and evidence gathering comparable to those held by the Commerce Commission or the Financial Markets Authority. These provisions are well established and tested and would bring the OIO in line with the powers of other regulators. A further option would be to adjust the threshold for the use of the information-gathering power that is already in the OIA, for example, so that the power to require a person to provide information or documents is available when the OIO considers that it is necessary or desirable for the administration or enforcement of the OIA.

Preferred Option

85. The preferred option is to initially adjust the threshold so that the power to require a person to provide information or documents is available when the OIO considers that it is necessary or desirable for the administration or enforcement of the OIA. The option of providing the OIO with evidence and information gathering powers similar to those used by the FMA and Commerce Commission is something that should be considered in any future review of the OIO's enforcement powers.

The Issue: Disposal process

86. Under the OIA, the court can order a person to dispose of their property where that person has contravened or committed an offence (s 47).
87. Court processes are lengthy (it is not unusual for a matter to take two years to get to court) and costly. Once the OIA is amended, a significant increase in the amount of disposal enforcement action taken by the OIO is anticipated. A quick and efficient process for disposal where a breach has occurred will be necessary. The process will also need to encourage cooperation, which means that it cannot overly penalise persons where their breach has been inadvertent, or where they have co-operated with the OIO.

Options

88. An option is to keep the status quo in regards to disposal. However, this limits the OIO's effectiveness of the policy overall as requiring the disposal of residential property through the Court is a time-consuming and costly exercise.
89. Another option is to provide the OIO with the ability to issue a notice of breach in circumstances where the OIO has reasonable grounds to believe that an overseas person has purchased a residential home in breach of the OIA. The notice would require the owner to either object to the notice (that is, to show that they are not in breach of the OIA) or to agree to dispose of the property. If the owner disposes of the property pursuant to a notice, no further penalty would be imposed on them thereby encouraging cooperation (that is, they would not be subject to criminal or civil liability). If the owner does not agree to dispose of the property, the OIO could then apply to the court for disposal and seek any orders under subpart 5 of the OIA, including a civil penalty.
90. The Foreign Investment Review Boards of Australia and Canada use similar mechanisms.
91. The OIO would not be required to use this mechanism if it did not consider that it was appropriate in the circumstances, for instance, in the case of a flagrant or repeat

contravention of the Act. In those cases, the OIO would use the current mechanisms in the Act to require disposal and to impose criminal and/or civil liability.

Preferred Option

92. The preferred option is to change the OIA disposal provision to allow for the notice of breach/disposal mechanism for residential property. An efficient disposal mechanism which encourages voluntary disposal will assist to achieve the policy objective of ensuring residential land is made available to New Zealanders and seeks to minimise the enforcement costs. Consider whether this mechanism should be available in all cases involving sensitive land, or whether it should be limited to just residential property.

The Issue: Civil Penalty

93. The OIA allows a court to impose a civil penalty for a breach of the OIA for the higher of \$300,000 or any quantifiable gain.
94. The effect of the provision means there is no real penalty. A worst case scenario is that a person breaks even. As a consequence, there is no incentive to comply with the OIA and it does not act as a deterrent on property speculation.
95. A multiplier based on the quantifiable gain would encourage voluntary disposal under the proposed notice/disposal mechanism described above and also act as a deterrent on property speculation.

Options

96. An option is to keep the status quo in relation to the civil penalty provision. However, with the residential ban, there will be a potential increase in the number of breaches of the OIA. Under the status quo, there is no financial disincentive for buying property in breach of the OIA.
97. Another option is to increase the penalty well beyond the gain that the investor has made. For example, s 80 of the Commerce Act 1986 enables the court to impose a penalty of three times the value of the commercial gain resulting from the contravention. Increasing the penalty in this way would increase the deterrent effect of the civil penalty and would also help to encourage persons who are in breach to voluntarily dispose of the property (so as to avoid the civil penalty).
98. A further option is to increase the figure of \$300,000 in s 48(2)(a) to a more substantial sum. The advantage of this amendment would be that the OIO could, in the majority of proceedings, apply for a civil penalty under s 48(2)(a) instead of pursuing any quantifiable gain. For this option to be viable, the sum would need to be higher than what the OIO would usually obtain from pursuing the quantifiable gain.

Preferred Option

99. The preferred option is to increase the penalty well beyond the gain that the investor has made. This can most effectively be achieved by amending the OIA to allow a court to impose a penalty of three times the value of the quantifiable gain resulting from the contravention..

100. Increasing the maximum penalty well beyond the quantifiable gain resulting from the breach also means that the penalty will be proportionate to the gain in every case. The concern with increasing the penalty figure in s 48(2)(a) is that the OIO could be imposing a penalty for significantly more than what the person has gained, making the penalty disproportionate to the actual breach that has occurred.

The Issue: Third party liability

101. The OIA imposes civil penalties on those that have contravened the OIA or committed an offence under it (s 48). However, civil penalties are not available in relation to third parties (for example, real estate agents) who assist in a contravention of the OIA. In order for the residential ban to be effective, there should be consequences for third parties who are complicit in contraventions of the OIA.
102. (Third party liability is available in relation to the criminal offences set out in the OIA through the generic provisions in Part 4 of the Crimes Act 1961. This means that a person who, for example, aids or abets a contravention of the Act may face criminal consequences as a party offender, but would not be liable to the civil penalties under the Act.)

Options

103. An option is to keep the status quo in relation to accessory liability. An issue with this option is that there is less of a financial deterrent for third parties involved in a property transaction to ensure compliance with the OIA. Compliance with the Act will not be effective unless advisers and agents are more readily subject to the civil penalties.
104. An alternative option is to provide that a person who is 'involved in a contravention' (for example, they aid or abet the contravention) would be liable for a civil penalty in the same way as the party who contravenes the Act (that is, the foreign investor). A similar approach is taken in the Financial Markets Conduct Act 2013 and in the Australian foreign investor legislation (since around 2015). Our understanding is that the Foreign Investment Review Board has not yet sought the imposition of civil penalties on any third parties but we are seeking further information on that.
105. Advisers and agents may have concerns that, under this approach, they may be subject to liability for innocently facilitating transactions that they are unaware are or may be a contravention of the Act. However, to be subject to third party liability for civil penalties a degree of knowledge or complicity is required (in the same way that it is in order to attract party liability in the criminal context). To the extent that advisers or agents have concerns about a transaction (and as a consequence, the prospect of third party liability for themselves), they will be incentivised to make inquiries and to provide advice in order to ensure the transaction complies with the OIA which, in turn, would support the effectiveness of the residential ban.
106. The third party liability would relate to all contraventions of the Act, including those that do not relate to the direct sale of property. For example, a share transfer that resulted in a proprietor becoming a foreign investor would be caught, so the advisors involved in that transaction would be incentivised to consider compliance with the OIA.

Preferred option

107. The preferred option is to amend the OIA to impose liability for civil penalties on any person involved in a contravention of the Act. The ability for the OIO to impose a civil penalty on third parties will be an effective means of ensuring compliance with the Act.

The Issue: The Position of Vendors

108. A vendor of residential land is unlikely to be subject to any criminal or civil penalty under the OIA as a consequence of the land being bought in contravention of the OIA. The exception to this is where the vendor is complicit in the contravention, for example, the vendor knew that the buyer was not eligible to buy the property. However, there is no prospect that, in the absence of complicity, a vendor would be subject to criminal or civil liability or would, for example, be required to forfeit the purchase price or to resume ownership of the property.
109. It is possible that a small number of agreements for sale and purchase (ASP) will not be completed as a consequence of the ^{s6(a)} [REDACTED]. For example, a buyer may enter into an ASP, then receive advice that they are not eligible to buy residential land and, as a consequence, are not in a position to complete the transaction.
110. This could leave the vendor in a difficult position, particularly if they have bought another property in reliance on an unconditional ASP.
111. It is unlikely that a Court would make an order for specific performance because the remedy, forcing the purchaser to complete the purchase, would be an unlawful contravention of the residential ban. The vendor is likely to be limited to retaining any deposit that has been paid and, if their losses exceed the amount of the deposit, seeking damages from the buyer. The ASP (ADLS standard form) requires purchasers to warrant that they do not need OIO consent to purchase the property. That warranty would be one basis on which the vendor could found their claim.
112. Situations where a property transaction cannot be settled arise for a number of reasons (including, for example, where the purchaser is unable to raise finance), so this will not be an entirely new type of risk for vendors. That said, it is important to reduce the likelihood that the situation will arise. In addition to the role for conveyancers (discussed at paragraphs [] to []), it is proposed that real estate agents (and possibly banks) are encouraged to, or have some obligations imposed on them, to advise potential purchasers of the broad parameters of the residential ban, so that it is less likely that purchasers will discover they are ineligible after they have entered into an ASP. We are considering this further.
113. We have considered whether an ASP (that relates to a contravention of the OIA) ought to be an 'illegal contract' under the Contract and Commercial Matters Act 2016. However, there are some risks attached to this approach. The OIA expressly provides that such contracts are not illegal contracts. This was a deliberate policy choice reflected in the OIA in 2005. It was intended to avoid some of the harsh consequences of making a contract an illegal contract. For example, a vendor would be obliged to return the deposit (and then sue for damages in respect of all their losses, rather than any losses exceeding the amount of the deposit). There is also a view that, if such an ASP is an illegal contract and as a consequence is treated as being of no effect, the enforcement tools under the OIA would not be available (because there would, at law, be no contract and no contravention to prosecute).

Timing and Implementation

114. [to come – issues to cover include those in below table]

115. Transitional provisions
1. Assume commencement date of 1 January 2018.
2. Transition same as recent amendment regulations.
3. Consider contracts not unconditional (with or without deposit paid). Consider impact on any affected NZ vendors.
116. s9(2)(g) (i)
4. s9(2)(g)(i)
117. Other consequential changes?
5. E.g. does “associate” and “associated land” regimes in the OIA Act work effectively as anti-avoidance mechanisms for residential land transactions?
118. Repeal some or all of subpart 7 transitional provisions as spent
6. Leave for now?
119. s6(e)(vi)
7. s6(e)(vi)

120.

Financial Implications

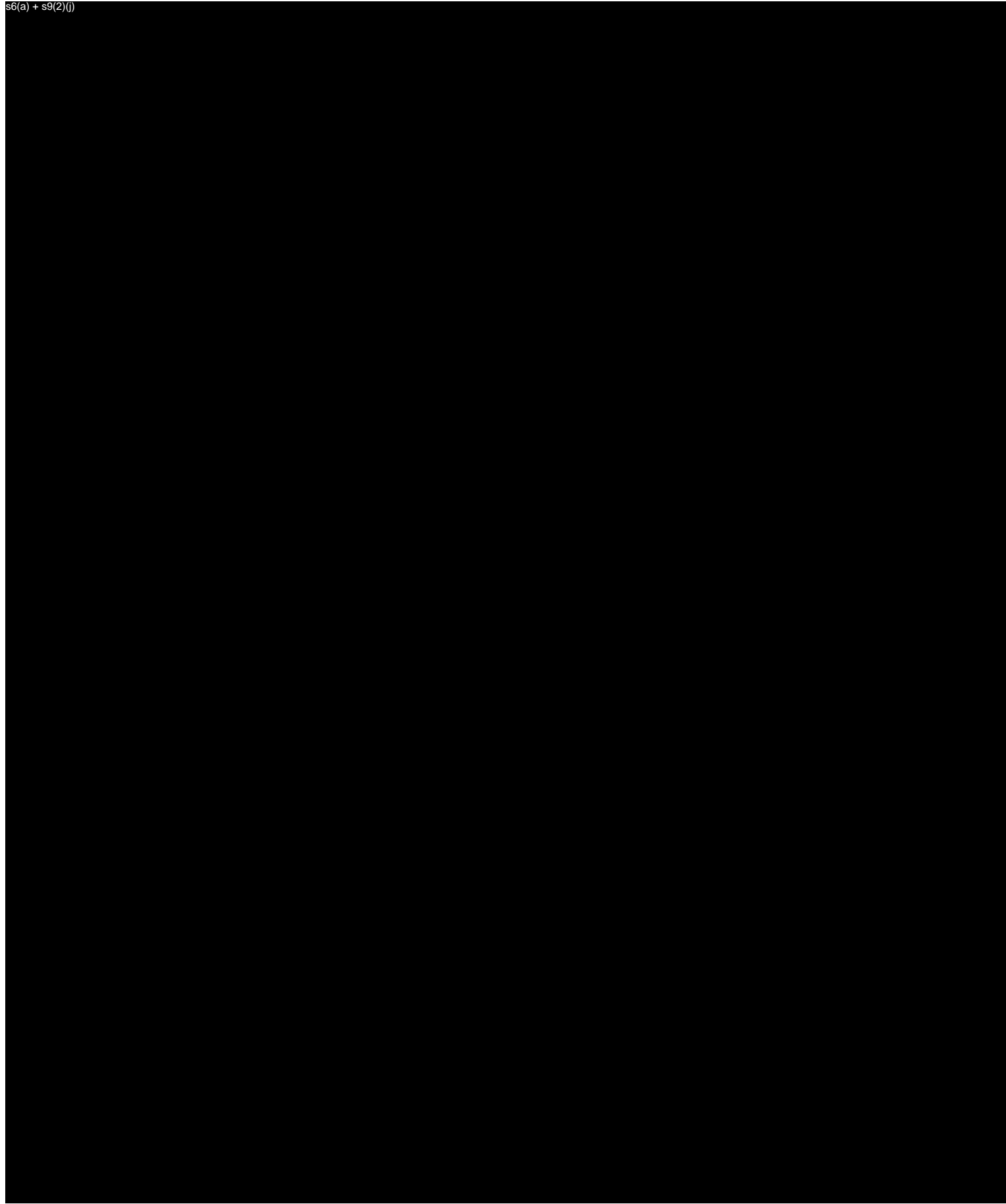
121. [to come]

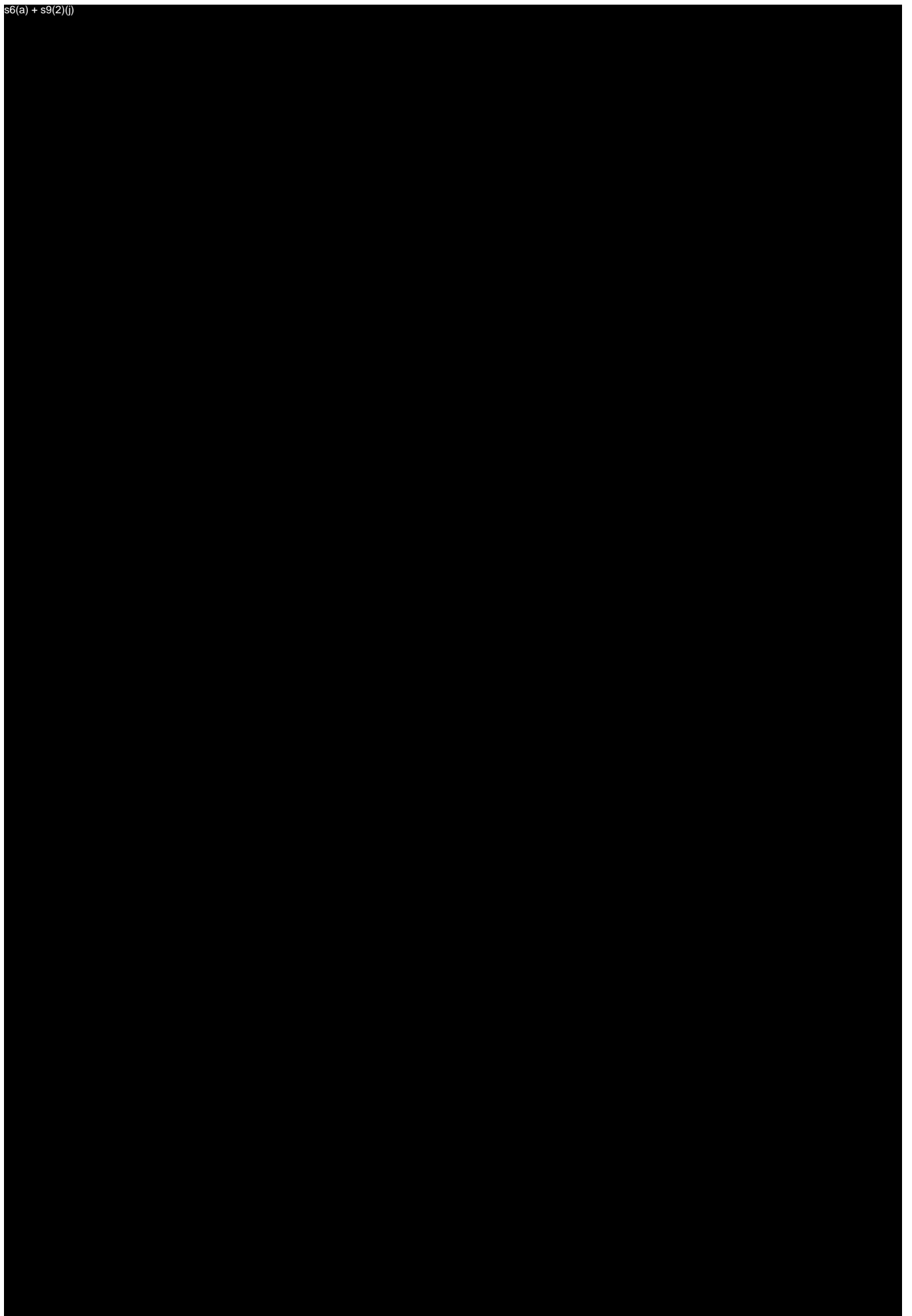
Next Steps

122. [to come]

Consultation

123. The following departments have been consulted in the development of the advice and recommendations in this report:





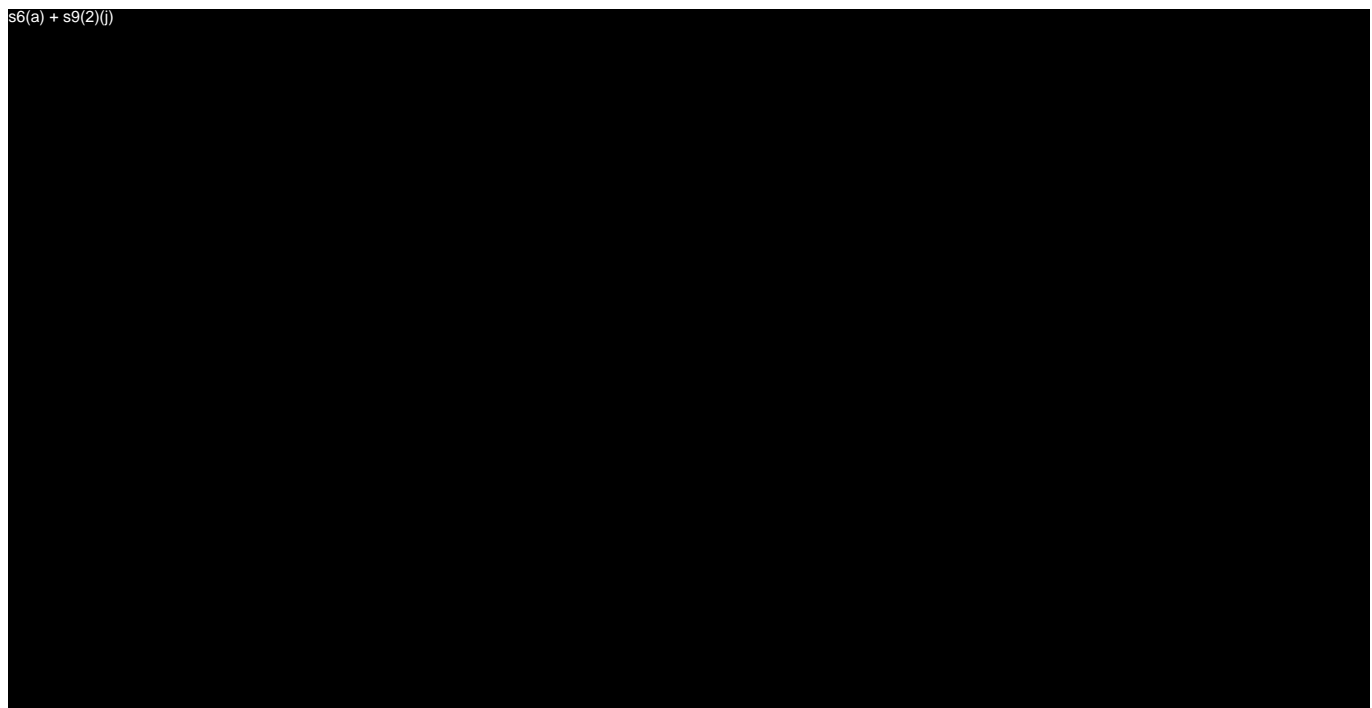
$s6(a) + s9(2)(j)$

[Redacted content]

$s6(a) + s9(2)(j)$


[Redacted content]

s6(a) + s9(2)(i)



DRAFT

s6(a) + s9(2)(i)



Treasury Report: Banning Overseas Buyers of Existing Homes: Detailed Design Proposals

Date:	7 November 2017	Report No:	T2017/2389
		File Number:	IM-5-1

Action Sought

	Action Sought	Deadline
Prime Minister (Rt Hon Jacinda Ardern)	Agree to the recommendations in this paper regarding what property and buyers will be subject to the new rules, and enhanced monitoring and enforcement powers for the Overseas Investment Office.	Friday, 10 November 2017
Deputy Prime Minister (Rt Hon Winston Peters)		
Minister of Finance (Hon Grant Robertson)		
Minister of Housing and Urban Development (Hon Phil Twyford)		
Associate Minister of Finance (Hon David Parker)	Agree to the recommendations in this paper regarding what property and buyers will be subject to the new rules, and enhanced monitoring and enforcement powers for the Overseas Investment Office. Refer this report to the Minister of Immigration for his information.	Friday, 10 November 2017
Minister for Land Information (Hon Eugenie Sage)	Agree to the recommendations in this paper regarding what property and buyers will be subject to the new rules, and enhanced monitoring and enforcement powers for the Overseas Investment Office.	Friday, 10 November 2017

Contact for Telephone Discussion (if required)

Name	Position	Telephone	1st Contact
Steve Cantwell	Principal Advisor, Financial Markets	s9(2)(k) (wk)	s9(2)(a) (mob) ✓
Thomas Parry	Team Leader, International Team	(wk)	s9(2)(a) (mob)

Actions for the Minister's Office Staff (if required)

Return the signed report to Treasury.

Note any
feedback on
the quality of
the report

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Enclosure: No

Treasury Report: Banning Overseas Buyers of Existing Homes: Detailed Design Proposals

Executive Summary

This report seeks decisions from the group of Ministers with power to act on deciding the details of the ban on overseas buyers buying existing homes agreed by Cabinet on 31 October 2017. This includes proposals on scope (what property, and what buyers, are caught), enforcement, and advice on international treaty implications.

We have used the three criteria used in the last Cabinet paper to evaluate options. Those criteria are policy effectiveness, compliance with New Zealand's international obligations, and minimising compliance and administration costs.


What property should be covered by the ban?

We recommend that the ban apply to residential and lifestyle land as determined by the rules used to determine how to classify land for local government rating purposes (known as the "Rating Valuation Rules"). Compared to the other assessed options, this solution gives transparent and unambiguous answers knowable to all parties in a transaction, established within a strong existing legislative and practice framework by a third party that is disinterested in the fate of any particular sales transaction. These features give excellent coverage while minimising compliance and administration costs.

We have identified a small gap in the coverage, namely non-urban land of less than 5 hectares that is classified neither residential or lifestyle (e.g. commercial) that could be repurposed to residential use. We do not recommend attempting to address this as doing so risks over-reach, by extending to non-residential land a regime targeting sales of homes.

Who should be covered by the ban?

We understand the broad objectives of this policy are to:

- prevent overseas buyers from buying existing homes in New Zealand;
- s6(a) 
- permit citizens of other countries that hold New Zealand residence class visas (this includes permanent residents) and live in New Zealand be able to buy a home in New Zealand without Overseas Investment Office (OIO) screening.

We seek confirmation of this, and recommend that current OIO practice for determining if an investor is "ordinarily resident" be formalised. That would mean that holders of New Zealand residence class visas (or the equivalent Australian visas) that have been resident for the past 12 months and lived in New Zealand for more than 183 days during that period would be able to purchase residential property without OIO screening.

We also seek approval for a new regulation-making power to provide a mechanism for holders of residence class visas who do not meet the 183 day test, or some classes of temporary visas, to be able to purchase residential property. For many visa holders, their non-qualifying residence or temporary visa is a step on path to permanent residence or citizenship, and denying these visa holders the ability to buy a home appears unduly onerous.

Compliance and enforcement

The OIA already provides the OIO with monitoring and enforcement powers. s9(2)(g)(i)

Therefore, the OIO have advised us that to effectively monitor and enforce the ban on residential house purchases it needs improved information gathering powers, better ability to service documents on foreign investors, streamlined options for disposal of property bought in contravention of the OIA, and stronger penalty provisions.

The OIO consider the proposed changes the minimum necessary to effectively regulate the new rules from introduction. We recommend you seek Cabinet agreement to apply the proposed changes to all OIA applications and breaches, not just those regarding residential property. s9(2)(g)(i)

We will also provide advice in an upcoming report on the compliance roles of real estate agents and conveyancing lawyers.

Next steps

We are currently working on follow-up reporting that deals with more detailed design issues. We hope to get the first of these to you on Friday 10 November. We are working towards the Cabinet expectation that a draft OIA amendment bill be taken to Cabinet Business Committee on or before 11 December 2017.

Recommended Action

We recommend that you:

- a **note** that Cabinet delegated authority to this group of Ministers to agree further detailed design on the ban of overseas buyers of existing residential housing;
- b **note** this briefing is the first of a set of detailed design papers that will be provided to ministers in the next two weeks, and important design details including the 'new build exemption' will come in future papers;

Determining what is residential land and property subject to screening

- c **agree** that the residential property captured by the ban would be land classified in information the relevant council captures to support the District Valuation Roll as either "residential" or "lifestyle";

Agree/disagree

- d **note** that defining residential property through the District Valuation Roll is likely to capture almost all, but not all, properties that will be used for predominantly residential purpose, and will be relatively easy for users of the system to refer to for confirmation of status of the relevant land;

Determining who is subject to screening

- e **agree** that New Zealand and Australian citizens will be exempt from the ban;

Agree/disagree

- f **agree** holders of residence class visas (including permanent residents) will be exempt from the ban if they have been resident for the past 12 months and lived in New Zealand for more than 183 days during that period;

Agree/disagree

- g **agree** that a 'notification' process which would exempt holders of residence class visas (including permanent residents) and holders of certain (to be defined) work related temporary visa be defined through a new regulation making power;

Agree/disagree

- h **agree** that the regulation making power in recommendation g be established for use to:

- a. define the classes of temporary visas that will be subject to the 'notification' process in recommendation g; and
- b. establish tests for determining whether persons covered by the 'notification' process in recommendation g have a long-term commitment to New Zealand;

- i **agree** that temporary visa holders exempt through the 'notification' process in recommendation g be subject to a condition that they sell their investment within three months of ceasing to be resident in New Zealand, unless they meet the exemption for residence class visa holders outlined in recommendation f or become a New Zealand citizen;

Agree/disagree

- j **agree** Australian permanent residents be treated in the same as New Zealand permanent residents under the new ban;

Agree/disagree

- k **agree** that officials provide further advice on whether the definition of persons exempt from the ban on residential property purchases replaces the definition of persons "ordinarily resident" in the wider OIA screening regime;

Agree/disagree

l

ss(2)(i)

Agree/disagree

Compliance and Enforcement

m **agree** that a new set of new enforcement and compliance powers are applied to the residential property regime, at the time of entry into force:

- a. information gathering powers are strengthened to allow the OIO to require a person to provide information or documents when the OIO considers that it is necessary or desirable for the administration or enforcement of the OIA;

Agree/disagree

- b. disposal of property through a notification process in circumstances where the OIO has reasonable grounds to believe that an overseas person has purchased a residential home in breach of the OIA (with protection from further liability or penalty for overseas persons who sell as a consequence of the notification process);

Agree/disagree

- c. ability to serve document using alternative mechanisms to personal service such as service at a known electronic address or by leaving documents at the address of the relevant property;

Agree/disagree

- d. increasing the maximum civil penalty in the Overseas Investment Act to three times the gain that the investor has made;

Agree/disagree

- e. a third party person who is 'involved in a contravention' (for example, they aid or abet the contravention) would be liable for a civil penalty in the same way as the party who contravenes the Act (that is, the foreign investor);

Agree/disagree

n **Agree** to seek Cabinet approval, at the time it considers the draft legislation, that the new enforcement and compliance powers outlined in recommendation m are applied across the entire Overseas Investment Act regime;

Agree/disagree

o **Note** that, even with those enhanced enforcement powers, the OIO faces significant enforcement challenges when offshore persons unlawfully circumvent the regime and relevant evidence is not located in New Zealand, but that stronger legal powers (e.g. reverse onus of proof) could raise natural justice and civil rights issues;

p **Agree** that officials provide further advice on stronger enforcement powers that address the OIO's significant enforcement challenges, including any trade-offs with natural justice and civil rights;

Agree/disagree

q **Note** that officials consider the existing legal mechanisms that protect vendors in the event of a failed residential agreement for sale and purchase, are adequate to address any new issues arising in an uncompleted sale; and

Referrals

r **refer** to the Minister of Immigration for his information.

Refer/not referred.

Thomas Parry
Team Leader, International Team

Rt Hon Jacinda Ardern
Prime Minister

Rt Hon Winston Peters
Deputy Prime Minister

Hon Grant Robertson
Minister of Finance

Hon Phil Twyford
**Minister of Housing and Urban
Development**

Hon David Parker
Associate Minister of Finance

Hon Eugenie Sage
Minister for Land Information

Treasury Report: Banning Overseas Buyers of Existing Homes: Detailed Design Proposals

Purpose of Report

1. This report seeks decisions from the group of Ministers with power to act on deciding the details of the ban on overseas buyers buying existing homes agreed by Cabinet on 31 October 2017. This includes proposals on scope (what property, and what buyers, are caught), compliance, enforcement, and advice on international treaty implications.

Background

2. On 31 October Cabinet agreed to ban overseas buyers of existing homes, and agreed that a “group of Ministers consisting of the Prime Minister, Deputy Prime Minister, Minister of Finance, Associate Minister of Finance, Minister of Housing and Urban Development, Hon David Parker and the Minister of Land Information with power to act on further detailed policy matters that need to be addressed to enable the legislation to be drafted”. (Cab minute CAB-17-MIN-0489 refers).
3. This report seeks decisions on that detailed design. We have used the three criteria used in the last Cabinet paper to evaluate options. Those criteria are policy effectiveness, compliance with New Zealand's international obligations, and minimising compliance and administration costs.
4. Another important consideration that stems from the tight timeline for introduction of legislation is efficiency of policy and legislative design, and implementation. Therefore we have looked to draw on existing legislation, regulation, processes and so on to the greatest extent this can be done while meeting the above three evaluation criteria.

Structure of Report

5. This report provides analysis and recommendations on the following sets of design issues:
 - What property will be caught by the ban;
 - What buyers will be caught;
 - Compliance and enforcement
 - International treaty implications.
6. It concludes with information on next steps and consultation.

The Issue

7. A clear definition of “residential property” is important so the property covered by the ban can be easily determined. This reduces risks that the ban will upset property transactions – for example if an overseas person enters into an agreement to purchase a property (that they believe is not residential property), only to subsequently find out that the property is classified as “residential” meaning the sale cannot be finalised.
8. There is no suitable definition of “residential land” in the Overseas Investment Act at present. Such a definition needs to be created.

Options

9. We have considered four options for defining “residential property”.

Option A – using the Rating Valuation Rules

10. Under this option, residential property would be properties classified in the relevant council’s District Valuation Roll as either “residential” or “lifestyle”.
11. These classifications are performed according to the Rating Valuations Rules, which are issued by the Valuer-General under the Rating Valuations Act. These rules require councils to assign a “property category” to each property based on its highest and best use (which can be different from its actual use).
12. Residential property is defined in the Rules as “residential land of a domestic type”. Lifestyle property is land that is larger than an ordinary residential allotment, generally in a rural area, and where the predominant use is for a residence. Farming the land in the traditional sense is non-economic.

Option B – using the Income Tax definition of residential property

13. Under this option, residential property would be all properties that meet the definition of “residential land” in the Income Tax Act. This definition specifies that “residential land” is:
 - i land that has a dwelling on it;
 - ii land for which the owner has an arrangement that relates to erecting a dwelling;
 - iii bare land that may be used for erecting a dwelling under rules in the relevant operative district plan;
14. Land used predominately as business premises or is farmland is excluded from being “residential land”.
15. This definition is used in the 2-year brightline rule and in the residential land withholding tax rules.

Option C – Zoning basis definition

16. Residential property would be all properties that are zoned as residential in the relevant proposed or operative district plan.

Option D – Definition based on intention of use

17. Under this option, a property would be classified as “residential property” if it is purchased by a person who intends to use the land.
18. In contrast to the options above, the classification of a property would not turn on the characteristics of the land itself, but rather on how that land is intended to be used. This means, for example, that a large farm would be classified as “residential property” if it is purchased by a person with no intention to actively farm the land. Similarly, a house would not be classified as “residential property” if it is purchased by a person who intends to operate a business from the property.

Option analysis

19. We have considered the above options against the criteria of policy effectiveness, minimising compliance and administration costs, and meeting our international obligations.

Policy effectiveness

20. We do not consider that option D (intention of use) would be an effective option. How a person intends to use a property is hard to determine – it is difficult to challenge a person’s claimed intention. For example, an overseas purchase could purchase a house claiming an intention of running a business from it but never actually start a business activity. The fact that the overseas person did not start a business activity would not prevent them from claiming they had a genuine intention of doing so at the time the property was purchased.
21. We note that a key reason for the introduction of the 2-year brightline test for property sales was because determining a person’s intention (in that case, intention to sell a property) is very difficult.
22. We also do not consider that option C (zoning based definition) would be totally effective. This is because it may not capture all types of property that would be generally considered residential – for example, lifestyle blocks on the urban fringe – may not be zoned residentially.
23. We have considered whether it would be possible to solve this problem by extending this option to cover land where its zoning allows for the construction of a dwelling. In this case it would be necessary to carve-out farmland and businesses from the definition of “residential land” as it is often permissible to construct a dwelling on a farm or business premises. With these modifications, this option becomes effectively option B (the Income Tax definition).
24. We consider that both options A (Rating Valuation Rules) and B would fully meet the criterion of policy effectiveness. Under both, residential property is broadly defined, capturing both suburban properties and more urban-fringe properties such as lifestyle blocks. Both options would generally capture holiday homes and bachs. Similarly, both options exclude land where residential housing is not its primary function (such as farms and commercial properties that include a residential premise¹).

¹ Where a property has mixed uses (for example, an office building with apartments on top), it will generally be split into different titles that can be sold separately. In this case, the apartments would be classified as a “residential property” while the office space of the building would not be. Consideration of whether a mixed-use property is primarily used for residential housing is necessary only where the property must be purchased as a whole package.

Minimising compliance and administration costs

25. We consider that option A would have the lowest compliance and administration costs.
26. As discussed above, options A and B are similar in terms of the types of property covered. The main difference between these options is whose judgement is used in determining whether a property is “residential land”. In most situations it will be clear whether or not property is residential land, but there will be marginal cases – commercial property with substantial residential housing on it, or a small rural property where it is questionable whether it can be economically farmed – where it is unclear whether a property is better classified as residential or as something else. In these cases judgement is required.
27. Under option A, this judgement is carried out by the relevant council’s valuation provider² when determining how to classify the property for ratings purposes. Under option B, this judgement would be carried out by the purchaser (or seller) of the property.
28. Under option A, an offshore person could check the categorisation of a property they are and know definitively whether they are entitled to purchase it.³ Option B requires the purchaser to come to a view as to the correct classification of the property, which may come at a cost and could delay some property transactions.
29. Similarly, option A would be the easiest option to administer and enforce – the categorisation of the property at the time of purchase can be determined by checking the relevant council’s District Valuation Roll. Disputes over whether how a property should be best categorised could not arise.
30. We consider that option D would have relatively high administration costs. Ensuring that overseas buyers only purchase properties where they *genuinely* intend to use it for a non-residential purpose would be hard. Proving a person had an intention different to what they claim is a difficult, requiring careful investigation and potentially lengthy dispute processes.

Meeting international obligations

31. s9(2)(h)

Preferred Option

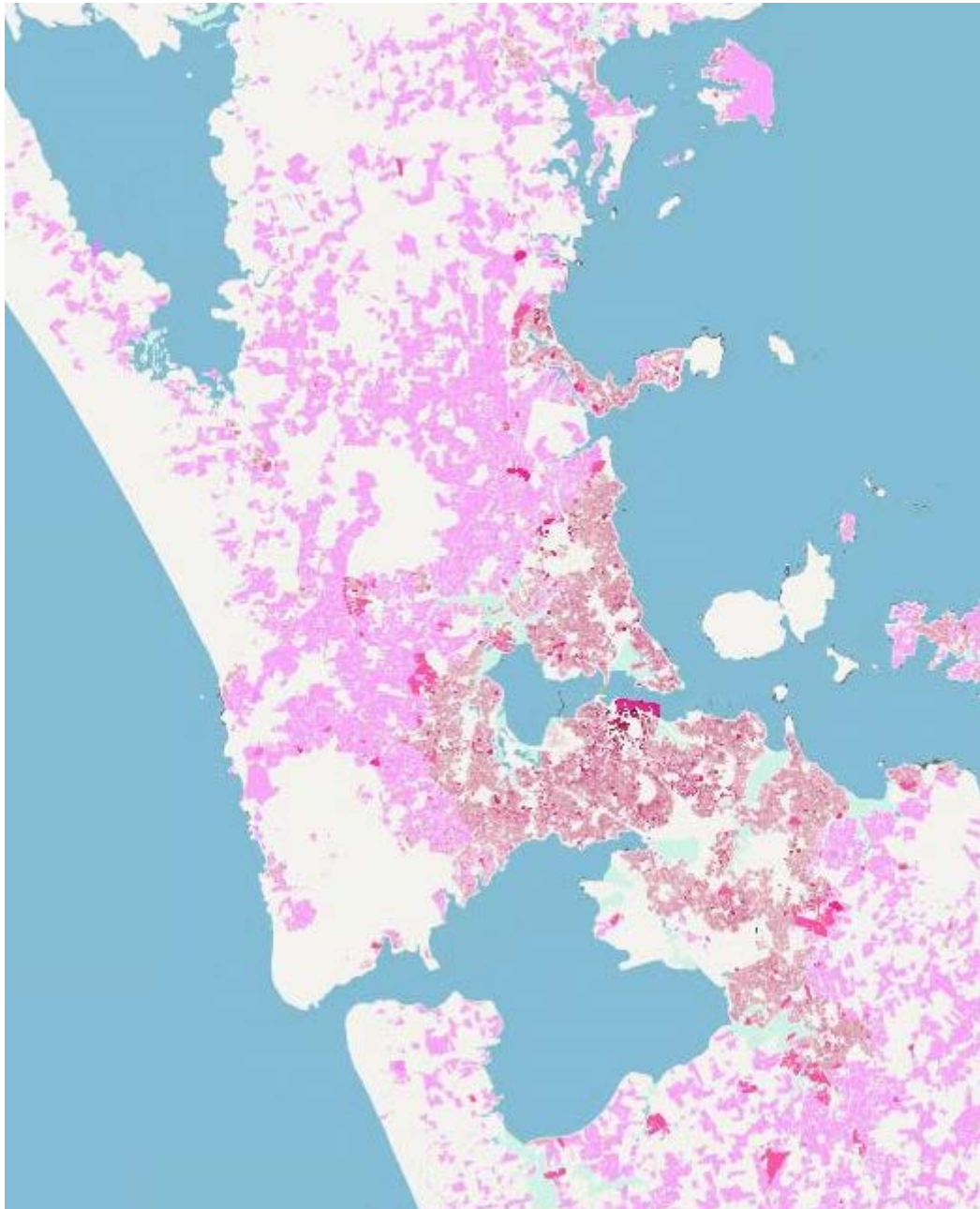
32. Our preferred option is option A – to define residential land as land that has a property category in the relevant council’s District Valuation Roll as either “residential” or “lifestyle” under the Rating Valuation Rules.⁴ We consider that this option best achieves the policy objectives of effectiveness, minimising compliance costs, and being consistent with our international obligations. It covers a broad range of residential-type properties, carves out non-residential property, and whether a property is “residential property” can easily be determined by prospective purchases (and the Overseas Investment Office OIO).
33. Running against this, option B is already used in the context of residential property transactions (such as when considering if the 2-year brightline rule applies). Adopting option A would introduce another definition of “residential property” to be considered when property is being sold. However, given the simplicity of the option, and the importance of a clear rule in this context, we still consider it the best option.

² The company the council uses to assess property values for rating purposes, such as QV New Zealand.

³ A property’s classification can be obtained from websites such as property-guru.co.nz (for a fee).

⁴ Strictly speaking, a property’s classification is not recorded in the DVR but is recorded as part of the “supporting information” that councils are required to maintain for each property alongside the DVR.

34. The map below illustrates the effect of this option – the red- and pink-shaded areas are properties that have a classification of either residential or lifestyle in the District Valuation Roll (and would therefore be classified as “residential property”).



35. While this is a new use for the District Valuation Roll, we note that it is designed to underpin a form of taxation (Council rates). Because of this, each council's Roll is audited periodically by the Valuer General to ensure national consistency and registered valuers are required to maintain it.
36. We also note that a property owner can object to how their property has been classified on the Roll – for example, if a property has been classified as lifestyle but would be better classified as pastoral. An objection does not mean that the classification will necessarily be changed, however; it just means that the relevant councils' valuation provider will consider what its classification should be.

Residential land/rural land interface

37. This definition of “residential land” should capture most non-business properties that are not currently classified as sensitive under the Overseas Investment Act (i.e. suburban housing and rural properties that are smaller than 5 hectares). This can be seen in the map above; the classification is fairly extensive, covering a large range of properties.
38. However, there will be a small gap of properties smaller than 5 hectares (so not subject to screening) that could be used predominately for a residential purpose, but that will not be categorised as “residential” or “lifestyle” in the District Valuation Roll (and therefore not classified as “residential” under our preferred option). These properties are unlikely to exist near large cities (most small rural sections near a large city will be classified as “lifestyle”), but could be found elsewhere such as on the outskirts of small towns.
39. We do not consider that this is a significant issue. Most property that will be used primarily for a residential purpose will be captured by our recommend option – particularly near large cities.
40. If this were a significant concern, it would be possible to expand the definition of “residential property” to capture more types of property that are smaller than 5 hectares (for example, it could be expanded to apply to non-urban property of a farming-type classification that is smaller than 5 hectares⁵). However, this would increase the complexity of the rule and increase the chance of overreach (i.e. preventing non-residents from purchasing property not intended to be used primarily for residential purposes). Given that we do not anticipate this being a significant issue, we do not recommend this modification.

Who should be covered by the ban?

The Issue: Who should be able to buy an existing home without OIO approval

41. We understand the broad objective of this policy is to prevent overseas buyers from buying existing homes in New Zealand. We seek confirmation, or make recommendations, with respect to the application of the policy to various groups of buyers.
42. We understand the intention is that New Zealand citizens will be able to purchase homes without OIO screening, regardless of where they reside. We understand the intention is that citizens of other countries that hold New Zealand residence class visas (including permanent residents) and live in New Zealand be able to buy a home in New Zealand without OIO consent. That is the existing policy for investments currently subject to OIO screening.
43. Therefore, we have focused our analysis of options on residence class visa holders not resident in New Zealand and temporary entry class visa holders.
44. ***Our preferred approach*** is to design a test which allows all residence class and some temporary entry class visa holders to be able to purchase existing homes in New Zealand if they can demonstrate a long-term commitment to New Zealand.

Residence class and temporary entry class visas

45. You have asked for advice on how holders of temporary entry class visas should be dealt with under the ban on overseas buyers. We also provide advice on how

⁵ The arable, dairy, forestry, horticultural and pastoral property classifications.
T2017/2389 : Banning Overseas Buyers of Existing Homes: Detailed Design Proposals

residence class visa holders would be treated. An overview of key visa categories is set out in Annex One.

46. Residence class visas include two categories: permanent resident visas (which have no conditions and do not expire if the person is outside New Zealand) and residence visas (which may have conditions and can expire if the person is outside of New Zealand). As long as they remain in New Zealand people with Resident Visas have a right to reside in New Zealand indefinitely (provided certain conditions are met). They can be eligible for a Permanent Resident Visa if they spend enough time in New Zealand over two consecutive years or meet other specified criteria demonstrating a commitment to New Zealand.
47. This use of the existing definition of “overseas persons” in the OIA for residential land investments would prevent some residence class visa holders and all temporary entry class visa holders from purchasing homes in New Zealand. This is in contrast to the situation under the OIA for other classes of sensitive land, which would allow holders of these visas to purchase provided they met the criteria for consent in the Act.
48. s9(2)(f)(iv) + s9(2)(g)(i)

Options for determining residency for home buying purposes

Option 1: Use definition of “ordinarily resident in New Zealand” from OIA

49. The OIA uses an “ordinarily resident in New Zealand” test to determine whether a residence class visa holder is resident or domiciled in New Zealand and therefore eligible to invest without screening. The existing definition of “ordinarily resident in New Zealand” requires an investor to judge whether they are ‘residing in New Zealand with the intention of residing there indefinitely’.
50. Current OIO practice in assessing applications is that an investor that resides in New Zealand for 183 or more days within the last 12 months is likely to meet this test. However, the current legislative language can make this a difficult or disputed test to apply. In the OIO’s experience, investors and their advisors apply the test poorly, tending to judge themselves to be ordinarily resident (and thus entitled to invest without undergoing screening) when in fact they are not. The increased volume of regulated transactions that will result from the residential ban will exacerbate this problem.
51. Therefore Treasury does not favour this option. We favour options that rely more on objective tests than buyer judgements.

Option 2: Establish a bright line test solely based on visa status

52. This option would permit holders of New Zealand residence class visas, including permanent residents, to invest without consent, whether or not the visa holder resided in New Zealand.
53. We assess this option as inconsistent with your objective that non-New Zealand citizens can only buy homes in New Zealand if they have a demonstrated commitment to remaining in New Zealand.

Option 3: Establish a bright line test based on visa status and actual residence

54. This option would allow a person to invest if they hold a residence class visa *and* have been in New Zealand for a certain period of time. A bright line version of the existing OIA test could be used. Legislating current OIO practice would require a person to have been resident in New Zealand for 12 months, and present in New Zealand for at least 183 days in that period. This test is more difficult to meet than the test for tax residency but is consistent with the purpose of the OIA.
55. We favour residence class visa holders who meet the time in New Zealand test be able to buy a home without OIA screening. However it means that some migrants will continue to be screened that you may wish to exclude on broader policy grounds.

Option 4: Option 3, plus a mechanism to allow others with strong commitment to New Zealand to buy a home in some circumstances

56. This option extends option 3, so that holders of some classes of temporary entry visa that have strong long-term commitment to residence in New Zealand and so are considered to be on a path to residence or citizenship can also buy a home if they meet the time resident in New Zealand test (which we propose to be 183 days within the last 12 months). We recommend that this regime covers temporary entry class visa holders on some types of work visas (to be defined in regulation). This extension would only apply to OIA screening of homes. The existing OIA screening of other investments by these visa holders would be unaffected.
57. Home buyers holding temporary visas would need to notify the OIO of their investment (to enable compliance to be monitored) and would be subject to a requirement that they sell their property within a specified time of ceasing to be resident in New Zealand (the Australian regime requires sale within three months of ceasing to be resident).
58. We also recommend that a supplementary approval or notification mechanism also be developed to enable home purchases by residence class visa holders who do not meet the 183 day test in option 3. This may be desirable as some residence class visa holders may have an intention to reside long-term in New Zealand prior to obtaining their residents visa, for instance migrants who have previously lived in New Zealand.

Clarifying definition of “ordinarily resident in New Zealand” across the Act

59. The OIO would like any simplified test for “ordinarily resident in New Zealand” that is adopted for residential property to also apply to other assets screened under the OIA as this would improve application of the OIA residency tests. The Treasury recommends that officials provide further advice on whether the definition of persons exempt from the ban on residential property purchases replaces the definition of persons “ordinarily resident” in the wider OIA screening regime;

Preferred Option

60. Our preferred option is to adopt Option 4. This would involve:
- Exempting all New Zealand citizens from the ban;
 - The establishment of bright line test for residence class visa holders based on a time-based assessment of their residence in New Zealand. We propose to use a bright line version of the current OIA test, which requires residence in New

Zealand for at least 12 months, and presence in New Zealand for at least 183 days in aggregate in the last 12 months; and

- A regime to allow some other temporary visa holders that are in New Zealand for work purposes and are able to demonstrate a long-term commitment to residence in New Zealand to purchase residential property after notifying the OIO, accompanied by a requirement that they sell if they cease to be resident. Details of how this would operate would be confirmed in subsequent advice, but could include the 183 day test proposed for residence class visa holders.

61. We consider this design balances the three policy criteria:

- Policy effectiveness: the tests would clearly establish those that can invest in New Zealand and provide a pathway for others. The ban would be targeted on non-New Zealand and Australia citizens with no demonstrated or intended commitment to residence in New Zealand, while minimising unintentional capturing others. However, the notification regime outlined in sub-paragraph 62 may allow some people to circumvent the ban if not enforced.
- Compliance with international obligations: The 183 day test would make little practical difference to the way the "ordinarily resident in New Zealand" test in the OIA is currently applied, but would be far more clear. ^{s6(a)}

- ^{s9(2)(h)}

62. MBIE supports option 2 and the ability afforded by option 4 to exempt some temporary visa holders (subject to further design work) on the basis that this would balance the policy intent of the ban on foreign speculators with the aims of the immigration system. MBIE notes that the immigration system works to assess resident visa holders' potential to contribute to New Zealand. MBIE notes that its preferred options would minimise the impact on high value migrants, would be simple for potential buyers and migrants to understand and for the OIO to enforce.

63. Treasury notes that this would be a more liberal option than the current OIA test for permanent residents.

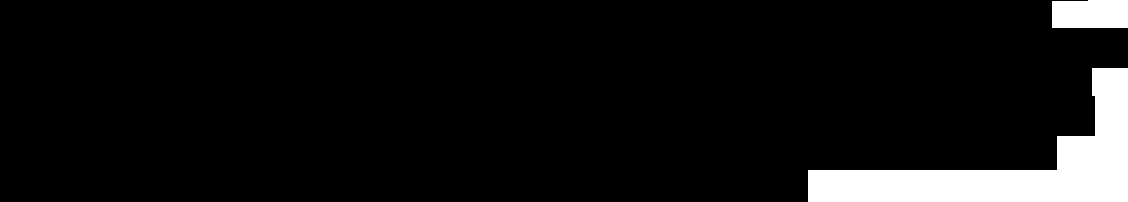
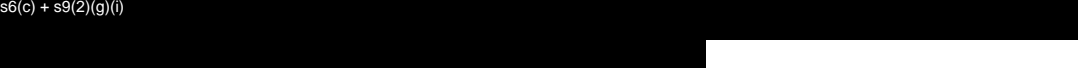
The Issue: Mixed nationality relationships

64. A New Zealander and their overseas person spouse do not require consent to acquire assets under the existing OIA rules, provided the assets are relationship property. We propose that these existing rules continue to apply in respect of the residential ban.

^{s6(a)}

66. We propose to treat Australian citizens and permanent residents in the same way New Zealand citizens and permanent residents are treated under the new ban, limiting any exemption for Australian permanent residents to the minimum required by our international legal obligations given New Zealand permanent residents are not exempted from Australia's residential property ban.
67. With respect to Australian enterprises and legal persons, we propose to adopt the regime used to implement the CER IP which requires 75% or more Australian ownership and control in order for the exemption from screening to apply.

Compliance and enforcement

71. We anticipate that most prospective overseas buyers will voluntarily comply with this regime (especially when considering the advice that real estate agents and conveyancers will be able to provide; we will provide advice to you on this in our next report). However, an effective monitoring and enforcement regime will need to be in place to ensure the rules are effective.
72. The OIA already provides monitoring and enforcement powers to the OIO; ^{s6(c) + s9(2)(g)}_(i)

73. ^{s6(c) + s9(2)(g)(i)}

74. The OIO have advised us it needs improved information gathering powers, better ability to serve documents, stronger penalty provisions and more effective ways to make people dispose of property acquired unlawfully in order to assist it to effectively monitor and enforce the ban on residential house purchases (these changes are discussed in more detail below).

75.

s9(2)(g)(i)

76. Note that the enhanced powers discussed below would apply generally – to both the residential ban and the more general OIA provisions. Therefore for the decision to fall within this group of Ministers' power to act without reference back to Cabinet, you may wish to satisfy yourselves that this issue is within Cabinet's intended scope of "...further detailed policy matters that need to be addressed to enable the legislation to be drafted" [CAB-17-MIN-0489 refers].

Options

77. The key decision here is whether these enhanced powers should be implemented immediately, or if they should be implemented as part of a broader review of the OIA's enforcement powers once the ban has been in place for some time.
78. We recommend that the changes detailed below be implemented immediately, as part of this phase of the review of the OIA. Without these changes, there are risks that the OIO will not be able to effectively enforce the ban. For example, without strengthened information gathering powers the OIO would may not have the ability to make initial enquiries in relation to residential property to confirm the residency status of who purchased it.

79.

s9(2)(g)(i)

80. Making these changes now does not preclude a subsequent review of the OIO's enforcement powers, once the residential ban has been in place. This post-implementation review would allow consideration of other changes that could be made once the OIO has some practical experience with the ban's operation.

Enhanced powers

Information gathering powers

81. Under the OIA, the OIO can, if it has reason to suspect that a person has committed an offence under the OIA, require a person to provide information or documents that may furnish evidence in relation to that offence (s 41). This threshold is relatively high, when compared to other regulators.

82.

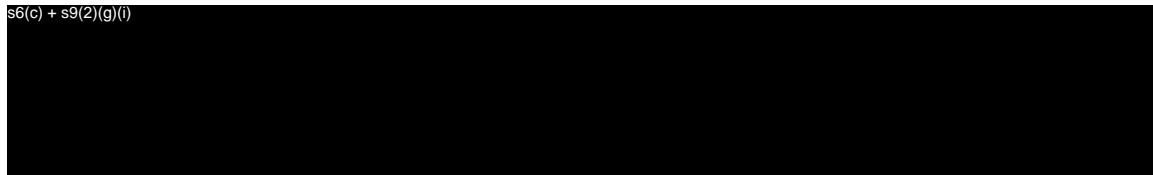
s6(c) + s9(2)(g)(i)

83. At this stage, we recommend that these information gathering powers be strengthened so that the OIO is able to require a person to provide information or documents is

available when the OIO considers that it is necessary or desirable for the administration or enforcement of the OIA.

84.

s6(c) + s9(2)(g)(i)

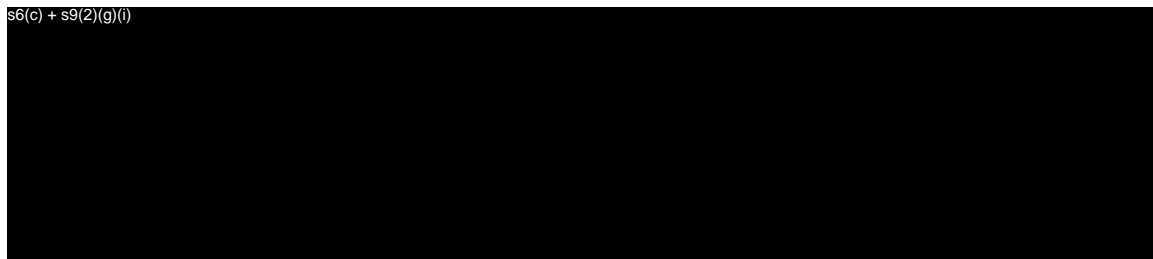


Ability to service documents

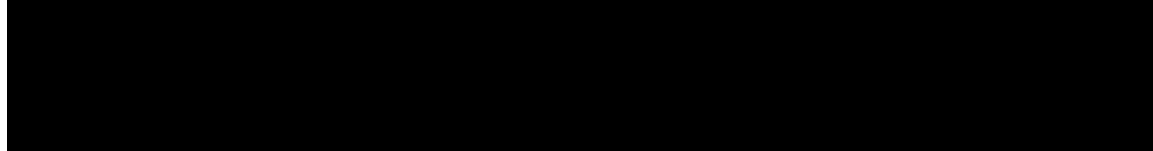
85. Under the OIA, consent holders must provide a New Zealand address for service. Any documents (including proceedings) that the OIO needs to serve on a consent holder can be served at the address that the consent holder provides (s 54).

86.

s6(c) + s9(2)(g)(i)



87.



88. Accordingly, we recommend that the OIA be changed to allow for service using alternative mechanisms to personal service such as service at a known electronic address or at the address of the relevant property.

Disposal process

89. Under the OIA, the court can order a person to dispose of their property where that person has contravened or committed an offence (s 47).

90. Court processes are lengthy (it is not unusual for a matter to take two years to get to court) and costly. Once the OIA is amended, a significant increase in the amount of disposal enforcement action taken by the OIO is anticipated. A quick and efficient process for disposal where a breach has occurred will be necessary. The process will also need to encourage cooperation, which means that it cannot overly penalise persons where their breach has been inadvertent, or where they have co-operated with the OIO.

91. We recommend changing the OIA disposal provision to allow for a notice mechanism for disposal. This would give the OIO discretion to issue a notice in circumstances where the OIO has reasonable grounds to believe that an overseas person has purchased a residential home in breach of the OIA. The notice would require the owner to either object to the notice (that is, to show that they are not in breach of the OIA) or to agree to dispose of the property.

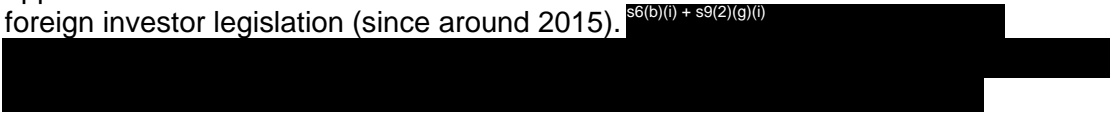
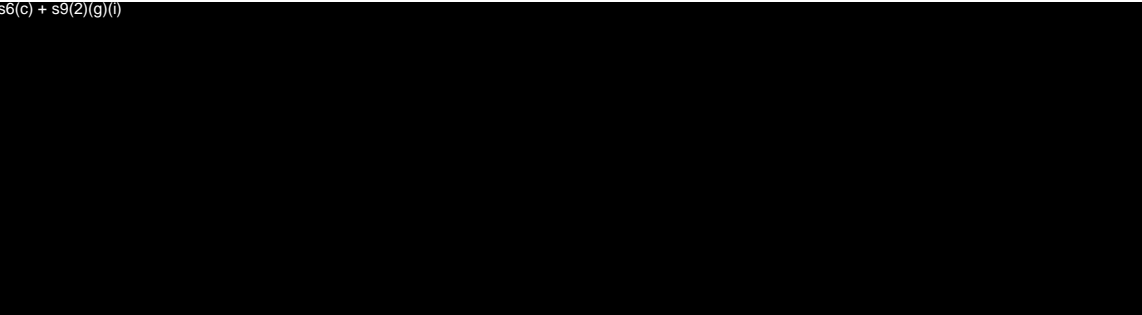
92. If the owner disposes of the property pursuant to a notice, no further penalty would be imposed on them thereby encouraging cooperation (that is, they would not be subject to criminal or civil liability under the OIA for their breach). If the owner does not agree to dispose of the property, the OIO could then apply to the court for disposal and seek any orders under subpart 5 of the OIA, including a civil penalty.

93. It is expected that this option will encourage voluntary disposal, which will support the policy objective of ensuring residential land is made available to New Zealanders while minimising enforcement costs.

Civil penalties

94. The OIA allows a court to impose a civil penalty for a breach of the OIA for the higher of \$300,000 or any quantifiable gain (s 48(2)).
95. The effect of the provision means there is often no real financial penalty for breaching the OIA. A worst case scenario for a person who breaches the OIA and makes a gain on the land is that they will break even. As a consequence, there is little incentive to comply with the OIA and the civil penalty does not act as an effective deterrent on property speculation.
96. A penalty that is a multiple of the quantifiable gain would encourage voluntary disposal under the proposed notice mechanism described above and would also be a deterrent on property speculation.
97. Accordingly, we recommend increasing the civil penalty in the OIA to three times the gain that the investor has made. This can most effectively be achieved by amending the OIA to allow a court to impose a penalty of three times the value of the quantifiable gain resulting from the contravention. This matches a penalty under section 80 of the Commerce Act (which relates to penalties for restrictive trade practices).

Third party liability

98. The OIA imposes civil penalties on those that have contravened the OIA or committed an offence under it (s 48). However, civil penalties are not ordinarily available in relation to third parties (for example, real estate agents) who assist in a contravention of the OIA.⁶ In order for the residential ban to be effective, there should be consequences for third parties who are complicit in breaches of the OIA.
99. Accordingly, we recommend that a person who is 'involved in a contravention' (for example, they aid or abet the contravention) would be liable for a civil penalty in the same way as the party who contravenes the Act (that is, the foreign investor). A similar approach is taken in the Financial Markets Conduct Act 2013 and in the Australian foreign investor legislation (since around 2015).^{s6(b)(i) + s9(2)(g)(i)}

100. ^{s6(c) + s9(2)(g)(i)}

101. The third party liability would relate to all contraventions of the Act, including those that do not relate to the direct sale of property. For example, a share transfer that resulted in a proprietor becoming a foreign investor would be caught, so the advisors involved in that transaction would be incentivised to consider compliance with the OIA.

⁶ Third party liability is available in relation to the criminal offences set out in the OIA through the generic provisions in Part 4 of the Crimes Act 1961. This means that a person who, for example, aids or abets a contravention of the OIA may face criminal consequences as a party offender, but would not ordinarily be liable to the civil penalties under the OIA.

The position of vendors

102. It is possible that a small number of agreements for sale and purchase (ASP) will not be completed as a consequence of the residential ban. For example, a buyer may enter into an ASP, then receive advice that they are not eligible to buy residential land and, as a consequence, are not in a position to complete the transaction.
103. This could leave the vendor in a difficult position, particularly if they have bought another property in reliance on an unconditional ASP. As discussed above, this is one of the reasons why we consider it important that who is subject to ban, and the types of property covered, be as clear as possible.

Consequence of failed ASP

104. A vendor of residential land is unlikely to be subject to any criminal or civil penalty under the OIA as a consequence of the land being bought in contravention of the OIA (the exception to this is where the vendor is complicit in the contravention, for example, the vendor knew that the buyer was not eligible to buy the property).
105. It is unlikely that a Court would make an order for specific performance because the remedy, forcing the purchaser to complete the purchase, would be an unlawful contravention of the residential ban. The vendor is likely to be limited to retaining any deposit that has been paid and, if their losses exceed the amount of the deposit, seeking damages from the buyer. The ASP (Auckland District Law Society standard form, which is used in many residential property sales) requires purchasers to warrant that they do not need OIO consent to purchase the property. That warranty would be one basis on which the vendor could found their claim.
106. We consider that this is the best mechanism for dealing with failed ASPs; we do not recommend any policy changes here.
107. We have considered whether an ASP (that relates to a contravention of the OIA) ought to be an 'illegal contract' under the Contract and Commercial Matters Act 2016. However, there are some risks attached to this approach. The OIA expressly provides that such contracts are not illegal contracts. This was a deliberate policy choice reflected in the OIA in 2005. It was intended to avoid some of the harsh consequences of making a contract an illegal contract. For example, a vendor would be obliged to return the deposit (and then sue for damages in respect of all their losses, rather than any losses exceeding the amount of the deposit). There is also a risk that, if such an ASP is an illegal contract and as a consequence is treated as being of no effect, the enforcement tools under the OIA would not be available (because there would, at law, be no contract and no contravention to prosecute).

Next Steps

108. We are currently working on follow-up reporting that deals with more detailed design issues. We hope to get the first of these to you on Friday 10 November. We are working towards the Cabinet expectation that a draft OIA amendment bill be taken to Cabinet Business Committee on or before 11 December 2017.
109. We understand that the Government anticipates a broader review of the OIA in the future which will require a further bill. For the residential ban bill, we have recommended the changes to the OIA that we consider are the minimum necessary to effectively implement the ban. A further review of the OIA will provide an opportunity to ensure that the OIO regime is working effectively (as a whole and in relation to the residential ban).

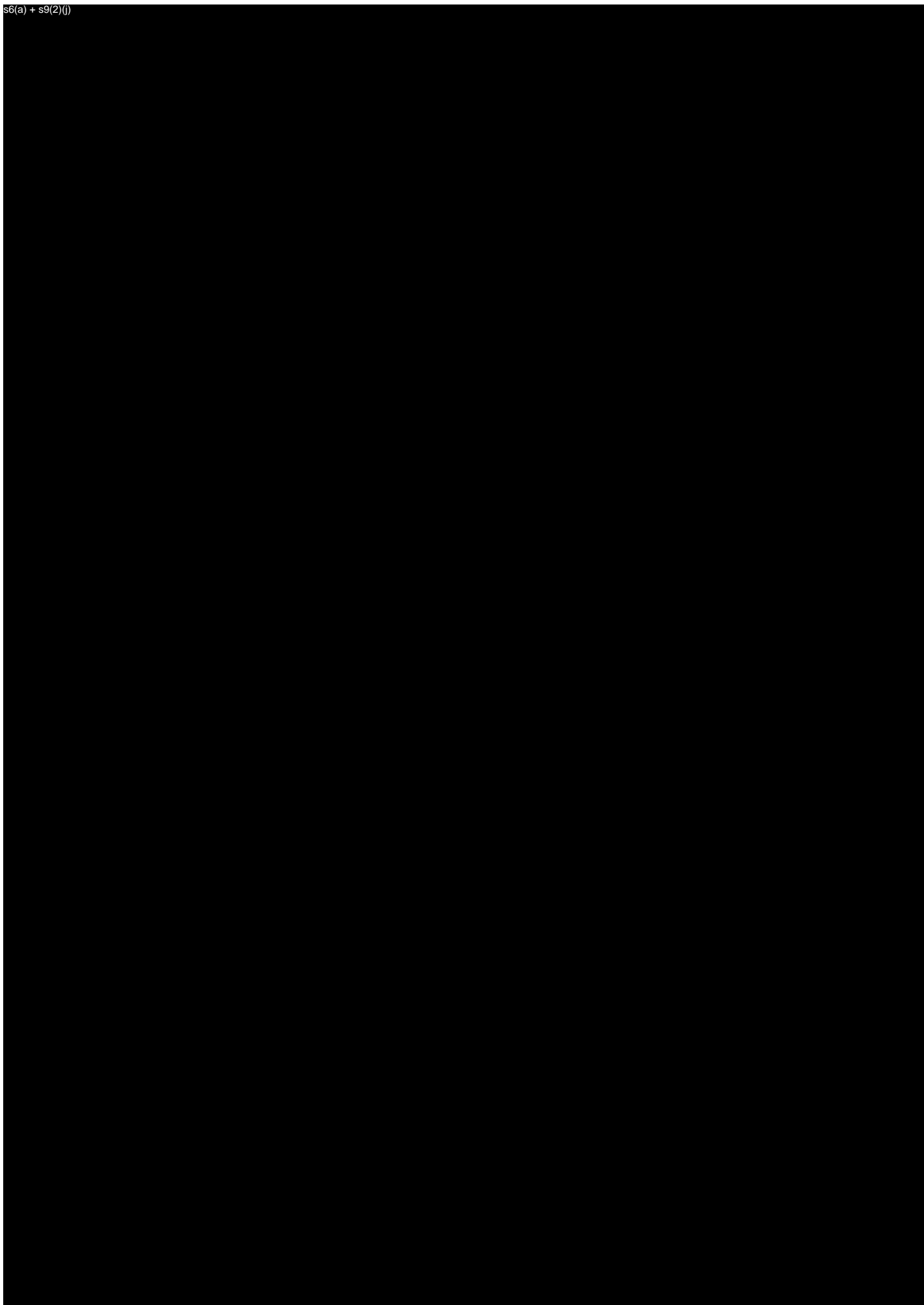
110. The following departments have been consulted in the development of the advice and recommendations in this report: Land Information New Zealand, Ministry of Business, Innovation and Employment, Ministry of Foreign Affairs and Trade, Ministry of Justice; Inland Revenue, Parliamentary Counsel Office and the Overseas Investment Office. The Department of Prime Minister and Cabinet and Te Puni Kokiri have been informed.

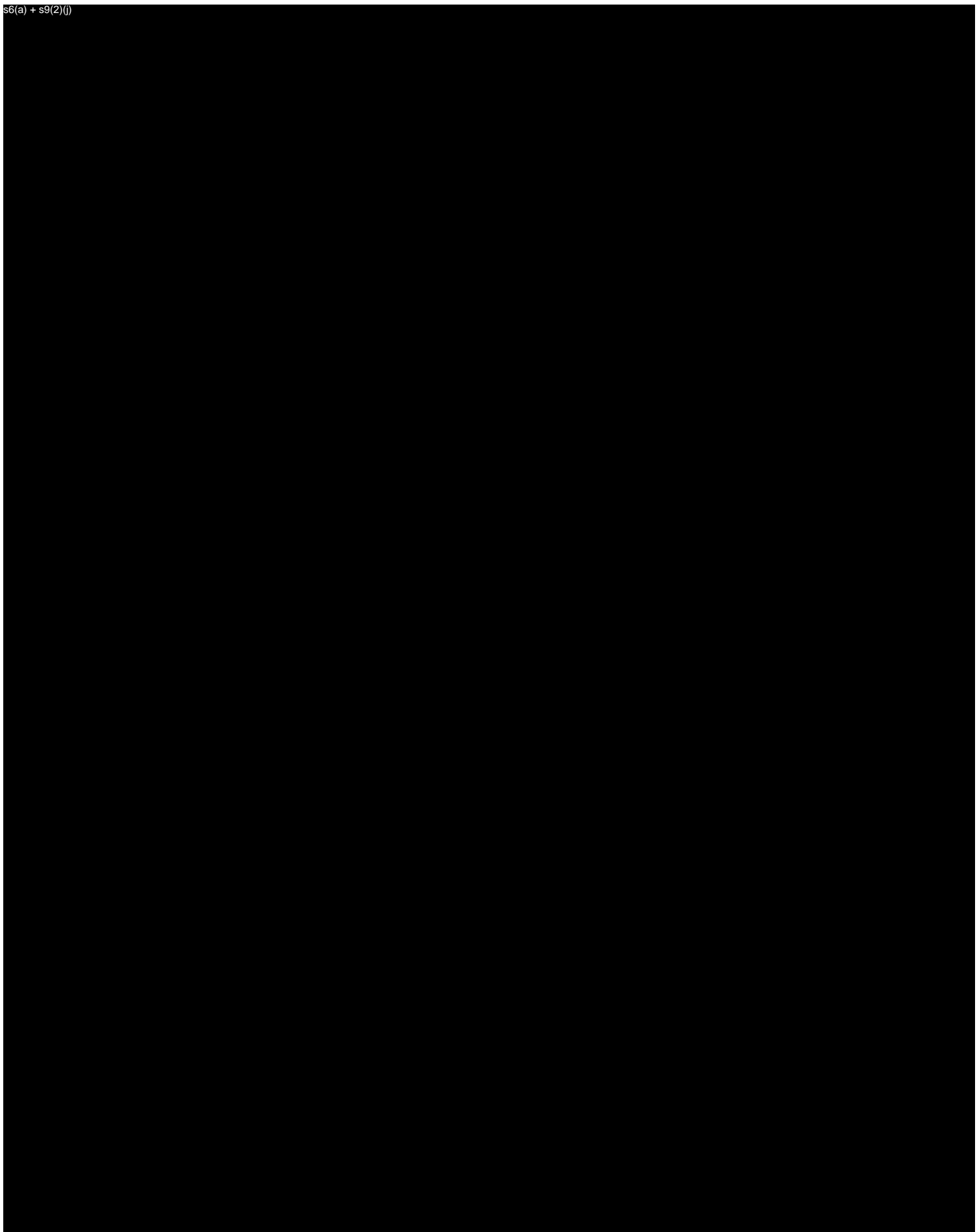
Annex One: Summary of key residence and temporary entry class visas

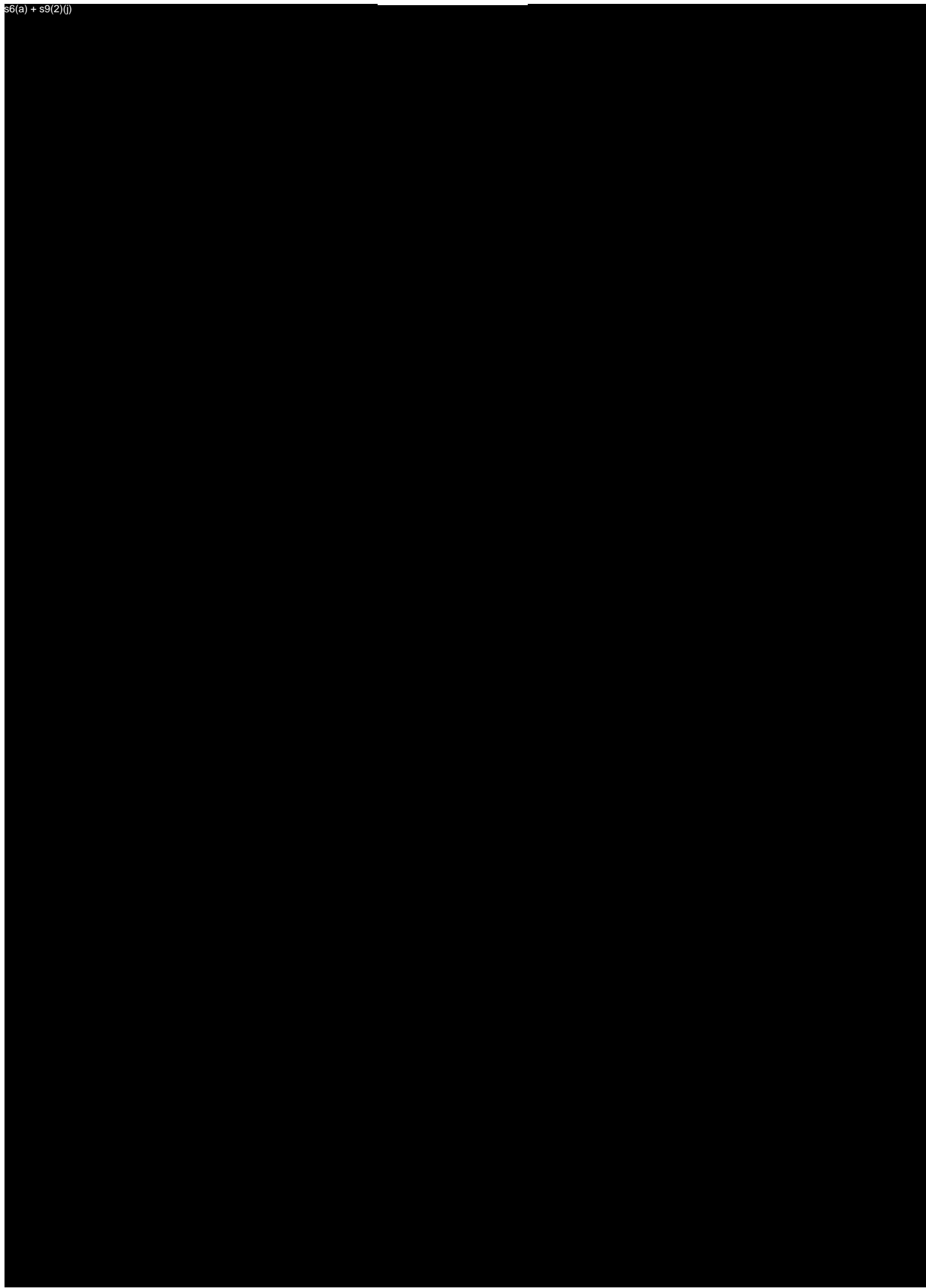
	Visa Category	Description	Number in NZ [approved in the last 5 years; in NZ on 30 June 2017]	Approved in 2016/17
Total visas	All residence categories	All residence categories as described below.	186,200	47,700
Skilled / Business	Skilled Migrant Category (SMC)	A points based system, with points awarded for age, qualifications, work experience and skilled employment or offer of employment in New Zealand. Applicants need 160 points to be selected.	94,500	24,100 people (includes family)
	Residence from Work	For people who have held a work to residence visa for two years under Talent (Arts, Culture and Sports), Talent (Accredited Employer), Long Term Skill Shortage List, or South Island Contribution	6,400	2,400 people (includes family)
	Investors	Two categories of investors: Category 1 requires investment of \$10 million for three years; Category 2 is a points system that requires a minimum investment of \$3 million for 4 years.	2,000	1,400 people (includes family)
	Entrepreneurs	For people who have successfully run a business in New Zealand for two years that has benefited New Zealand (a pilot Global Impact Visa has also been introduced).	2,800	600 people (includes family)
Family	Partnership	For partners of New Zealand citizens and residents where there is a genuine relationship and the couple have lived together for 12 months.	43,000	10,900 people
	Parent	For parents of New Zealand citizens and residents who have resided as resident for at least three years. Parent must be able to support themselves. Currently suspended.	12,700	1,800 people
	Dependent Child	Dependent children up to 24 years old of New Zealand citizens and residents.	6,300	1,900 people
International / Humanitarian	Samoa Quota	Applicants who are citizens of Samoa can be granted residence through the ballot provided they have a job in New Zealand.	4,100	1,100 people (includes family)
	Pacific Access	Applicants who are citizens of target countries can be granted residence through the ballot provided they have a job in New Zealand.	2,300	700 people (includes family)
	Refugees	Includes: Refugee Quota, Refugee Family Support Category, and successful asylum claimants.	Approx. 4,000	Approx. 1,700 people
	Other	Includes victims of domestic violence and victims of people trafficking.		

	Visa Category	Description	Number in NZ [on 30 June 2017]	Approved in 2016/17
Total visas	All temporary categories	All temporary categories as described below. (Note: some small work categories included in the total are not listed below.)		942,600

Work	Essential Skills	Migrants can be granted a visa if the job is on a skill shortage list or the employer can demonstrate through a labour market test that there are no suitable domestic workers available or trainable and that they are paying the market rate. 2017 changes introduced salary thresholds and time limits and family restrictions for lower-skilled workers.	36,700	33,000 9,700 new workers
	Work to Residence	Workers with: - an accredited employer earning \$55,000pa+; - an international reputation in certain fields; - a job on the Long Term Skill Shortage List earning \$45,000pa; - 5 years in the South Island on Essential Skills	5,400	4,500 2,297 new workers
	Recognised Seasonal Employer	Seasonal work in horticulture and viticulture. Employers must be accredited. Preference for recruiting from the Pacific.	5,100	11,300
	Post Study Work	Open to students who have completed a qualification in NZ taking 2 years at levels 4-6, or 1 year at level 7 or above. PSW is a 1 year open work visa, then a 2 year employer-assisted work visa with a job relevant to their study.	28,900	27,900 18,900 new workers
	Working Holiday Schemes	Available to young people (age 18 to 30 for most countries) to holiday and work in NZ. Most are for up to 12 month. NZ has 44 schemes, 14 are uncapped.	32,800	70,000 only granted once
	Specific Purpose or Event	Facilitates entry for a specific purpose or event where there is no risk of a negative impact on opportunities for New Zealand citizens or residents. Common purposes include: entertainers, actors, musicians, and support staff; sports people; seconded business people; installers of equipment	3,700	17,700
	Partner of a NZ Citizen or Resident	For partners of New Zealand citizens and residents where there is a genuine relationship, who do not qualify for residence or wish to stay in NZ for less than 2 years. Can work full time in any employment.	10,600	13,800
	Partner of a Worker or Student	The partners of some work (excluding RSE, WHS and low earning Essential skills migrants) and some student visa holders (those sponsored by the NZ aid programme or studying postgraduate qualifications or degrees in skill shortages) are able to obtain an open work visa for the same length as their partner's visa. No requirement to have lived together prior to the application.	23,200	22,000
	Dependant students	For dependent children of workers. Must be in compulsory education and in some cases their parent must earn over a threshold.	14,300	12,500
Study	International Students	International students can be granted a visa provided they have an: <ul style="list-style-type: none"> offer of place at NZ institution that is signatory to the Code of Practice sufficient funds to support themselves, and meet any course prerequisites Most tertiary students allowed to work for 20 hrs per week while they study.	59,500	74,900
	Other students	Exchange students, students granted visas under section 61, dependants of NZ citizens.	1,800	4,100
Visitor	Visitor	Available for up to 9 months in an 18 month period.		641,891







Treasury Report: Banning Overseas Buyers of Existing Homes: Further Detailed Design Proposals

Date:	Friday 10 November	Report No:	T2017/2478
		File Number:	IM-5-1-1

Action Sought

	Action Sought	Deadline
Prime Minister (Rt Hon Jacinda Ardern)	Agree the recommendations in this report.	14 November 2017
Deputy Prime Minister (Rt Hon Winston Peters)		
Minister of Finance (Hon Grant Robertson)		
Minister of Housing and Urban Development (Hon Phil Twyford)		
Associate Minister of Finance (Hon David Parker)	Agree the recommendations in this report. Refer this report to the Minister of Immigration for his information.	14 November 2017
Minister for Land Information (Hon Eugenie Sage)	Agree the recommendations in this report.	14 November 2017

Contact for Telephone Discussion (if required)

Name	Position	Telephone	1st Contact
Steve Cantwell	Principal Advisor	s9(2)(k) (wk)	s9(2)(a) (mob) ✓
Thomas Parry	Team Leader	(wk)	s9(2)(a) (mob)

Actions for the Minister's Office Staff (if required)

Return the signed report to Treasury.

Refer a copy of this report to the Minister of Immigration

Note any
feedback on
the quality of
the report

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Enclosure: No

Treasury Report: Banning Overseas Buyers of Existing Homes: Further Detailed Design Proposals

Executive Summary

This report seeks decisions from the group of Ministers with power to act on deciding the details of the ban on overseas buyers buying existing homes agreed by Cabinet on 31 October 2017. This includes recommendations on scope and application of the new builds exemption, treatment of residential property that is also sensitive land under existing OIA rules, proposed extension of the new “ordinarily resident” test to all areas of OIO business, potential roles of real estate agents and conveyancers, enforcement powers, and transitional provisions. This report assumes that the recommendations in T2017/2389 *Banning Overseas Buyers of Existing Homes: Detailed Design Proposals* are agreed.

We have used the three criteria used in the last Cabinet paper to evaluate options. Those criteria are policy effectiveness, compliance with New Zealand’s international obligations, and minimising compliance and administration costs.

New builds exemption

Our key recommendations regarding the new builds exemption include:

1. **What qualifies as a new build:** any development that increases the number of dwellings on the relevant sites(s); this to include subdivisions that develop new residential sections for sale (as opposed to built homes). We also recommend that new or expansions to retirement villages, residential care facilities, student accommodation, and similar facilities, also fall within this exemption.
2. **How to apply the new build exemption:** all overseas buyers wanting to use the exemption would need to apply for OIO approval before purchase, and meet the existing OIO investor and good character tests. We also recommend a pre-approval regime so regular developers that are overseas persons can be pre-approved to make purchases in the course of their business without needing to screen each individual land purchase. Any such purchases would need to be notified to the OIO.
3. **Development for letting:** where the developer intends to let rather than sell the developed accommodation, we recommend limiting the new build exemption to commercial leases, retirement villages, aged care facilities and student accommodation.
4. **Purchase of residential land for another purpose:** an investor may buy residential land for another purpose, for instance to build a motel or retail facility. Unless addressed, the ban would prevent foreign investors converting residential land to higher-value uses. We recommend that where an investor wants to develop residential land to another use, the current OIO “benefits test” would apply. Factors the Minister may consider in applying that test include that the investment will create jobs, or add competition, efficiency or productivity, or enhance domestic services in New Zealand.
5. **Residential land that also ‘sensitive land’ under the OIA:** We recommend screening this land as sensitive land per existing policy, plus subject the purchase to the ban on the purchase of existing homes. Therefore for a purchase to occur an overseas investor would need to meet the existing sensitive land tests, and access the new build exemption, or convert the land to a non-residential use.

Extension of proposed “ordinarily resident” test to other OIO screening

T2017/2389 *Banning Overseas Buyers of Existing Homes: Detailed Design Proposals* proposed a 183 days with the last 12 months rule for determining the New Zealand residential status of buyers who are not New Zealand or Australian citizens. We propose that the OIA be changed so this test is also the statutory test for other situations where the OIO needs to determine the residency status of an investor (e.g. purchases of significant business assets and non-residential sensitive land). Applying the same test in all areas of OIO business offers significant policy, communication and administrative advantages, and removes the risk that an investor might qualify under one OIA residency criteria and fail under another.

Obligations on real estate agents and conveyancers

We recommend that no formal obligations be placed on real estate agents. Real estate agents have no contractual relationship with buyers – they are the vendor’s agent – and the agents are not well-equipped to interrogate the bona fides of potential purchasers. That said, we anticipate that the agents’ obligations to the vendor and their interest in a successful sale will result in agents encouraging prospective purchasers to satisfy themselves that they meet the OIA requirements.

Regarding conveyancers, we recommend that conveyancers be required to certify that they have informed the purchaser of the OIA requirements regarding purchase of residential property. Placing more onerous requirements on conveyancers to determine the OIA status of purchasers will increase costs for all sales transactions (as all purchasers will need to prove they qualify).

Offences and penalties

T2017/2389 proposed enhancements to the existing OIA offences and penalties regime in light of the residential ban. We recommend those enhancements apply to all areas of OIO business, not just the regime for residential land.

Status of advice

Advice on this policy initiative has been prepared under very short timeframes. Decisions sought in this paper may be revisited as further technical work is undertaken.

Recommended Action

We recommend that you:

- a **Note** that Cabinet agreed the ban on overseas buyers would not include ‘new build’ properties that are purchased for on-sale or letting
- b **agree** that ‘new build’ captures:
 - i. any development that increases the number of dwellings on the relevant site(s), including subdivisions that develop new residential sections for sale
 - ii. new or expansions to retirement villages, residential care facilities, student accommodation, and similar facilities

Agree / Disagree

- c **Agree** that the conditions of consent imposed under the 'new builds' criteria be enforceable through the notification and disposal power previously agreed by this group of Ministers
- d **Agree** that the 'new build' exemption is applied to overseas persons in the following way
- i. all overseas buyers wanting to use the exemption need to apply for the OIO approval before purchase, and meet the existing OIO investor and good character tests

Agree / Disagree
 - ii. regular developers that are overseas persons can be pre-approved to make multiple purchases of residential property in the course of their business without needing to screen each individual land purchase

Agree / Disagree
- e **Agree** that where a developer intends to let rather than on sell the developed accommodation, the new build exemption is limited to commercial leases, or retirement villages, aged care facilities and student accommodation

Agree / Disagree
- f **Agree** that where an investor wants to develop residential land for another use, for example to build a motel or retail operation, the current OIO screening "benefits test" would apply

Agree / Disagree
- g **Agree** that where residential land is also 'sensitive land' under the OIA, the land is screened as sensitive land per existing policy and subject to a requirement to on-sell or let the property

Agree / Disagree
- h **Note** the practical implications of recommendations f and g above is that an overseas investor would need to meet the existing sensitive land tests, and then either access the new build exemption, or convert the land to a non-residential use
- i **Agree** that the following exemptions be added to the Overseas Investment Regulations 2005 for residential property investments by overseas persons:
- i. the purchase of property by a foreign government for a diplomatic or consular mission or for housing for diplomatic or consular staff

Agree / Disagree
 - ii. the ban not apply in relation to a person of Māori descent in respect of Māori freehold land to which they have an ancestral connection

Agree / Disagree

- j **Agree** to seek Cabinet approval that the new definition of “ordinarily resident in New Zealand”, as previously agreed by this group of Ministers, is expanded out to the full OIA screening regime
- Agree / Disagree*
- k **Note** that the group of Ministers agreed in recommendation m (subparagraph e.) of our previous report that a third party person who is ‘involved in a contravention’ (for example, they aid or abet the contravention) would be liable for a civil penalty in the same way as the party who contravenes the Act (that is, the foreign investor)
- l **Agree** that a person who is liable on account of being ‘involved in a contravention’ have a defence to civil liability if the person’s involvement in the contravention was due to reasonable reliance on information supplied by another person, or if the person took all reasonable and proper steps to ensure compliance with the OIA
- Agree / Disagree*
- m **Agree** that no formal obligations should be imposed on real estate agents in relation to the regime
- Agree / Disagree*
- n **Agree** that conveyancers be required to certify that they have informed the purchaser about the regime
- Agree / Disagree*
- o **note** officials will provide advice on a specific commencement date to be included in the introduction copy of the bill, at the time you seek Cabinet approval to introduce the bill
- p **agree** the new law will only apply to transactions entered into after the commencement date
- Agree / Disagree*
- q **note** the new law will not affect any residential land already owned by overseas persons at the time of commencement
- r **agree** that applications for consent formally lodged with the OIO before the commencement date continue to be screened, and have consent conditions imposed, under the current law
- Agree / Disagree*
- s **agree** the new law including “conditional agreements” for sale and purchase where conditions precedent are not yet met and the contract is not yet enforceable
- Agree / Disagree*

- t **note** that this advice has been prepared under very short timeframes in order to meet deadlines for drafting instructions and may need to be updated later to reflect new technical considerations
- u **refer** to the Minister of Immigration for his information.
Refer / not referred

Thomas Parry
Team Leader

Rt Hon Jacinda Ardern
Prime Minister

Rt Hon Winston Peters
Deputy Prime Minister

Hon Grant Robertson
Minister of Finance

Hon Phil Twyford
**Minister of Housing and Urban
Development**

Hon David Parker
Associate Minister of Finance

Hon Eugenie Sage
Minister for Land Information

Treasury Report: Banning Overseas Buyers of Existing Homes: Further Detailed Design Proposals

Purpose of Report

1. This report seeks further decisions from the group of Ministers with power to act on deciding the details of the ban on overseas buyers buying existing homes agreed by Cabinet on 31 October 2017. This report assumes that the recommendations in T2017/2389 *Banning Overseas Buyers of Existing Homes: Detailed Design Proposals* are agreed.

Analysis

The issue: the new builds exemption

2. Cabinet agreed that the screening regime changes include provisions enabling overseas investors to invest in the construction of new residential property for on-sale or letting, in some situations (CAB-17-MIN-0489). We understand the purpose to be to prevent the ban on residential property investment (which is intended to affect demand) from also affecting the supply of newly built residential properties.
3. We also understand that you intend the new builds exemption to be designed with the following characteristics:
 - a Overseas persons should be prevented from purchasing existing residential properties (including newly built ones), as this would limit the policy's effect on demand and would not promote the supply of residential property.
 - b The new build exemption should operate as a criterion to be assessed by the OIO through the screening of investments (rather than, for example, a self-judging exemption from the ban on purchasing existing homes).
4. We have not considered alternatives to the above questions. We seek your advice on the following policy design questions which relate to the operation of the new build exemption:
 - a What qualifies as a new build?
 - b How to apply the new build exemption?
 - c Options for allowing overseas persons to purchase for development and letting.
 - d Should the investor test (including the good character test) apply to the new builds exemption?
 - e Whether to retain the benefits test for some types of residential land purchases?
 - f How to deal with residential land this also 'sensitive' for another reason in the OIA?
 - g How to treat mixed developments?

5.

s9(2)(g)(i)

A What qualifies as a new build?

6. We understand your intention is to permit new builds by screening proposed purchases of residential property by overseas persons. This requires us to define what is meant by “new build”.
7. We understand from earlier guidance that you intend the new build exemption to allow overseas persons to purchase vacant land and land with an existing dwelling, if the investment results in a greater number of dwellings on the land.
8. This would cover any development of the land, if it contributes to your objective of increasing housing supply in New Zealand, including the construction of new houses and apartments. It would include an investor buying a property with one house on it and subdividing it to add a second home. We agree that these transactions should be covered as, when accompanied by the requirement that the overseas person on-sell or let, they meet your objective of increasing the supply of residential property.
9. We also recommend that the exemption applies to the subdivision of land and the development of services (e.g. water, roads, sewerage) but which stops short of building the dwellings. This would be a significant investment, would be subject to the requirement to on-sell or let, and would support your objective of increasing the supply of residential property.
10. We also recommend that the exemption apply to investments that result in development of retirement villages, aged care facilities, student accommodation and similar facilities. These facilities provide medium to long term accommodation for their residents, and so effectively represent an increase in the supply of residential property.

B How to apply the new build exemption?

11. The current screening process under the OIA involves an assessment of a number of criteria against which applications to invest are assessed. One of these criteria is that the investment will benefit New Zealand, which is in turn assessed against a number of factors including the creation of jobs, increasing investment and export receipts, and a range of environmental and other factors. Approval is granted if all of the criteria are met, and is subject to conditions that are monitored to ensure compliance. The process is a comprehensive one, and takes on average five months to complete.
12. We have considered the OIA screening process against your objectives of reducing administration and compliance costs, and supporting increased housing supply. We prefer an option that minimises additional costs on developers. We outline below two options for your consideration.

Options considered

Option 1: consent after screening in all cases

13. Under this option, all overseas persons would be required to apply for consent before purchasing residential land. However, overseas persons could satisfy a simpler test than the existing test in the OIA recognising the type of land there are acquiring, and the significance of the Government's policies to increase the supply of residential property.
14. Overseas persons would be required to satisfy the OIO that it:
 - a met the 'investor test', comprising financial commitment, business experience and acumen, good character, and compliance with certain sections of the Immigration Act;
 - b would increase the number of dwellings on the land; and
 - c the overseas person intends to on-sell or let the property.
15. In practice, the OIO would consider a number of factors to assess the likelihood that the investor would increase the number of dwellings on the land before granting consent. These factors would include the financial capacity of the investor, their ability to legally develop the land as proposed (e.g. taking into account zoning rules and likelihood of resource consents being granted), the investors track record as a developer, and how advanced the investor's planning is.
16. The OIO has a wide power to impose conditions of consent. In order to ensure that the objectives of the new build exemption are met, we propose that the OIO would impose the following enforceable conditions on the investor, with the timeframes for each condition to be set on a case by case basis:
 - a On-sale or letting of the property take place within a defined timeframe;
 - b The investment be disposed of if it is not developed as provided for in the consent; and
 - c Developers report on their progress.
17. We recommend that the Government have the ability to direct to OIO as to the types of dwellings that will meet the 'new build' test, and be able to amend that directive over time in order to maintain consistency with the Government's wider housing policy. We think its important that newly built dwellings not only increase the supply of residential housing, but are also the right types of residential dwellings. While the majority of new dwellings are likely to be suitable, the OIO is aware of cases in Auckland where low quality relocatable buildings are being moved onto properties. The 'new build' exemption should not be allowed to facilitate investment of that nature.

Option 2: consent as per Option 1, with a power to exempt quality developers

18. The intention of this option is to provide a process for regular overseas developers with a proven track record of developing residential property. Investments by these investors are likely to be of low risk. This would minimise additional costs imposed on developers, which could work against the objective of increasing housing supply. The pre-screening/exemption would only be available to established developers. Option 1 would apply in all other cases.

19. Overseas persons would be eligible to apply for pre-screening to purchase residential property. The pre-screening would involve an assessment of many of the factors outlined above but the approval would allow them to purchase multiple blocks of land without the need to obtain consent in each case. The pre-screening would be subject to similar conditions as a normal consent. Investors would be required to notify the OIO each time they acquire property so that the OIO can monitor the development and on-sale of lots in each case. The pre-approval would be for a limited time, but could be renewed by the OIO provided it was satisfied that the investor had complied with the conditions, and could be revoked if they had not.
20. The Australian overseas investment regime also makes available a similar exemption for programmes of land acquisition by developers. There have been criticisms in Australia of how this has operated, with significant proportions of newly built properties being sold to foreigners in some parts of Australia. We do not anticipate similar issues if this option was adopted in New Zealand as overseas persons would be subject to the requirement that they on-sell or let.

Preferred Option

21. Option 2 is our preferred option. We consider it to be the strongest option when assessed against the policy criteria established for this policy:
 - a Policy effectiveness: this approach balances your objective of limiting overseas investment in residential property, and the desire to establish bright lines and support increased housing supply.
 - b International obligations: this design aspect is neutral from an international obligations perspective. In general, international partners are more likely to accept an option which reduces the costs of compliance for their companies,
s9(2)(h) [REDACTED]
 - c Minimising administration and compliance costs: Option 2 would minimise the number of new applications for consent that the OIO would need to consider under the new builds exemption. This will reduce compliance costs for investors and administration costs for the OIO relative to option 1.

C How to apply the ability to let under the new build exemption?

22. In this section, we provide advice on options to operationalise Cabinet's agreement that new-build exemption allow overseas investors to invest in the construction of new residential property for letting to others. We consider the ability to on-sell to be relatively simple to apply in a way that does not undermine the objectives of the overseas buyers ban as any on-sale would also be subject to the overseas buyers ban. Letting involves a different set of considerations, which we explore in this section.
23. In general, we do not anticipate that the option to let a newly built property under the new build exemption would be used by many established developers. We understand the majority of developers to use a business model based around the construction and sale of properties, with any letting taking place by subsequent purchasers (which could not be overseas persons under the ban). There may be some developers that use commercial leases or licensing arrangements, such as developers of retirement villages and student accommodation. A leasing arrangement may also be used by other developers offering innovative or niche rental services or seeking to maximise the value they derive from their investment prior to sale for capital gain.

Options considered

Option 1: Broad definition of lease, including residential tenancies and commercial leases

24. This option would allow an overseas person granted consent under the new builds exemption to lease their residential property through a residential tenancy or commercial lease. Commercial leases of residential property are relatively uncommon, as almost all tenancies are made under the Residential Tenancies Act.
25. We would recommend under this option that the overseas person be entitled to let their property to any persons with the legal right to take on a tenancy or lease in New Zealand. This would include non-residents such as shorter-term workers, students and visitors in New Zealand legally. A lease of three years or more in duration to an overseas person would require consent under the OIA. In practice this would make it difficult for an overseas person to obtain consent to take on a lease of three years or more.
26. We would recommend that investors be prevented from granting a commercial lease, residential tenancy or licence to occupy to family and other associates, in order to limit the possibility of the 'letting' option be used to circumvent the regime.
27. This option would be relatively costly and difficult for the OIO to monitor, if there was to be confidence that an investor had let the property correctly. Verifying that a property had been let correctly might involve receiving copies of tenancy agreements (easily forged), ensuring properties were actually occupied, and ensuring that tenants were family or otherwise connected with the landlord. The longer the OIO was required to monitor the obligation to let the property, the greater these problems would become. Without monitoring on this scale, it's possible that investors could use residential tenancies to circumvent the ban.
28. However, to ensure that monitoring could be done cost effectively and without undue inconvenience to investors and tenants, the OIO would likely only look for evidence a legal lease/tenancy agreement is in place. This means that dwellings could be vacant, especially if the tenants are non-residents. We would also recommend that any monitoring of consent conditions by the OIO be for a limited period of time in order to limit the ongoing cost of administering the regime. However, this would introduce opportunities for investors to circumvent the ban at the conclusion of the monitoring period.
29. We do not favour this option as we consider it to be easy to circumvent and difficult to administer, monitor and enforce.

Option 2: Commercial leases, retirement villages and student accommodation only

30. The second option would only allow the overseas person to "let" the underlying residential land, as well as the newly built dwellings under a commercial lease or arrangement used by an operator of a retirement village, aged care facilities and student accommodation.
31. This option would allow overseas person developers to retain ownership of the land and profit from any capital gains in land value over a longer period of time (compared with on-selling), which would better incentivise such investment. However, the interest of the developer could not be freely traded in an international market, as on-sale or leases for longer than three years to an overseas persons would be screened under the OIA.
32. As with Option 1, we would recommend that investors be prevented from leasing/licensing use to family and other associates, in order to limit the possibility of the 'letting' option to circumvent the regime.

33. Under this option we would recommend that the powers be available to the OIO to:
- a Monitor the investment for 10 years (based on a common three-year lease, with two rights of renewal) from the date construction is completed, including to ensure it was not being leased to an associate or related party;
 - b Require that the investor regularly notify the OIO of the occupancy status of its property; and

c s9(2)(f)(iv)

34. s9(2)(f)(iv)

Option 3: Require overseas investors who wish to let newly built residential properties to meet the existing criteria for sensitive land by showing 'benefit to New Zealand'

35. Under this option, investors would be required to meet the existing criteria for sensitive land by showing 'benefit to New Zealand'. Relevant factors would likely include the creation of jobs, the introduction of investment for development purposes, and giving effect to significant Government policies or strategy (in the housing space). If the benefits were sufficient, then the OIO could consider granting consent without a requirement to on-sell the property, allowing the investor to lease or let the property.
36. This process contrasts with the simpler 'new build' test which would require that the property be on-sold once it had been developed. It would add some complexity to the regime. Care would need to be taken to define the circumstances in which using the benefit test for residential land purchases was permissible to ensure that it could not be used to avoid the ban on overseas persons purchasing residential property.

Options analysis

Policy effectiveness

37. Option 1 would be the least effective against the objective of limiting the ability of overseas persons to purchase residential property in New Zealand, but would likely be the most effective against the objective of supporting increased housing supply. Option 2 builds in greater bright lines, reducing some of the limitations of Option 1, while retaining incentives for overseas persons to develop residential property in New Zealand. Option 3 would allow the dual objectives outlined above to be balanced (albeit with greater compliance costs).

International obligations

38. s9(2)(h)

Minimising compliance and administration costs

39. Option 1 would involve the least compliance cost for developers but the most administration cost to monitor and enforce to ensure the objective of limiting the ability of overseas persons to purchase residential property in New Zealand was not circumvented. Option 2 would also limit compliance cost for developers but involve reduced administration costs. Option 3 would be the most costly for developers and likely involve high administration costs.

Preferred Option

40. Our preferred option is Option 2. We consider this achieves the best balance between our three policy criteria:
- a Policy effectiveness: it will prevent an overseas person from assigning a tenancy to a relative or related party and residing in the property themselves or leaving vacant. It targets the class of investors – large developers – that we understand the exemption is intended to capture.
 - b International obligations: ^{s9(2)(h)} [REDACTED]
 - c Minimising compliance and administration costs: it limits the applicability of this part of the new build exemption to a relatively narrow class of investments, reducing the number of transactions that would need to be screened. It also creates the largest number of bright lines for developers and limits screening.

D Application of the good character test for ‘new builds’

41. Cabinet noted the need for further advice on the application of the good character test for applications for consent by overseas persons seeking to make use of the new build exemption for residential property investments.
42. There are two broad choices:
- a Option 1: remove the good character test for residential property; or
 - b Option 2: retain the good character test for residential property.
43. The option to remove the test is based on the argument that the character of the investor is less relevant where the investor will be required to on-sell or lease their investment to another person. Its use would introduce an element of uncertainty into a regime which we understand you would like to be as certain as possible.
44. The option to retain the good character test is based on the argument that removing the good character test for residential property transactions would create complexity across the regime by creating a different test for residential property compared to other sensitive land. It also recognises that the administrative inefficiency of applying this test to known overseas investors that regularly apply for consent can easily be overcome through the use of administrative discretion to not reinvestigate good character when the investors character is already known. Finally, we consider that investors who are not of good character are less likely to comply with conditions of consent, and less likely to deliver the quality of housing expected.

Preferred Option

45. Our preferred approach is Option 2 as we consider it best meets your policy criteria:
- a Policy effectiveness: this option would allow overseas investors to be prevented from using the new build exemption if they could not meet the good character test.

b International obligations: ^{s6(a) + s9(2)(h)}


- c Minimise administration and compliance costs: this option may involve greater marginal costs for residential property investments because of the need to screen good character but will limit additional complexity being added to the OIA regime overall. Discretion to limit consideration of good character where this is already known in respect of a particular investor as well as the proposed exemption for 'quality developers' will also help to reduce the impact of this option.

E Whether to retain the benefits test for some types of residential property purchases

46. There are a number of categories of transactions involving residential property that we consider require the use of the benefits test to ensure that the residential property ban for overseas buyers doesn't lead to outcomes that are not in New Zealand's benefit or which would undermine the policy objectives of the ban.

Purchasing residential land for a different use

47. A ban on purchasing residential property by overseas persons (except where the regulator grants consent on a 'new build' basis) would prevent a developer from purchasing residential land for another purpose (as the investment would not increase the number of dwellings on residential property in New Zealand). The OIO advises that it occasionally handles applications which involve the conversion of residential land to a commercial purpose. These applications are rare because residential property is rarely sensitive land under the OIA, and we expect that these transactions will be more common than OIO statistics suggest.
48. Examples of the types of transactions that could be prevented from taking place, unless a solution is found, include the development of a hotel on residential land (the OIO is aware of a current example in Queenstown) and the purchase of residential property to develop a supermarket or petrol station in an urban area.
49. These transactions will be the exception but we recommend a solution be adopted to allow these investments to occur. Not providing a solution would prevent transactions that may have significant benefits for the community from taking place.

Preferred approach

50. We recommend that overseas investors seeking to invest in residential property and intending to convert the property to a non-residential purpose be able to satisfy the existing 'benefits' test instead of the proposed 'new build' test. As part of this there would be a requirement to convert the property to that non-residential purpose to avoid circumvention of your new build policy. Any property that remained residential at the conclusion of the development would need to be on-sold or let.

Residential land that is also 'sensitive' for another reason

51. Some land will be both residential property and sensitive under the OIA regime for another purpose. Examples include residential land that exceeds 0.2 hectares and adjoins a foreshore (occasionally seen in Auckland in particular), or exceeds 5 hectares and is in a non-urban area (common for greenfield housing developments).

52. In respect of these types of sensitive land, it is necessary to determine how they will be screened. We consider that an option that has elements of both the existing 'benefits' approach, and the proposed 'new build' approach should be preferred.
53. Treating land in this category as **residential property only**, would have the effect of removing the benefits test currently applied to this category of land under the. This could open up the circumstances in which consent could be granted, but consent would only be granted when the new build exemption was met, including the requirement to on-sell or let. An alternative would be to treat this category as **sensitive land only** (i.e. not residential). The impact of this would be that overseas persons could purchase the property outright, without the requirement to on-sell or let, if the benefits test was met.

Preferred Option

54. Our preferred option is to screen this category as **sensitive land but with a condition to on-sell or let** (in most cases). This would ensure that the effect of both the existing regime for sensitive land and the new regime for residential property was retained for this category of investment. An overseas person would only be able to obtain consent to purchase this category of land if it can meet the benefits test and on-sell or let the property. A residual discretion would remain to permit the land to be retained for non-residential purposes. This is most likely to be the case with non-urban land which, while deemed to be residential property, will not be used as such.
55. We consider this to test to best meet your policy objectives, even though it would involve the highest administration and compliance costs of the three options.
 - a Policy effectiveness: our preferred option is the most effective in the overarching policy objective.
 - b International obligations: all options considered above are neutral from an international obligations perspective.
 - c Minimising administration and compliance costs: The three options are likely to involve similar levels of compliance and administration costs. But option 3 is likely to involve the highest costs overall.
56. Annex 1 summarises the Pathway for determining who the new policy applies to, and the different pathways to overseas ownership of land when screening is required.

Issue: Other exemptions

57. The Overseas Investment Regulations 2005 (OIR) contain a number of exemptions from the existing regime. These are mostly for minor and technical matters which, while caught by the broad requirement for consent, do not engage the OIA's purpose of acknowledging that it is a privilege for an overseas person to own or control sensitive New Zealand assets.
58. Among other things, existing exemptions allow:
 - a overseas owned banks to lend to the owners of sensitive land;
 - b the orderly handling of the estate of a deceased investor;
 - c the replacement of the trustees of a trust; and
 - d the division of relationship property upon divorce or separation.
59. The OIR also allows the OIO to exempt transactions on a case-by-case basis. These exemptions are generally granted for technical reasons only, and are uncommon (three granted to date in 2017).

60. The exemptions in the OIR did not contemplate being applied to residential property transactions, and a small number of additional exemptions are warranted to deal with the unintended consequences of the ban.
61. We propose that the following exemptions be added to the OIR.

Diplomatic missions and housing for diplomatic staff

62. It is uncommon for foreign governments to require OIO consent to acquire property for a diplomatic or consular mission or for housing for diplomatic or consular staff as the property targeted is rarely 'sensitive land'. (The OIO advises that in 2012 it granted consent for the government of the People's Republic of China to acquire a property in Christchurch for consular purposes.)
63. However, the extension of the OIA to residential property will make it more common for consent to be required for the purchase of property for a diplomatic or consular mission or for housing for diplomatic or consular staff.
64. Given New Zealand's obligations under the Vienna Conventions, Diplomatic Privileges and Immunities Act 1968 and the Consular Privileges and Immunities Act 1971, we recommend exempting such transactions from the OIA, to the extent that the land being acquired is residential property. An exemption of this nature would have a very minor effect on the effectiveness of the ban,^{s6(a)}
65. We recommend that the acquisition of property that is sensitive for other reasons continue to require consent.

Interests in Maori freehold land

66. We consider that there is a small possibility that the ban may preclude a person of Māori descent from acquiring an interest in Māori freehold land that they have an ancestral connection to. While we consider the likelihood of this outcome to be very low (the ban does not apply to people who are either New Zealand or Australian citizens, regardless of where they are residing), we consider it appropriate to remove this risk by way of an exemption.
67. We recommend that the ban not apply in relation to a person of Māori descent in respect of Māori freehold land they have an ancestral connection to.

Issues to consider in future

Mixed developments

68. A mixed development could include the following types of properties:
- a mixed residential and commercial development on residential land e.g. an apartment building with shops on the ground floor; or
 - b mixed residential and commercial development on sensitive residential land e.g. an apartment building with shops on the ground floor built on 0.22 hectares of land adjacent to the foreshore.
69. We will provide advice on this in a future paper.

Special land

70. Under the OIA, 'special land' means seabed, foreshore, riverbed and lakebed land. Under the existing sensitive land regime, one of the 'benefits' that an investor can show is that any special land has been offered to the Crown.
71. It is possible that residential property will also include special land, but not already be 'sensitive land' under the OIA. The most likely type of land in this category will be non-urban land smaller than 5 hectares.
72. There are elements of the existing special land regime that do not work, and a broader review of the special land regime is required. We recommend that the application of the special land rules to residential property be considered as part of a wider review of the special land rules.

Buying off the plans

73. We will provide further advice on whether an overseas investors should be eligible to purchase "off the plans" under the new build exemption (subject to the requirement that they on-sell or let). The argument in favour of this is that it support the ability to finance construction of additional housing supply but it is unclear whether this is necessary to fill gaps in New Zealand demand for this type of construction.

The Issue: Definition of "ordinarily resident in New Zealand" in the Act

74. The first detailed design briefing sought agreement to use a new simplified definition of 'ordinarily resident in New Zealand' for residential housing transactions – in order to meet the policy objectives of the ban. As noted in the first briefing, the OIO would like any simplified test for "ordinarily resident in New Zealand" that is adopted for residential property to also apply to other assets screened under the OIA as this would improve application of the OIA residency tests.
75. The two primary legislation components of the new 'ordinarily resident' test are:
 - a New Zealand citizen; or
 - b Hold a residence visa, have been resident for 12 months and spent at least 183 days in that 12 months in New Zealand
76. These are consistent with the way the existing test - which instead uses the term 'domicile' - is being applied by the OIO.
77. However, adopting the new regulation making power for temporary visas would represent a liberalisation of the existing screening regime.
78. If the two primary legislation components of the ordinary resident test were expanded across the regime, this would be largely neutral for the policy effectiveness or international obligations but would have significant benefits for administrative efficiency. It would add clarity for other non-residential investors over the status quo, whereas in contrast now having two definitions of overseas person in the legislation would make the regime less user friendly and add significant complexity to the drafting.
79. As the existing OIA definition is in practice the same as the proposed change there are no discernible costs in expanding the definition except to practitioners who will need to update their guidance to investor clients.
80. We recommend you seek Cabinet approval to expand this definition across the OIA regime.

81.

s6(a)

Role of real estate agents and conveyancers

82. Property transactions generally involve two types of third-party agent: real estate agents and conveyancers. We have considered the role these agents could play in relation to the overseas buyers ban.
83. Third-party agents could support two objectives in relation to the ban:
- a ensuring compliance with the ban – for example by checking that a person is entitled to purchase a parcel of land, and preventing the transaction from occurring if it is not allowed under the ban;
 - b minimising the number of land transactions that fail because of the ban – helping ensure that overseas persons do not enter into agreements to purchase land only to find that the purchase cannot be completed.
84. We have analysed the various obligations that could be imposed on real estate agents and conveyancers against these two objectives.

Real estate agents

85. Real estate agents are often – but not always – involved at the beginning of a property transaction, finding prospective purchasers and facilitating the signing of agreements to purchase.
86. Potential obligations we have considered imposing on real estate agents are:
- a No formal obligations;
 - b Require that real estate agents notify prospective purchasers about the ban;
 - c Require that real estate agents verify that a property transaction would not be prohibited by the ban.
87. Option C – requiring verification – in theory would support both objectives, ensuring compliance with the ban and minimising the number of land transactions that fail because of it. However, we do not consider that this is a workable option. Real estate agents are generally engaged by the vendors of a property, not prospective purchasers. This means that, in many instances, real estate agents will not be in a position to verify whether a prospective purchaser is able to buy a property under the ban (especially as a property for sale can attract numerous purchase offers, sometimes entered into with little involvement with the real estate agent). In addition, we are concerned that this option would require real estate agents to verify something that may be outside their area of expertise.
88. Option B – requiring notification – would support the objective of minimising transactions that fall over because of the ban. The notification would serve as an opportunity for prospective purchasers, before they enter into a formal agreement to purchase, to turn their minds to whether or not the ban would apply to them in relation to the property.

89. There are risks, however, with imposing obligations on real estate agents without any consultation with the industry. For example, there are risks that an obligation may be impossible to comply with in certain circumstances (such as when an offer is received with little involvement from the agent).
90. Option B would not be effective at ensuring compliance with the ban. It would not prevent overseas persons who were inclined to disregard the ban from attempting to purchase residential land.
91. We anticipate that option A – no formal obligations – would operate in practice similarly to option B. Vendors will not want to risk accepting an offer that will not be able to be completed, and will expect their real estate agent to seek assurances from the purchaser that this will not happen. It will therefore be reasonably effective at minimising the number of transactions that fail, but will not be effective at ensuring compliance.

Preferred option

92. We recommend that no formal obligations be placed on real estate agents as part of this process. The informal role that real estate agents will be expected to play by the vendors of a property means this option will still support the objective of ensuring transactions do not fail, and it eliminates the risk that an obligation will be imposed on agents that they are unable to fulfil.
93. We note that this is the approach taken in Australia – real estate agents have no formal obligations under their overseas buyers ban, but they do play an informal role.
94. This option does not preclude obligations being imposed on real estate agents subsequently. The Minister of Justice has the power under the Real Estate Agents Act 2008 to amend the practice rules for real estate agents, which impose certain obligations. This would allow, for example, an obligation to be imposed on agents to inform prospective purchases about the ban and how it might apply outside of this process (and after consultation with the industry).

Conveyancers

95. Conveyancers are often engaged only after an unconditional agreement has been entered into. The conveyancer may not meet with his or her client to sign transfer documents until a few days before settlement.¹
96. Potential obligations we have considered are to:
 - a Require conveyancers to certify that they have informed the purchaser about the ban;
 - b Require conveyancers to certify that, to the best of their knowledge, that the purchase is not inconsistent with the ban (i.e. the land is not residential and/or the purchaser is not covered by the ban) ;
 - c Require conveyancers to certify that the purchase is not inconsistent with the ban.

¹ Note that a small number of transfers are lodged manually without the involvement of a conveyancer. Due to system constraints, we would not expect the number of these transfers to increase.

97. None of these options would be effective at achieving the objective of minimising the number of land transactions that fail because of the ban. Since conveyancers are often only involved once an unconditional agreement has been entered into, if a problem arises once a conveyancer has been engaged (e.g. the conveyancer discovers the purchaser is unable to purchase the property because of the ban) then it is almost certain the transaction will fail. The vendor will have to go back to market and seek a new purchaser.
98. In terms of ensuring compliance with the ban, option C – requiring conveyancers to certify that the purchase does not contravene the ban – would be the most effective. Conveyancers would be required to make enquiries as to the status of the land and purchaser, and would only be able to complete the transaction if they were satisfied. They could not rely on assurances given by their client, but would need to review reliable documentary evidence that established the position.
99. The problem with this approach is that it would increase the cost of all property transactions – including the vast majority of transactions, which involve only New Zealand citizens and permanent residents. While in the case of individuals this verification may be straight forward², this will not be the case where the purchaser is a company or a trust – potentially substantial investigation would be required.
100. Option A – requiring the conveyancer to certify that they have informed the purchaser – would help compliance with the regime from some overseas persons. However, it would not by itself prevent committed foreign investors from buying in contravention of the ban. Nevertheless, it would eliminate any opportunity for a person in contravention of the ban to claim they were unaware of the ban (a helpful fact at the enforcement stage, and may also mean that a court is better prepared to impose penalties). It may also persuade more cautious investors to seek further advice to ensure their purchase is compliant.
101. We also note that, in our last report on this (T2017/2389 refers), we recommended that third parties who are involved in a contravention of the ban could face penalties under the OIA. This would mean that if a conveyancer knows that a sale is in contravention of the ban, proceeding with the transaction could make them potentially liable for these third-party penalties.
102. We anticipate that option B – requiring certification to the best of the conveyancer's knowledge – will operate similarly to options A or C, depending on the circumstance. Cautious conveyancers may be unwilling to make this certification without making due enquires about the compliance with the ban, meaning it will operate similarly to option C (and therefore be costly in some cases).
103. On the other hand, less cautious conveyancers may adopt a “don't ask, don't tell” approach, making no efforts to ascertain the status of the person. In this case, it would operate similarly to option A (or potentially less effectively than option A, as the conveyancers wouldn't necessarily have to inform the purchaser about the ban).

Preferred option

104. We recommend option A – that conveyancers be required to certify that they have informed the purchaser about the ban. While not as effective in ensuring compliance with the regime as option C, it ensures that the cost of processing land transfers does not increase – important especially because the vast majority of residential land transactions involve New Zealand citizen or permanent resident purchasers.

² Even in the case of New Zealand citizens, they may not have a valid passport so may find proving this difficult. A transaction could be delayed while suitable evidence was obtained, even where there was no suggestion that a foreign buyer was involved.

105. This option could be integrated into the existing certification in Landonline as to compliance with statutory requirements. The Registrar-General of Land could specify that the provision of advice was a statutory requirement caught by the certifications under the Land Transfer Act. The requirement would then be a statutory requirement with the effect that a transaction cannot proceed unless the conveyancer certifies that the requirement has been met.³
106. In addition, the third-party penalty provisions that you have already agreed to will help support the effective operation of the ban.
107. We note that this is similar to the approach adopted in Australia. There, conveyancers are not required to make any formal certification – but they may face penalties if they proceed with a property transaction knowing that it is in contravention of the ban.
108. Note that we have not engaged in any consultation with relevant stakeholders (such as the New Zealand Law Society). This means there is a risk that this requirement to certify that the purchaser has been informed about the ban will have unintended consequences – though this risk is limited by the fact that this option imposes relatively minor obligations on conveyancers.

Link with anti-money laundering and countering financing of terrorism legislation

109. We have considered the AML/CFT regime that will begin to apply to lawyers and conveyancers in July 2018 and real estate agents in January 2019 and whether the AML/CFT regime could play a part in supporting the residential ban.
110. Among other requirements, the AML/CFT regime requires reasonable steps to be taken to verify a customer's *identity*⁴. In the case of a trust or company, the AML/CFT regime requires the lawyer, conveyancer or agent (the "reporting entity") to establish the identity of its beneficiaries or beneficial owners (for example, the ultimate natural person owners of the company), respectively.
111. The AML/CFT requirements around identity does not extend to obtaining their nationality or immigration status. While in some cases this will be obvious from documents provided to prove identity (for example, New Zealand citizen using New Zealand passport to prove identity), in many cases this will not be the case (for example where the person proves their identity without a passport).
112. As a consequence, a reporting entity may sometimes be in a position to establish whether or not a property transaction is in contravention of the OIA (e.g. where the identities of all relevant people have been established through the provision of current New Zealand passports). However, in other cases the AML/CFT regime will not provide any useful information for establishing whether or not this is the case (i.e. where identities have been established through non-New Zealand passports or through some other kind of documentation).
113. We have considered whether it would be appropriate to add to the AML/CFT obligations and require reporting entities to establish a person's immigration status for the purposes of this ban. We do not think it would be appropriate. While in some cases, this would not be a difficult task, in many cases the extra obligation would be onerous – especially where in the case of corporate or trust purchasers, or where there are a large number of individuals (for example, all the beneficiaries of a discretionary trust) whose immigration status would need to be confirmed.

³ Note that making more substantial changes to Landonline could take some time to implement.

⁴ In the case of an individual, a full name, date of birth, address and, in the case of a body corporate, a full name, registered office, relevant registration number (such as company registration number), and in both cases, any other information prescribed by regulations.

114. We note that rolling out the AML/CFT regime to lawyers, conveyancers and real estate agents has been a long process involving significant stakeholder engagement and consultation. Adding to the requirements without any consultation carries considerable risk.
115. We do note, however, that the AML/CFT regime will be helpful in enforcing compliance. Often the OIO spends considerable time and resources to identify the owners of land (with mixed success). When reporting entities are obliged to collect that information for AML/CFT purposes, the OIO will, in some circumstances, be able to obtain that information reporting entities to help support their investigative activities.

The Issue: Amendments to Existing Offences and Enforcement Provisions

Defences for those involved in a contravention

116. Ministers agreed in recommendation m (subparagraph e.) of the first Treasury Report that a third party person who is 'involved in a contravention' (for example, because they aid or abet the contravention) would be liable for a civil penalty in the same way as the party who contravenes the Act (that is, the foreign investor).
117. Paragraph 100 of T2017/2389 notes that agents and advisers may have concerns that "they may be subject to liability for innocently facilitating transactions that they are unaware are, or may be, a contravention of the Act". For the reasons given in that paragraph, we consider that concern would be misplaced.

Preferred Option

118. However, in order to meet the anticipated concern and to more closely align with other Acts that provide for third party civil liability (Commerce Act, Fair Trading Act, Financial Markets Conduct Act), we propose that the bill provides a possible defence for a person who is liable on account of being 'involved in a contravention'. The defence is that the person's involvement in the contravention was due to reasonable reliance on information supplied by another person or that the person took all reasonable and proper steps to ensure compliance with the OIA.

Applying changes to all sensitive land and significant business asserts

119. The 'new enforcement powers' referred to in recommendation on page 6 of the Treasury Report (T2017/2389) are a mix of:
- a entirely new powers or mechanisms (notice of disposal; third party civil liability); and
 - b adjustments to existing powers or mechanisms (information-gathering powers, increasing the maximum civil penalty; ability to serve documents by leaving them at the relevant property).
120. The new enforcement powers have been identified as necessary through the OIA's current experience of shortcomings in the powers set out in the Act (that is, in relation to the existing categories of sensitive land or significant business assets). To the extent that the new enforcement powers are necessary for residential property situations, they are also necessary for situations relating to what is already sensitive land or assets under the OIA.
121. The existing enforcement powers and mechanisms in the OIA apply equally to all classes of investments under the OIA.
122. Having a single set of tools available in respect of the different types of sensitive land provides greater certainty for the regulator and other participants and decreases scope for legal challenge to the exercise of powers.

123. From a legislative design perspective, providing for enforcement powers for residential land that differ from those available for other sensitive land is undesirable as it would require two largely parallel sets of provisions, further complicating the OIA.
124. We have analysed whether there will be any negative or unintended consequences by rolling out the new enforcement powers across the OIA generally (that is, in relation to the existing categories of sensitive land). We don't consider that there are negative or unintended consequences of doing so.
125. The new enforcement powers have been designed to work with the existing powers. For example,—
- a In relation to information gathering, the proposal is to adjust the threshold for the exercise of the existing power (which required the regulator to have reason to suspect an offence). In practice, it would support existing information-gathering arrangements that are already in place for all classes of sensitive land.
 - b The adjustment to the service provisions will draw on existing legislation (in particular, the District Courts Act 2008) and will also address the practical and jurisdictional issues of serving documents on people who are overseas. The adjustment also remedies an anomaly where people who apply under the OIA automatically 'opt in' to the service rules set out in the OIA, but people who do not apply (including those who evade the OIA) must, in most cases, be personally served, including when overseas.
 - c The notice of disposal provision reflects current practice between the OIO and investors. Providing for that practice in the OIA would give a statutory basis for protection from civil and criminal liability under the OIA where OIO decides to issue a notice to a foreign investor (instead of proceeding straight to enforcement options) and the foreign investor voluntarily disposes of the land bought in contravention of the OIA.
126. We have considered proposing more extensive powers for OIO. However, more extensive powers carry a greater risk of unintended consequences (and natural justice and civil rights considerations), and are better considered as part of a wider review of the OIA.

Preferred Option

127. Operationally, it is preferable for the same powers and mechanisms to be available to the regulator regardless of the type of land in question. Otherwise, for instance, an individual or entity may be a party to a transaction or series of transactions that involve different types of sensitive land under the OIA and it would not be clear which set of enforcement powers prevail.
128. We have recommended that this aspect is confirmed by Cabinet.

BORA matters

129. We have discussed the 'new enforcement powers' proposed in Treasury Report (T2017/2389) with Ministry of Justice officials.
130. Ministry of Justice has indicated a preliminary view that reducing the threshold for the exercise of the information-gathering power will engage the right to freedom of expression and the right to be secure against unreasonable search and seizure. This would apply both in relation to residential land, and if the new information-gathering power applies more broadly to all investments under the OIA.

131. Ministry of Justice officials have indicated that broadening the scope and reducing the threshold of a warrantless search power will require justification. They have suggested including a threshold that would require an objective and credible basis for exercising the information-gathering power (for example, “reasonable grounds to believe”).
132. We consider that decreasing the threshold is justified because of the opaque nature of corporate ownership and the lack of a reliable alternative methods of obtaining information about owners (for example, their intention to remain in New Zealand). It is proposed that any extant BORA concerns be addressed through the drafting of the bill and the BORA vetting process.

Information Sharing with Other Agencies

133. The OIA provides some information-gathering powers to the OIO. We have recommended some adjustment and enhancements to those powers.
134. Throughout the drafting process, officials intend to consider other legislation to ensure that relevant information held by other agencies is available to the OIO in appropriate circumstances (that is, without unnecessary barriers, but subject to appropriate safeguards).
135. We think that further consideration should be given to establishing a data matching programme between OIO and Immigration New Zealand in order to allow the OIO to detect offences more effectively. We do not consider that establishing a data-matching programme is a necessary prerequisite to implementing the residential ban, so do not recommend that data-matching mechanisms be included at this initial stage.

The Issue: Timing and transitional provisions

Commencement

136. ^{s9(2)(h)} [REDACTED]
137. Given the publicity around this policy, the longer it takes to implement the legislation, the greater the potential to see a spike in overseas persons purchasing residential property before the ban takes effect. Despite that potential spike, we do not recommend that the law has retrospective effect. This is partly because land transactions are often highly interconnected in chain of transactions, as the sale receipts of one transaction become the purchase money for another transaction. Retrospectivity would introduce significant uncertainty into the market, and could also have a chilling effect on the residential property market more broadly, given the interconnectedness of transactions. Retrospectivity would also raise considerable practical difficulties and impact on rule of law values.
138. We also recommend that the new law will not affect any residential land already owned by ‘overseas persons’ at the time of commencement. The Act screens transactions and is only engaged when ownership changes.
139. There are choices around when to bring into force the new legislation. You could either elect for the bill to include a specific commencement date, or state that a commencement date would be specified in an Order in Council. We recommend the introduction copy of the bill includes a specific date. ^{s6(e)(vi)} [REDACTED] We consider it is better for that early date to be included in the bill, so the public are aware of how soon the new law could take effect. Instead stating that a commencement date would be specified in an Order in Council would create a risk that the public might not have that awareness and would be surprised by the new law taking effect quickly.

140. We will provide further advice on what the date in the introduction copy of the bill should be, when you take the bill to Cabinet for approval for introduction.

Impact on OIO applications already lodged but not decided at time of commencement

141. A number of properties captured by the existing screening regime for sensitive land will also, following commencement, be captured by the new definition for residential land. There may be a small number of applications lodged with the OIO, but not yet decided, that include such “dual land”. Therefore a decision is needed as to whether to screen these applications and apply consent conditions under the current regime (the law that applied at the time of application), or under the new law (while giving the applicant the opportunity to amend its application).
142. We recommend screening such applications and applying consent conditions under the current regime. The new law will potentially require that this “dual land” can only be consented with new conditions, either requiring on-sale or lease or limiting use to not be for residential purposes. Often the commercial terms of a transaction, including purchase price, will be confirmed before the OIO application is lodged or decided. Applying those new consent conditions to land transactions negotiated and agreed under the current regime could therefore cause economic harm to applicants.

Impact on transactions entered into but not yet settled at time of commencement

143. We recommend that any contract that has been entered into before the commencement date can progress to settlement without requiring consent. This would include agreements that are still subject to certain conditions precedent, i.e. where the obligation to transfer title is not yet enforceable.
144. There are three key steps to a typical land transaction:
- a signing an agreement for sale and purchase, which may include certain ‘conditions precedent’ e.g. finance or building report. Typically a deposit is paid at this point;
 - b agreement becomes unconditional (i.e. all conditions precedent are satisfied), meaning the obligation to transfer title and pay the full purchase price become enforceable (this step can be skipped if a contract has no ‘conditions precedent’);
 - c settlement, meaning that title to the land, leasehold interest or shares in the land-owning company pass to the purchaser.
145. Allowing transactions at any of those stages to complete, including conditional agreements, presents a small gaming opportunity for overseas persons. They could enter such conditional agreements prior to the commencement date of the new law, in the hope they will become unconditional and progress to settlement after the new law takes effect. However, as noted above, there is already potential to see a spike in overseas persons purchasing residential property before the new law takes effect.

Next Steps

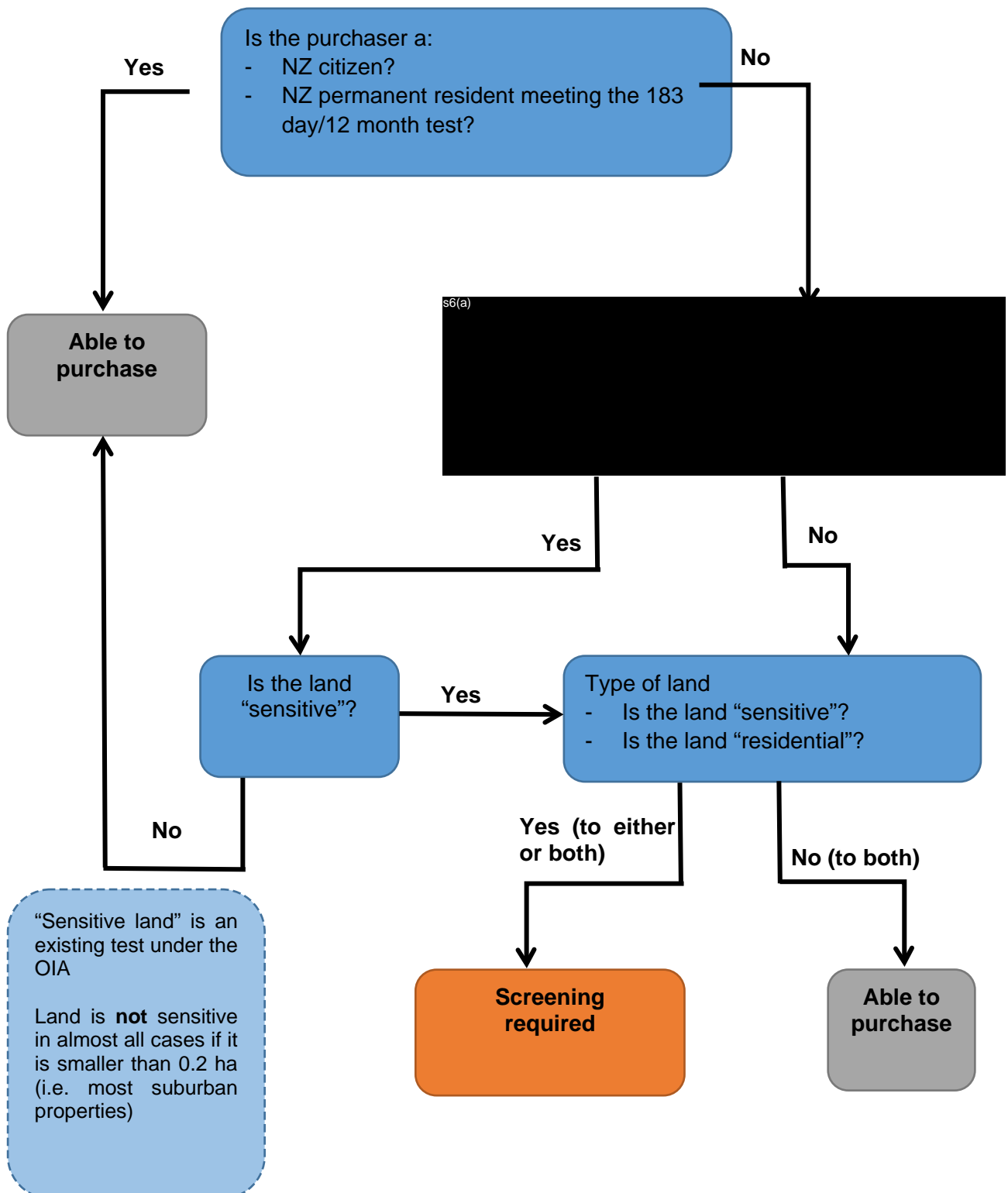
146. We are currently working on follow-up reporting that deals with further detailed design issues. We are working towards the Cabinet expectation that a draft OIA amendment bill be taken to Cabinet Business Committee on or before 11 December 2017.

147. We understand that the Government anticipates a broader review of the OIA in the future which will require a further bill. For the residential ban bill, we have recommended the changes to the OIA that we consider are the minimum necessary to effectively implement the ban. A further review of the OIA will provide an opportunity to ensure that the OIO regime is working effectively (as a whole and in relation to the residential ban).

Consultation

148. The following departments have been consulted in the development of the advice and recommendations in this report: Land Information New Zealand, Ministry of Business, Innovation and Employment, Ministry of Foreign Affairs and Trade, Ministry of Justice; Inland Revenue, Parliamentary Counsel Office and the Overseas Investment Office. The Department of Prime Minister and Cabinet and Te Puni Kokiri have been informed.

Annex 1: Pathway for determining whether the new policy applies to you



When screening is required – different pathways to overseas ownership of land

If screening is required, then the pathways to owning New Zealand land will depend on the type of overseas person and the type of land.

Australians

For Australian citizens, and Australian permanent residents who meet the test of being in New Zealand for the last 12 months and not absent for more than 183 days, the following will apply:

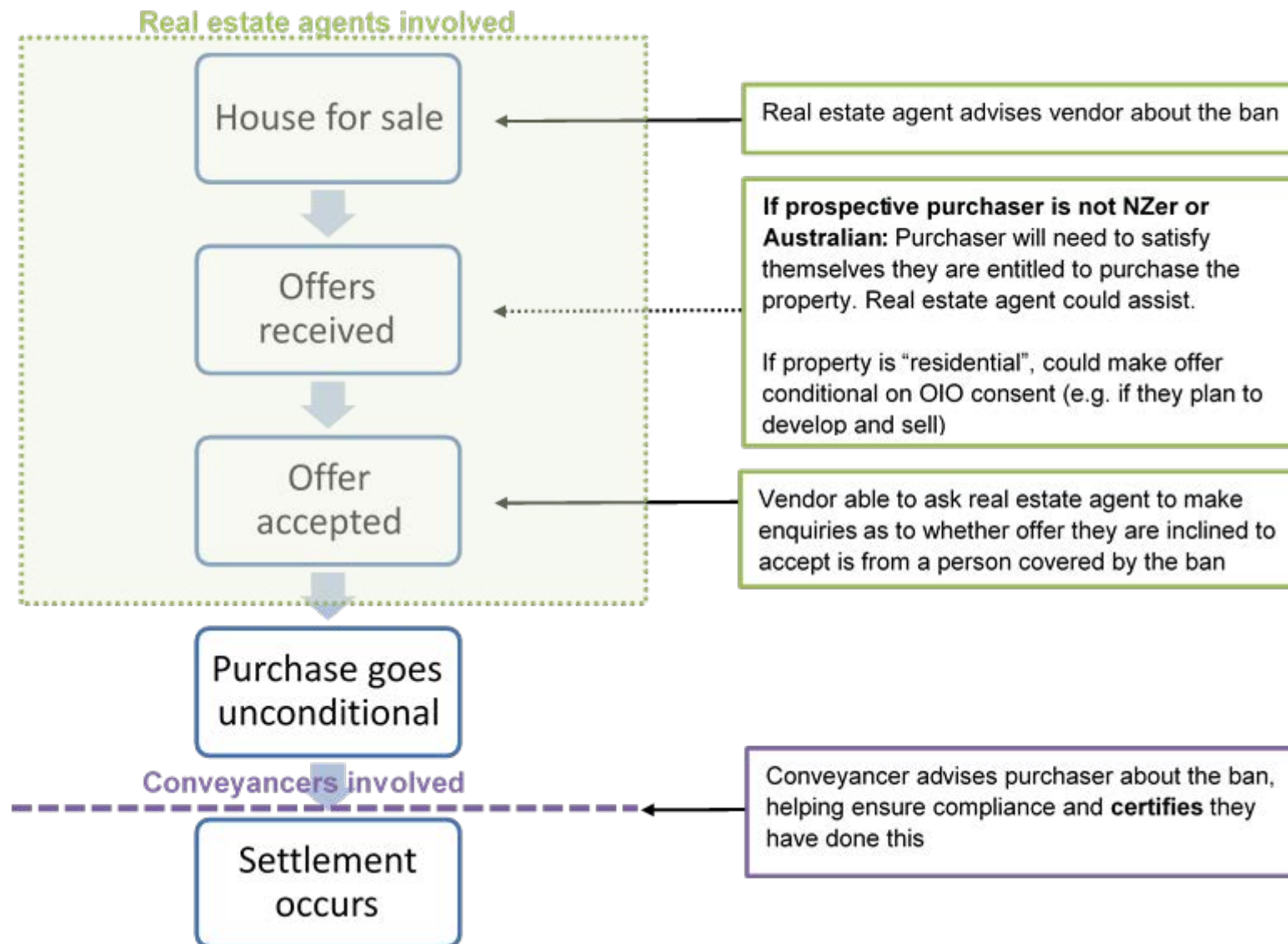
- They can buy any “residential land” that is not currently screened under the OIA. That is, those purchases will not be affected by the new law.
- For land that is currently screened as “sensitive” under the OIA (e.g. 0.2 ha block adjacent to foreshore, or 0.4 ha block adjacent to a lake), including when this is also “residential land”: they will be able to buy if they satisfy the current screening criteria. In essence, that means satisfying the current test of intending to reside in New Zealand indefinitely (not the new regime for those with a long-term commitment to New Zealand), or satisfying the Ministers/OIO that the investment will benefit New Zealand. That is, those purchases will be treated the same as they are under the current law.

Other overseas persons

For all other overseas persons s6(a) + 9(2)(j) including those with residence visas that have not been in New Zealand for 12 months, the pathways to owning New Zealand land will depend on the type of land:

Type of New Zealand land	Pathways to owning the land
Residential land that is not sensitive for any other reason. That is, residential land not currently screened under the Act.	<ul style="list-style-type: none">• Apply for consent under the new ‘long-term commitment to NZ’ pathway• Apply for consent under the new build criteria – must later on-sell or lease the land• Apply for consent under the current ‘benefit to NZ’ test. A condition of consent would be that the land cannot be used for residential purposes. This pathway enables a change of residential land to another purpose, e.g. building a supermarket, where the Ministers/OIO are satisfied that the investment will benefit NZ.• Or, become an NZ resident and be in NZ for the last 12 months and not be absent for more than 183 days
Sensitive land that is not residential land. That is, sensitive land currently screened under the Act, but that is not rated as residential or lifestyle.	Status quo: Apply for consent under the current section 16 criteria: <ul style="list-style-type: none">• intending to reside in New Zealand indefinitely• satisfying the Ministers/OIO that the investment will benefit New Zealand Or, become an NZ resident and be in NZ for the last 12 months and not be absent for more than 183 days

<p>Land that is both residential land and sensitive for another reason.</p> <p>That is, sensitive land currently screened under the Act and that is also rated as residential or lifestyle.</p>	<ul style="list-style-type: none"> • Apply for consent under the new 'long-term commitment to NZ' pathway • Apply for consent under the new build criteria – must later on-sell or lease the land • Apply for consent under the current 'benefit to NZ' test. A condition of consent would be that either: <ul style="list-style-type: none"> ○ the land cannot be used for residential purposes, or ○ the land must later be on-sold or let. <p>This pathway enables a change of residential land to another purpose, e.g. building a supermarket, where the Ministers/OIO are satisfied that the investment will benefit NZ, without providing a way to circumvent the on-sell or let condition for residential land.</p> <p>Or, become an NZ resident and be in NZ for the last 12 months and not be absent for more than 183 days</p>
<p>All other New Zealand land.</p> <p>That is, land that is not currently screened and is not rated as residential or lifestyle.</p> <p>This could include non-urban land smaller than 5 hectares that is not rated as residential or lifestyle.</p>	<p>Can purchase and own the land.</p> <p>Over time, the overseas person owner could develop this land into residential land. If so, the Act would only be engaged if the owner attempted to sell the land (including a 3 year lease or indirect interest in the land) to an overseas person – that overseas person purchaser would require consent.</p> <p>Preventing an overseas person owner from developing land not caught by the Act into residential land would be fundamental change to the Act, which operates as a screening regime that is engaged when transactions occur.</p>



Treasury Report: Banning Overseas Buyers of Existing Homes: Design Details Report #3

Date:	Friday 17 November 2017	Report No:	T2017/2536
		File Number:	IM-5-1-1

Action Sought

Action Sought		Deadline
Prime Minister (Rt Hon Jacinda Ardern)	Agree the recommendations in this report.	21 November 2017
Deputy Prime Minister (Rt Hon Winston Peters)		
Minister of Finance (Hon Grant Robertson)		
Minister of Housing and Urban Development (Hon Phil Twyford)		
Associate Minister of Finance (Hon David Parker)		
Minister for Land Information (Hon Eugenie Sage)		

Contact for Telephone Discussion (if required)

Name	Position	Telephone		1st Contact
Steve Cantwell	Principal Advisor	s9(2)(k)	(wk) N/A	✓
Thomas Parry	Team Leader	(wk)	s9(2)(a) (mob)	

Actions for the Minister's Office Staff (if required)

Return the signed report to Treasury.

Refer a copy of the report to the Minister of Immigration

Note any
feedback on
the quality of
the report

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Enclosure: No

Treasury Report: Banning Overseas Buyers of Existing Homes: Design Details Report #3

Executive Summary

This report seeks further decisions from the group of Ministers with power to act on deciding the details of the ban on overseas buyers buying existing homes agreed by Cabinet on 31 October 2017. This report builds on the advice and decisions in CAB-17-MIN-0489, T2017/2389 and *Banning Overseas Buyers of Existing Homes: Detailed Design Proposals*.

This report makes recommendations on a wide range of technical issues. Key ones include:

Overseas buyers purchasing off the plans: we recommend that overseas buyer can purchase a residence off the plans, provided construction has not yet begun, subject to the same conditions as other overseas buyers regarding completion and on-sale or lease of the new residential property.

Introduce a pre-screening regime: For residential property we recommend there be the ability for the OIO screen and approve a potential overseas buyers to buy residential property generally, rather than for a specific transaction. This would reduce transaction costs, and allow purchases through auctions and tenders. The OIO (or Minister) would be able to impose conditions, including notification of any property purchased under the approval.

Role of Conveyancers: Ministers have made different decisions on recommendations in previous reporting on the obligations on conveyancers. We seek confirmation of Ministers' with power to act collective views regarding conveyancer obligations.

Information sharing: the anticipated large increase in OIO transactions associated with residential property would be better managed with enhanced information sharing powers between the OIO, Immigration New Zealand, and the Department of Internal Affairs. We recommend the Bill contain measures to facilitate this.

s6(a)



Recommended Action

We recommend that you:

New builds exemption

1. **Note** that previous reporting provided advice on the new builds exemption and noted we would provide future advice on whether overseas buyers should be able to buy “off the plans”;

2. **Agree** that an overseas person be allowed to purchase a house before construction has begun ("off the plans"), subject to the obligations to sell or let the completed property.

Agree / Disagree

3.

s9(2)(f)(iv)

Agree / Disagree

Businesses purchasing housing for staff

4. **Note** that the ban would prevent a foreign-owned company from buying residential land to house its New Zealand-based staff, and that there is an existing exemption power that may be exercised by Ministers to deal with any issues that arise because of this. Any concerns over the operation of this existing exemption power could be picked up as part of the wider review of the Act.

Flat-owning companies

5. **Agree** that purchases of shares associated with rights to occupy a residence in a building owned by a flat-owning company are subject to the ban.

Agree/ Disagree

Pre-approvals

6. **Agree** that an overseas person could seek 'pre-screening' to purchase residential land, to enable developers to engage in land purchasing programmes and individuals to make unconditional bids or bid at auction for houses.

Agree/ Disagree

Mixed developments

7. **Note** that our previous report indicated we would provide further advice on mixed developments
8. **Note** that approaches covered in our previous reports provide approaches to address mixed developments in a way that doesn't undermine the objective of the overseas buyers ban policy;

Role of conveyancers

9. **Note** that Ministers with power to act have made different decisions regarding whether conveyancers be required to either (i) certify that they have advised a land purchaser about the ban or (ii) certify, to the best of their knowledge, that the purchase is not inconsistent with the ban.
10. **Agree** that conveyancers be required to certify that, to the best of their knowledge, that the purchase is not inconsistent with the ban (*Minister Parker's preferred option*)

Agree/disagree

Information-gathering power

11. **Note** that the frequency with which OIO will need to obtain information from Immigration New Zealand and the Department of Internal Affairs will increase under the

proposed changes to the OIA and that the current method of making ad-hoc requests is not sustainable in light of those changes

12. **Agree** that provision be made in the bill for Immigration New Zealand and Department of Internal Affairs to enter into agreements with OIO under which those departments could share, subject to appropriate protections, relevant personal information held by them that is necessary or desirable for OIO's monitoring and compliance work

Agree/ disagree

13. **Note** that officials intend to engage with the Office of the Privacy Commissioner on these information-sharing mechanisms during the drafting process.

s6(a)

Implications for the Fisheries Act and Antarctic Marine Living Resources Act

16. **Note** that the Fisheries Act 1996 and the Antarctic Marine Living Resources Act 1981 incorporate by reference the definition of "ordinarily resident in New Zealand" under the OIA;
17. **Note** that officials from relevant departments have indicated that their preference is for the new definition of "ordinarily resident in New Zealand" outlined in our previous report also apply to those Acts, and we will brief PCO accordingly;

International obligations and relations

18. s9(2)(h)

19.

Agree/ disagree

Resubmitted recommendations from T2017/2389 that contained errors

20. **Agree** that the regulation making power in T2017/2389 recommendation g be established for use to:
- a define the classes of temporary visas that will be subject to the 'notification' process in recommendation g; and
 - b establish tests for determining whether persons covered by the 'notification' process in recommendation g have a long-term commitment to New Zealand;

Agree/ disagree

21. **Agree** that the current law will continue to apply to all transactions entered into before the commencement date, including 'conditional agreements' for sale and purchase where conditions precedent are not yet met and the contract is not yet enforceable

Agree/ disagree

Referrals

22. **Refer** to the Minister of Immigration for his information.

Referred/ not referred

Thomas Parry
Team Leader

Rt Hon Jacinda Ardern
Prime Minister

Rt Hon Winston Peters
Deputy Prime Minister

Hon Grant Robertson
Minister of Finance

Hon Phil Twyford
**Minister of Housing and Urban
Development**

Hon David Parker
Associate Minister of Finance

Hon Eugenie Sage
Minister for Land Information

Treasury Report: Banning Overseas Buyers of Existing Homes: Design Details Report #3

Purpose of Report

1. This report seeks further decisions from the group of Ministers with power to act on deciding the details of the ban on overseas buyers buying existing homes agreed by Cabinet on 31 October 2017. Unless otherwise noted this report assumes the recommendations in previous reports T2017/2389 *Banning Overseas Buyers of Existing Homes: Detailed Design Proposals* and T2017/2478 *Banning Overseas Buyers of Existing Homes: Further Detailed Design Proposals* are agreed.

Issues Covered in this Report

2. This report covers the following issues:
 - a. New build exemption: overseas buyers buying off the plans for resale or lease;
 - b. Businesses purchasing housing for New Zealand-based staff;
 - c. Flat-owning companies;
 - d. Application to residential land of current exemptions affecting investment in sensitive land;
 - e. Mixed developments
 - f. Role of conveyancers;
 - g. Information-gathering powers
 - h. s6(a)
 - i. International Relations and Obligations;
 - j. Consequential changes to other legislation;
 - k. Commencement; and
 - l. Clarifications from earlier reporting.
3. We think that these are the last policy issues that we require decisions from the group of Ministers with power to Act prior to submission of a draft bill to Cabinet Legislation Committee in December.

New build exemption: overseas buyers buying off the plans for resale or lease

4. Following on from our previous report (T2017/2478 refers), we have further considered the extent the “new build exemption” should apply to off-the-plan sales and sales of newly constructed houses. By off-the-plan sale, we mean where a property is purchased from a developer before a house is constructed on it.
5. We have considered two options for applying the new build exemption to these type of sale:
 - a allow an overseas person to purchase a house off-the-plans (i.e. before construction has begun), provided they complete the construction of the house;
 - b allow an overseas person to purchase residential land under development, at any stage of its development up until 6 months after construction is complete (i.e. an overseas person could purchase off-the-plans or a completed house), provided they purchase the land off the original developer.
6. The requirement for the overseas person to sell or on-let the house (once completed) would apply in either case.

Option analysis

7. We consider that option A best aligns with your policy objective – ^{s6(a)} [REDACTED]
[REDACTED] Option B does not ensure this to the same extent, as it allows offshore persons to buy residential properties that have already been built.
8. On the other hand, option B would increase the potential pool of purchasers of newly developed sections, which may help increase incentives to develop residential land. It would, however, mean that overseas buyers would be able compete with New Zealand-based buyers for newly constructed houses.
9. We note that the Australian ban on foreigners purchasing residential houses aligns most with option B.¹ Similarly, the exemptions to the Reserve Bank’s loan-to-value ratio rules for new builds aligns with option B (the exemption applies to purchases of newly-build houses less than 6 months old).
10. We do not consider that either option would be significantly different in terms of their compliance and administration costs, or in relation to ensuring our international obligations are met. ^{s6(a) + s9(2)(h)} [REDACTED]
[REDACTED].

Recommended option

11. We recommend option A as it most closely aligns with your policy objectives. This option means that an overseas person would be allowed to purchase a house before it has begun, provided they complete the construction of the house.

¹ In Australia, an overseas person can purchase a house if it has not been occupied previously, or if the house is part of a development and has been occupied for less than 12 months.

Businesses purchasing housing for New Zealand-based staff

14. In some situations, the residential housing ban will prevent a business that is an “overseas person” under the OIA from buying houses for its New Zealand-based staff. (A business may want to provide housing for its staff where its staff are based in a remote location, or where it periodically brings in temporary staff from overseas and needs to house them).
15. In some situations the ban will not apply; if the housing is on a section predominately used for a non-housing purpose (such as workers lodgings on a forestry block), then the section should be classified as “non-residential” and the ban will not apply. However, in other situations the ban will apply.
16. The default situation for these companies is that the ban will apply, preventing the purchase of housing. However, there is an existing exemption power that may be exercised by Ministers that could be used to deal with any issues that arise, for example where an exemption was necessary because the company operates near a small town and there are few alternative ways for it to house its staff). If you have concerns about the operation of this existing exemption power, this could be picked up as part of the wider review of the Act.

Flat-owning companies

17. Some apartment/office buildings are wholly-owned by a “flat-owning company”² (rather than being split into multiple unit titles). When a person buys an apartment in one of these buildings, they purchase shares in the flat-owning company together with a license to occupy the specific apartment they have “purchased”.

² A flat-owning body is defined in the Land Transfer Act 1952 as being a company, the constitution of which provides that the registered holder of specified shares in the company is entitled, by virtue of being the holder of those shares, to occupy or use a specified residential flat or office forming part of a building owned by the company.

18. Sales of this bundle (shares and license to occupy) are not covered by the OIA, as they are not an “interest in land”.³ However, from a policy perspective the sale of a unit in an apartment building owned by a flat-owning company should be treated the same as the sale of an apartment that is on its own title.
19. Accordingly, we recommend that purchases of apartments in a building owned by a flat-owning company be subject to the ban. That is, the ban should apply to the purchase of shares in a flat-owning company if those shares give the purchaser the right to occupy a residence.

Ability to obtain ‘pre-approval’ to purchase a property and ‘notify’ OIO subsequently

20. In previous reports, we have discussed a notification regime for certain visa holders purchasing residential land to occupy while in New Zealand, and an ability for developers to obtain pre-approval to purchase land for housing developments.
21. This envisages that the new regime will allow overseas persons seeking to purchase sensitive land to obtain a consent *before* there is an identified land transaction, across all the different pathways for obtaining consent. The OIO would only give consent on the basis that once the overseas person purchased land then the necessary conditions would attach to that land, and the person would notify the OIO of the purchase (to enable monitoring and enforcement).
22. This is a change to current Act, where overseas persons are only able to obtain consent for a specific transaction.
23. Without this new feature, an overseas persons would have to bid for houses on the basis that the purchase is conditional on OIO consent. This would exclude overseas persons from buying houses at auctions, for example, and would undermine the objectives of allowing some visa holders purchasing residential land to occupy while in New Zealand.

Mixed Developments

24. In our previous report (T2017/2478 refers), we noted that we would provide further advice on the treatment of “mixed developments”. This could cover a range of different types of developments, including:
 - a. A property that has a primary commercial, industrial or other function, but which has residential property as an incidental part;
 - b. A property that has a primary commercial, industrial or other function, but which has residential property as an incidental part and is built on land that is sensitive because it is residential land and for another reason (e.g. it is 0.3 ha section next to the foreshore); and
 - c. The above two scenarios but where the commercial, industrial or other purpose is incidental to the residential purpose (e.g. an apartment building with shops on the ground floor).

³ There are some exceptions to this – for example, if there are four or fewer apartments in the building. In this case the purchase would be caught by the Overseas Investment Act, because it would involve the purchase of 25 percent or more of a company that has an interest in sensitive land.

25. Having considered these situations further, we believe that our previous advice adequately addresses these scenarios and ensures that the policy objective of the overseas buyers ban remains intact in the three situations outlined above.
26. Properties that do not have residential housing as their primary function of a property, will generally not meet the definition of “residential land” that we have proposed, meaning that commercial or industrial properties will not inadvertently be captured by the ban. However, in most cases mixed use properties will be unit titled, with different units classified according to their use. In such cases, each unit would be classified individually and treated as such under the OIA (e.g. screened as residential land or not captured if commercial). For residential land that is sensitive land for another reason under the OIA, the existing benefits test is applied as well as a requirement that the investor on-sell or let the property.

Role of conveyancers

27. In our previous report (T2017/2478 refers), we recommended that conveyancers be required to certify that they have advised a land purchaser about the ban. Ministers were not unanimous on this recommendation. Minister Parker indicated that his preference is that conveyancers should be required to certify, to the best of their knowledge, that the purchase is not inconsistent with the ban.⁴ This was option B in the previous report. Other Ministers agreed with officials’ recommendation.
28. We seek confirmation that Minister Parker’s preferred option is adopted.

Information gathering powers

29. In T2017/2389, we recommended that the information gathering power in the OIA be amended. The new amended power would allow the OIO to require a person to provide information or documents when the OIO considers that it is necessary or desirable for the administration or enforcement of the OIA.
30. The existing power is currently used to access information held by Immigration New Zealand (visa status and travel movements, in particular) and the Department of Internal Affairs (citizenship information).
31. Since that report was provided to you, the OIO has had an opportunity to undertake a more detailed analysis of its likely compliance and enforcement processes. This analysis has revealed a greater than anticipated reliance on information held by other agencies. While access to such information was contemplated by the general power proposed in T2017/2389, the likely scale is such that more specific mechanisms, with appropriate privacy protections, would be required.
32. Accordingly, we recommend that legislative provision be made for specific departments to share information with OIO in respect of specific categories of information, while the general power would remain for other types of information and for other purposes.
33. Information-sharing with the departments would be subject to an agreement, which will provide for the manner and method of sharing, and would address protections for personal information.
34. We anticipate that the information provided under this mechanism will likely be for

⁴ i.e. that the land is not residential, the purchaser is not a person subject to the ban, or the person has obtained consent from the OIO to purchase the property.

- a. monitoring conditions of consent that relate to citizenship, visa status, or country of residence, and
 - b. determining a person's eligibility to acquire property based on their citizenship, visa status, or country of residence.
35. We recommend that the OIO and the departments be required to consult with the Office of the Privacy Commissioner before entering into or varying such an agreement, and that the OIO be required to publish copies of the agreements on its website.
36. We intend to consult with the Office of the Privacy Commissioner throughout the drafting process.

Immigration New Zealand

37. At present, the OIO and Immigration New Zealand share information on an ad-hoc basis, in reliance on existing information-gathering powers or in reliance on exceptions to privacy principles.
38. The increased effort caused by the residential property ban will see the OIO's need to access this information increase, and we anticipate that Immigration New Zealand's need for OIO information will also increase.
39. Accordingly, we recommend that the OIO and Immigration New Zealand be able to enter into an agreement which allows information to be shared for the purposes of administering the OIA and the Immigration Act.
40. We anticipate that agreements might cover identity, visa, travel movement, and character information. Officials will, through the drafting process, need to consider alignment with, or consequential amendments to, the Immigration Act 2009.

Department of Internal affairs

41. At present, the OIO and the Department of Internal Affairs share information on an ad-hoc basis, in reliance on existing information gathering powers or in reliance on exceptions to privacy principles.
42. Again, the increased effort caused by the residential property ban will see the OIO's need to gain information on citizenship status increase.
43. We recommend that the OIO and the Department of Internal Affairs be able to enter into an agreement which allows information to be shared for the purposes of administering the OIA.
44. We anticipate that agreements would likely cover identity and citizenship information only. Officials will, through the drafting process, need to consider alignment with or consequential amendments to various Acts including Citizenship Act 1977, Citizenship (Western Samoa) Act 1982, Births, Deaths, Marriages and Relationships Registration Act 1995, etc, which touch on data sharing considerations (including whether official registers are open or restricted).

s6(a)

45.

s6(a)

46.

47.

48.

49.

50.

International Relations and Obligations

51.

s6(a) + s9(2)(h)

52.

53.

s6(a) + s9(2)(h)

54.

Consequential Legislative Changes: Implications for the Fisheries Act 1996 and the Antarctic Marine Living Resources Act 1981

55. In T2017/2478, we recommended that you seek Cabinet approval that the new definition of “ordinarily resident in New Zealand”, as agreed in TR2017/2389, apply to the full OIA screening regime. That would require an amendment to (or the replacement of) the current definition in section 6 of the OIA.
56. Officials have identified two Acts that will be affected by this proposed change:
- The *Fisheries Act* contains provisions concerning overseas investment in fishing quota that cross-reference and incorporate aspects of the OIA, including the OIA definition of ordinarily resident.
 - The *Antarctic Marine Living Resources Act* implements the Convention on the Conservation of Antarctic Marine Living Resources. This Act makes it an offence to take marine organisms (e.g. toothfish) from Southern Ocean without a permit. A defence exists for people who are not New Zealand nationals whose actions are authorised by another country. The definition of New Zealand national is defined (in part) by reference to the definition of ordinarily resident in the OIA.
57. Officials are consulting the relevant administering departments on whether the proposed changes to the definition of ordinarily resident should apply consequentially, or whether the current OIA definition should be preserved, for either or both Acts, and will instruct PCO accordingly.

Commencement

58. As noted in previous reporting, there are choices around when to bring the new legislation into force. s9(2)(h) + s9(2)(j)
59. We have previously recommended that you note that officials would provide advice on a specific commencement date to be included in the introduction copy of the bill at the time you seek Cabinet approval to introduce the bill. We have reconsidered whether a specific commencement date is the best method of bringing the bill into force.

60. You could elect for the bill to commence on any of:
1. on a specific date;
 2. on a date to be specified by Order in Council;
 3. on the day after the date on which the bill receives the Royal assent; or
 4. on a date that is a set period (for example, 10 days) after the date of assent.
61. These options trade-off certainty and flexibility. Commencement on a specific date provides the greatest certainty. ^{s9(2)(j)} [REDACTED] it is possible that any specific date stated in the bill would be superseded by events.
62. ^{s9(2)(j)} [REDACTED]
63. Commencing the bill on the day after the date on which the bill receives Royal assent carries a degree of implementation risk. Transactions that were permitted on the day of assent would not be permitted the day after, and LINZ and the public would only have notice of the exact day of commencement the day before the ban commences (when the assent is given).
64. Commencement by Order in Council provides maximum flexibility. However, it entails a further piece of legislation (and with it some small delay), and does not convey the sense of urgency and inevitability of the ban that the other options convey.
65. The Regulations Review Committee's view is that the commencement of legislation by Order in Council should be used only in rare and exceptional circumstances and that the reasons for commencement by this method be included in the bill's explanatory memorandum and considered by the Select Committee considering the bill.
66. LINZ's preferred option is that the commencement date be set by way of Order in Council. That would allow the commencement date to reflect the time needed to make operational changes, which are not yet known. ^{s9(2)(g)(i)} [REDACTED]
67. We consider the choice between the bill commencing a set number of days after the date of assent, or by Order in Council, is finely balanced. LINZ's view is that implementation risk decreases the longer the period between assent and commencement. ^{s9(2)(h) + s9(2)(j)} [REDACTED]
68. If necessary, for instance if the proposed approach turns out to be incompatible with LINZ's implementation programme or ^{s9(2)(j)} [REDACTED] the commencement method or date c House.

Clarifications from earlier reporting

69. Two of the recommendations in our report of 10 November (T2017/2389 refers) contained errors. We resubmit those in this paper.

- Recommendation (h) lacked an agree/disagree block, so Ministers were unable to indicate their decision. The recommendation should have read:

“g. agree that a ‘notification’ process which would exempt holders of residence class visas (including permanent residents) and holders of certain (to be defined) work related temporary visa be defined through a new regulation making power;

Agree/disagree

NOTE: this recommendation is included for context only, for recommendation H. It has been agreed.

h. agree that the regulation making power in recommendation g be established for use to:

- a.** define the classes of temporary visas that will be subject to the ‘notification’ process in recommendation g; and
- b.** establish tests for determining whether persons covered by the ‘notification’ process in recommendation g have a long-term commitment to New Zealand;

Agree/disagree”

This recommendation is 20 in the recommendation block, page 5.

70. We have also been asked to clarify the meaning of recommendation (s) from the same report. This recommendation was not as clearly worded as it could have been; it should have read “agree the current law will continue to apply to all transactions entered into before the commencement date, including ‘conditional agreements’ for sale and purchase where conditions precedent are not yet met and the contract is not yet enforceable”.

71. What this recommendation means is that any contract for the purchase of residential land that had been entered into before than ban comes into force would not be affected by the ban – including “conditional contracts” (e.g. if the agreement is subject to finance or a building report). This is to ensure that existing purchase arrangements are not upset by the ban coming into force.

Treasury Report: Draft Cabinet Legislation Committee Paper Banning Overseas Buyers of Existing Homes

Date:	24 November 2017	Report No:	T2017/2589
		File Number:	IM-5-1-1

Action Sought

	Action Sought	Deadline
Associate Minister of Finance (Hon David Parker)	Provide feedback on the attached draft Bill and Cabinet Legislation Committee Paper	27 November 2017

Contact for Telephone Discussion (if required)

Name	Position	Telephone	1st Contact
Robbie Taylor	Senior Analyst	s9(2)(k)	s9(2)(a) ✓
Thomas Parry	Team Leader		s9(2)(a)

Actions for the Minister's Office Staff (if required)

Return the signed report to Treasury.

Refer a copy of the report to the Prime Minister, Deputy Prime Minister, Minister of Finance, Minister of Housing and Urban Development, Minister of Immigration and Minister for Land Information.

Note any feedback on the quality of the report

Enclosure: Yes

Treasury Report: Draft Cabinet Legislation Committee Paper Banning Overseas Buyers of Existing Homes

Executive Summary

This report seeks your feedback on the attached draft Cabinet Legislation Committee paper (the LEG Paper), Bill amending the Overseas Investment Act (the Bill), and General Policy Statement (GPS) regarding the ban on overseas buyers buying existing homes. It also provides a draft of the Treasury's draft Regulatory Impact Statement (RIS) for your information.

The attached LEG Paper, Bill, GPS and RIS are in draft form. We have been working closely with other agencies but have not until this stage provided them with full drafts. Some of the issues discussed in this paper have not been incorporated into the draft of the LEG Paper.

We intend to get final versions of the LEG Paper and RIS, and a further draft of the Bill (incorporating the GPS) to you by Wednesday 29 November, for lodgement with the Cabinet Office by 10:00am Thursday 30 November. You have agreed that Cabinet's Legislation Committee (CLC) will consider the introduction version of the Bill on Thursday 7 December, and the full Cabinet on Monday 11 December. As the Bill has been prepared under extremely tight time constraints, quality assurance and technical corrections may need to be made up until the time when Cabinet considers the introduction version of the Bill on 11 December 2017.

A draft timeline is set out in the Next Steps section of this report.

Unless otherwise communicated to officials or noted, this report, the LEG Paper and Bill assume the recommendations in previous reports T2017/2389 *Banning Overseas Buyers of Existing Homes: Detailed Design Proposals*, T2017/2478 *Banning Overseas Buyers of Existing Homes: Further Detailed Design proposals* and T2017/2536 *Banning Overseas Buyers of Existing Homes: Design Details Report #3* are agreed.

Design details recommended for Cabinet's endorsement or agreement

We recommend that you seek Cabinet endorsement of the following decisions made by delegated Ministers that extend beyond "residential land" (T2017/2478 refers) and may as a result be beyond the scope envisaged by Cabinet when delegating Power to Act:

1. Expanding the definition of "ordinarily resident in New Zealand" across the Act;
2. Expanding new enforcement powers across the Act; and
3. Transactions involving residential land that is otherwise sensitive.

There are four areas in the draft Bill where we have proposed approaches that differ from or supplement decisions made by delegated Ministers in previous reports. If you agree with our recommendations, we propose that you seek Cabinet's agreement to them through the LEG Paper. These are as follows:

1. Ministers decided to limit the possibility for circumvention of the ban by **restricting overseas developers from leasing to associates and family members** under the new builds exemption. We recommend that the policy objective be achieved through: (a) using a focused approach that applies the existing definition of "associates" to prevent family members (and others) from acting together to circumvent the ban; and (b) allowing the Overseas Investment Office (OIO) to expressly prohibit leasing to family members through conditions to reinforce this on a case-by-case basis.

2. Ministers decided that the Bill provide for **information sharing agreements** between the OIO and other agencies. We now believe these can be given effect to under existing provisions of the Privacy Act 1993 and the Bill does not therefore make provision for them.
3. Ministers decided that **conveyancers will be required to certify** in relation to the purchase of residential land that, to the best of their knowledge, the purchase is not inconsistent with the ban. We recommend that the Bill provide for an offence for breach of the requirement to certify.
4. Ministers decided that the ban not apply in relation to a person of Māori descent in respect of **Māori freehold land** to which they have an ancestral connection. We recommend that the regulation making power in the Act be amended to ensure that the exemption for Māori freehold land and other exemptions needed to support the new regime can be made.

Other issues raised by Ministers

We have summarised key comments and questions raised by Ministers in our previous reports, and have noted how we have addressed these in responses or in the Bill.

Structure of the Bill

PCO has drafted the Bill in three Parts to allow for a more thematic organisation of the provisions of the bill (consistent with the Report of the Standing Orders Committee 2017).

Recommended Action

We recommend that you:

- a **note** that officials have been working on a Bill to implement Cabinet's 100 day commitment to ban overseas buyers from buying existing homes (the Bill), based on detailed design decisions made by delegated Ministers;
- b **note** the attached drafts of the Bill, paper for consideration by Cabinet's Legislation Committee (LEG Paper) and General Policy Statement (GPS), and provide any comments on these by 27 November 2017;
- c **note** that officials will provide you with a final version of the LEG Paper and RIS, and a further draft of the Bill (incorporating the GPS), by Wednesday 29 November 2017 for signature and submission to Cabinet Office by 10:00am on Thursday 30 November 2017;
- d **note** that quality assurance and technical corrections to the draft Bill may need to be made right up until it is considered by Cabinet on 11 December 2017;
- e **note** other departments have not until this point had the opportunity to comment on the complete draft of the Bill or the LEG Paper attached to this report;
- f **agree** to seek Cabinet's endorsement of decisions made by delegated Ministers on the following issues that extend beyond "residential land":
 - Expanding the definition of "ordinarily resident in New Zealand" across the Act;
 - Expanding new enforcement powers across the Act; and
 - Transactions involving residential land that is otherwise sensitive;

Agree/disagree

- g **note** that delegated Ministers agreed that overseas developers will be prevented from leasing to “associates” and “family members” under the new builds exemption to limit possibilities for circumvention;
- h **note** that using certain measures to prevent leasing to “family members” may give rise to issues under the Bill of Rights Act 1990;
- i **agree** to seek Cabinet agreement to use a focused approach that applies the existing definition of “associates” to prevent family members (and others) from acting together to circumvent the ban, and allow the OIO to expressly prohibit leasing to family members through conditions to reinforce this on a case-by-case basis;

Agree/disagree

- j **agree** to seek Cabinet agreement that the Bill does not make provision for information-sharing agreements between the OIO and other agencies on the basis that these can be accommodated under the Privacy Act 1993;

Agree/disagree

- k **agree** to seek Cabinet agreement that the Bill create a new offence if a conveyancer, in a transaction involving residential land, fails to provide a certificate that, to the best of their knowledge, the purchase is not inconsistent with ban;

Agree/disagree

- l **note** that delegated Ministers decided that the ban should not apply in relation to a person of Māori descent in respect of Māori freehold land to which they have an ancestral connection;

- m **agree** to seek Cabinet agreement to amend the regulation making powers in the Act to ensure that the exemption for Māori freehold land and other exemptions to support the new regime can be made;

Agree/disagree

- n **note** that officials will provide further reporting on accompanying regulations once the Bill is finalised;

- o **refer** this report to the group of Ministers with Power to Act (the Prime Minister, Deputy Prime Minister, Minister of Finance, Minister of Housing and Urban Development and Minister for Land Information) and the Minister of Immigration, for information.

Referred/not referred.

Thomas Parry
Team Leader, International

Hon David Parker
Associate Minister of Finance

Treasury Report: Draft Cabinet Legislation Committee Paper Banning Overseas Buyers of Existing Homes

Purpose of Report

1. This report seeks your feedback on a draft Cabinet Legislation Committee paper (the LEG Paper), Bill amending the Overseas Investment Act (the Bill) and a General Policy Statement (GPS) for the ban on overseas buyers buying existing homes. It also provides a draft of the Treasury's draft Regulatory Impact Statement (RIS) for your information.¹
2. Unless otherwise communicated to officials or noted, this report assumes the recommendations in previous reports T2017/2389 *Banning Overseas Buyers of Existing Homes: Detailed Design Proposals*, T2017/2478 *Banning Overseas Buyers of Existing Homes: Further Detailed Design proposals* and T2017/2536 *Banning Overseas Buyers of Existing Homes: Design Details Report #3* are agreed.

Analysis

Background

3. On 31 October 2017 Cabinet agreed to make legislative changes to deliver the Government's 100 day commitment to ban overseas buyers from buying existing homes in New Zealand. It also agreed the parameters of that policy and authorised a group of Ministers to make further detailed design decisions to enable the legislation to be drafted.²
4. Delegated Ministers have made a number of detailed design decisions on the overseas buyers ban. The attached draft LEG Paper, Bill, GPS and RIS have been drafted consistent with these decisions, except as noted below. Key features of the Bill are summarised for Cabinet in the draft LEG Paper.
5. In addition to seeking your feedback in the current drafts of the LEG Paper and Bill, this report also notes design aspects of the Bill that we recommend you seek Cabinet endorsement of or agreement to.
6. Officials are continuing to work with the Parliamentary Counsel Office (PCO) to ensure the Bill reflects decisions made by Cabinet and delegated Ministers. The draft LEG Paper and RIS may need updating to reflect the final design of the Bill and your feedback on the LEG Paper and Bill. Quality assurance and technical changes may need to be made right up to the time that Cabinet considers the Bill. Given the possibility of further changes to the Bill and LEG Paper, we have not yet fully consulted with other government agencies on these. We will do so early next week.
7. It is our intention to provide you with final versions of the LEG Paper, Bill and RIS on Wednesday 29 November 2017, for lodgement on Thursday 30 November 2017. However, we may need to seek your support to table a late paper early in the week of Monday 4 December 2017 if we are unable to finalise a draft Bill in time to meet the Cabinet Office lodgement deadline.

¹ Note that this is yet to undergo a quality assurance assessment.

² The Prime Minister, Deputy Prime Minister, Minister of Finance, Associate Minister of Finance, Minister of Housing and Urban Development, Hon David Parker and the Minister for Land Information.

Issues recommended for Cabinet endorsement

8. There are a small number of features of the draft Bill that we recommend you seek Cabinet's endorsement of through the LEG Paper. These reflect decisions by delegated Ministers that extend beyond "residential land" into assets currently screened under the Act.

Expanding the revised definition of "ordinarily resident in New Zealand"

9. In Treasury Report T2017/2478 Ministers agreed that the new definition of "ordinarily resident in New Zealand" proposed in Treasury Report T2017/2389 for residential land investments (the 183 days in 12 months test) be used when screening all assets captured under the Act. We recommended this on the basis that it would add clarity and reduce complexity in the regime.

Applying changes to enforcement powers across the Act

10. In Treasury Report T2017/2478 officials recommended that the 'new enforcement powers' that would be provided to the Overseas Investment Office (OIO) be available for existing categories of sensitive land and significant business assets investments under the Act. We recommended this on the basis that it would provide greater certainty for the regulator and reduce scope for legal challenge when enforcement powers are exercised.

Transactions involving sensitive land that includes residential land

11. In Treasury Report T2017/2478 we recommended that land that is residential land and sensitive for another reason under the Act (i.e. is currently screened) be generally dealt with under the screening regimes for both types of sensitive land i.e. subject to the benefits test, but with a requirement to on-sell or let. A residual discretion would remain for Ministers not to apply the on-sell or let requirement. Consent will also be available through the benefits test where the proposal is to convert residential land to another purpose that is seen as beneficial. Our recommendation avoids perverse outcomes that would result from treating the land solely as residential or otherwise sensitive land.

Explanation of approaches in the Bill

12. There are four areas in the draft Bill that we recommend you seek Cabinet's agreement to through the LEG Paper as the approaches to implementation proposed in the Bill may not be as anticipated by delegated Ministers. In all cases, the proposed approaches do not substantively alter the policy decisions made by delegated Ministers.

Restrictions on leasing to family members under the new builds exemption

13. In Treasury Report T2017/2478 officials recommended that overseas developers that make use of the new builds exemption and lease their property be prevented from leasing to family and other associates.
14. We understand your intention is to address people who intend to circumvent the regime through a family relationship. We note that a blanket ban on leasing to family members may raise issues for the Bill of Rights vet, for at least prima facie discrimination on the grounds of family status. It may also go too far to address the issue, by capturing estranged or unknown family members.
15. We propose a simplified approach in the Bill, which would avoid bill of rights concerns while still achieving the same outcome of reducing scope for avoiding the objective of the ban. This approach utilises the existing definition of "associates" in the Act, and would prevent an overseas person from leasing their property to a person with whom the investor controls, directs, acts jointly with or has an understanding or arrangement with in relation to the overseas investment or any other matter, including family members. Section 43 of the Act would also apply, making it an offence to knowingly or recklessly circumvent the Act.

16. We recommend that overseas developers also be prevented from leasing to family members through conditions imposed by the OIO, in appropriate cases. This avoids the possibility of discriminating on the basis of family status, needing to establish a rigid definition of “family member” and allows the condition to be tailored to the overseas developer’s circumstances.

Information-sharing agreements

17. In TR2017/2536, we recommended that information-sharing agreements be entered into between Immigration New Zealand and the Department of Internal Affairs and OIO. Following consultation with the Office of the Privacy Commissioner and relevant agencies, we consider that the necessary information-sharing arrangements can be accommodated under the existing framework set out in the Privacy Act 1993. As a consequence, the Bill makes no specific provision for information-sharing.

The role of conveyancing agents

18. The Bill provides that conveyancers will be required to certify in relation to the purchase of residential land that, to the best of their knowledge, the purchase is not inconsistent with the ban. You asked how this requirement would be implemented. A conveyancer that fails to provide the required certificate or to keep a copy of the certificate on file will be liable for an offence.
19. We propose that the Bill provide for a new offence for breach of the requirement to certify. The alternative, that there be no penalty or that other general offence provisions apply (including section 45 of the OIA, and potentially 107 of the Crimes Act 1961), would be uncertain and unsatisfactory. Separately, as we have mentioned previously, the requirement to certify is a matter that the Registrar-General of Land might in future specify as a statutory requirement for the transfer instrument, with the effect that the conveyancer would be required to confirm in the course of the e-dealing that the requirement to certify had been met.

An exemption for Māori Land

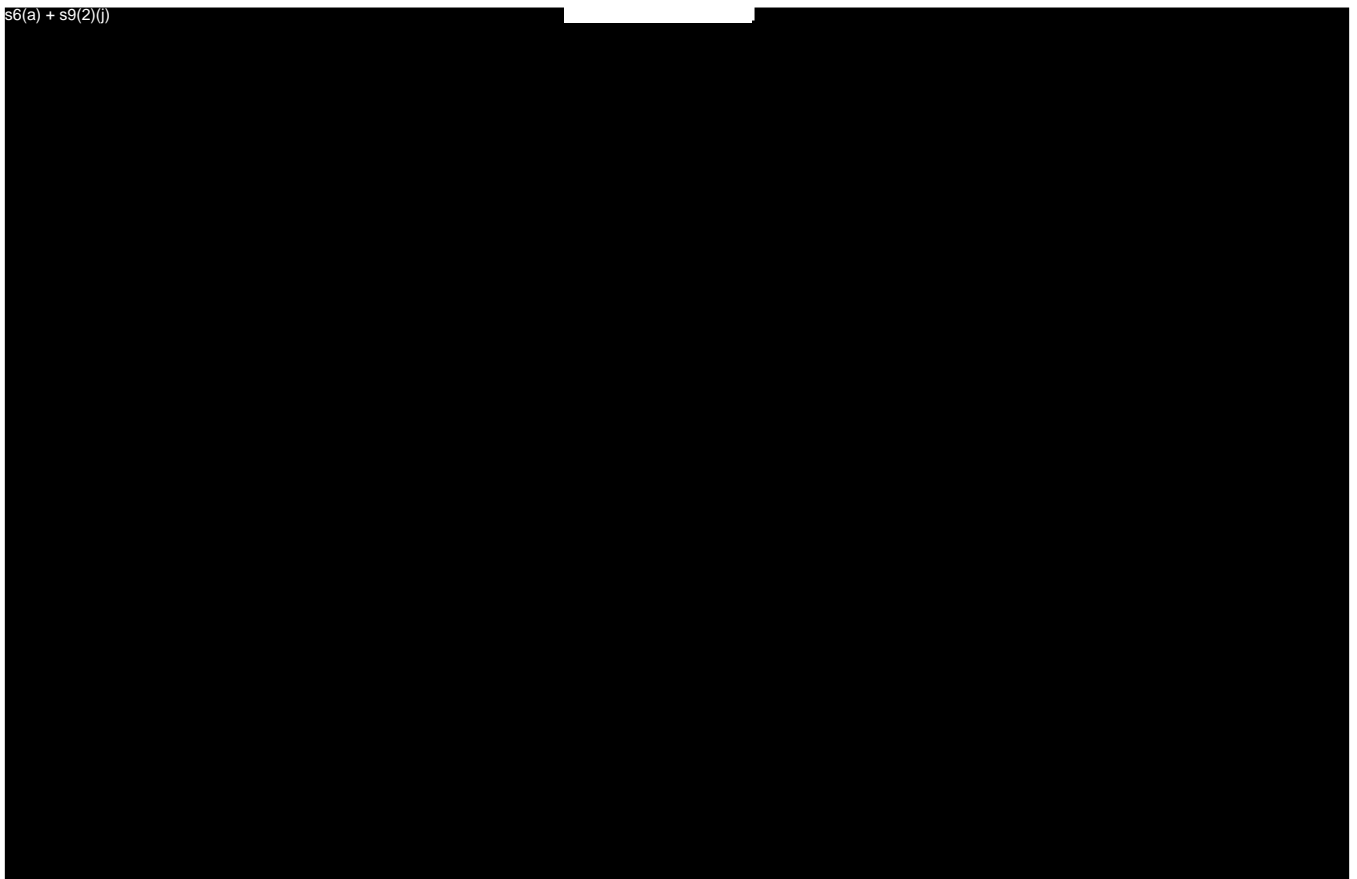
20. You asked us to clarify our proposal that the ban not apply in relation to a person of Māori descent in respect of Māori freehold land that is “residential land” to which they have an ancestral connection. Specifically, you asked whether this referred to communally owned Māori land obtained by descent (T2017/2478 refers). We confirm that this was the intention of the proposal.
21. We propose this exemption be placed in regulations, following the existing structure in the Act. We recommend that you seek Cabinet’s agreement through the LEG Paper to amend the exemption making power in the Act to ensure that this exemption and other exemptions need to support the new regime can be made through regulations.

Other issues raised by Ministers

22. A number of the members in the delegated Ministers group had questions and comments on proposals made in recent Treasury Reports. Many of these comments and questions are covered in the Bill or have been addressed through subsequent advice. We summarise the comments and questions, and our responses below.

s6(a) + s9(2)(j)





Pre-approval for developers

27. s9(2)(f)(iv) + s9(2)(g)(i) agreed with our proposal to provide a pre-approval mechanism for regular developers to make multiple purchases of residential land without needing to screen each transaction, subject to the ensuring that a company's character did not change.
28. It is our intent that the OIO monitors any changes in the character of developers that it has pre-approved. The OIO could make it a condition of pre-approval that overseas developers advise of any change in their circumstances that would impact on their ability to obtain consent, including under the 'good character' test.

Temporary entry visa holders

29. s9(2)(f)(iv) + s9(2)(g)(i)
30. The Bill provides a regulation-making power to define the classes of visa holders that would be able to use this consenting process for residential land, and the tests they would need to meet to demonstrate commitment to New Zealand. We will provide Ministers with advice on options for these regulations before the Select Committee hearings on the Bill take place.
31. This pathway has been described in policy terms as a notification process. In order to use the existing structures of the act and not increase international legal risk, the pathway will operate in the Act as a consent process. It will be a fast track application process but will in legal terms be an application for consent. An essential feature is that the purchaser can obtain consent before purchasing a property (pre-approval) but must notify the OIO of the property they purchase.

A minimum number dwellings under the new builds exemption

32. [REDACTED] further advice on the merits of requiring that a developer seeking to rely on the new builds exemption must construct a minimum number of dwellings (i.e. 10) on residential land. Following a discussion [REDACTED] agreed that the new builds exemption not require a minimum number of new dwellings on residential land.

s9(2)(f)(iv)

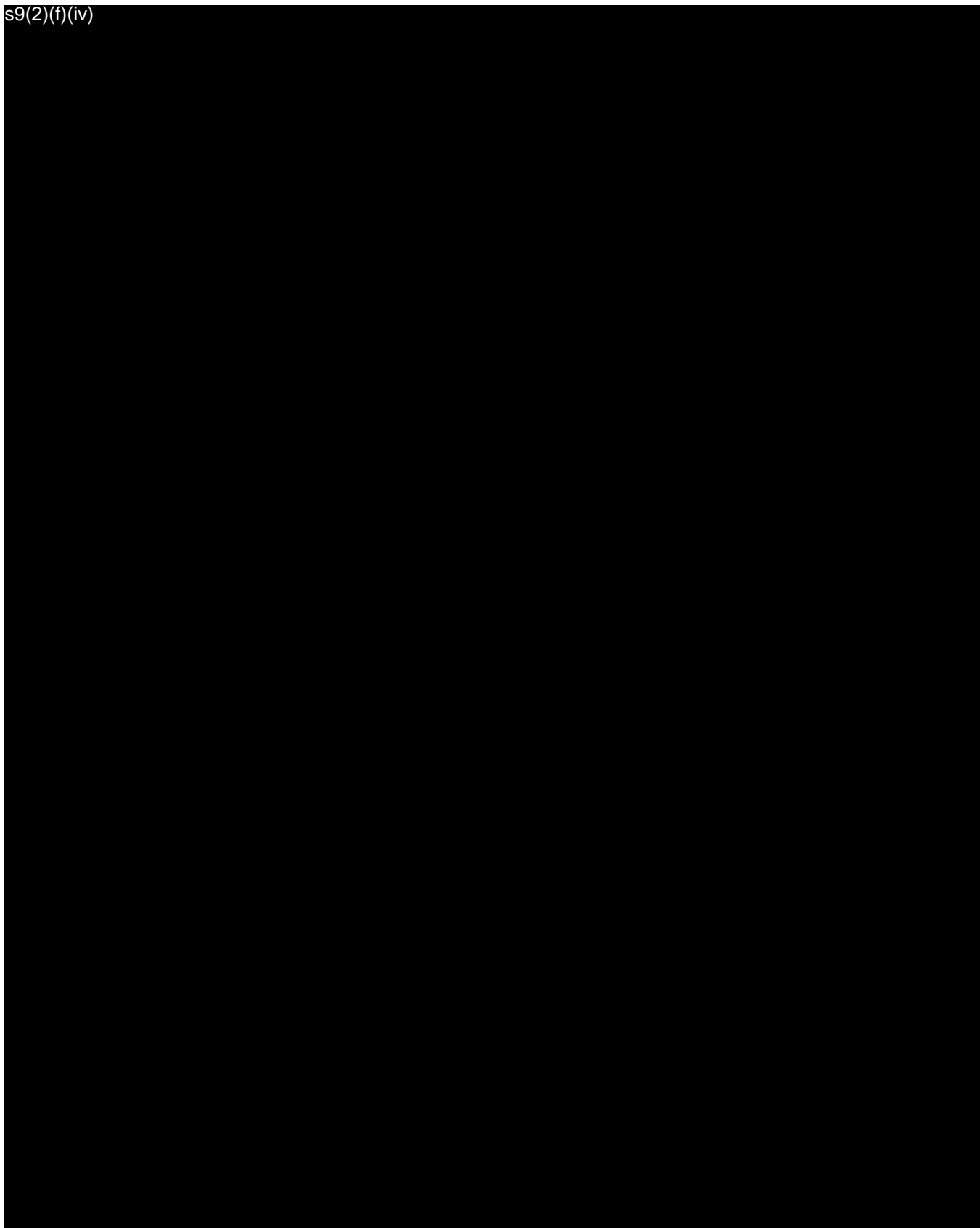
Structure of the Bill

34. The Bill is structured in three Parts. The rationale for this structure is to give some prominence to the residential ban aspect of the bill (Part 1), to allow for more thematic organisation of the provisions of the bill (consistent with the Report of the Standing Orders Committee 2017), and to better accommodate a wider range of amendments to the Act at a later stage in the legislative process. It would be possible to arrange the bill in a two Parts, however, which may (but will not inevitably) result in less House time at the Committee stage.

Next Steps

35. A table is set out below which records our recent discussions on key next steps in this process. The highlighted column focuses on the overseas buyers ban:

s9(2)(f)(iv)



36. Officials will provide further reporting on the timing of regulations to implement decisions made by delegated Ministers once the Bill has been finalised for introduction. We do not expect the regulations to be ready in time to accompany the Bill at the time of introduction.

37. The following departments have been consulted in the development of the advice and recommendations in this report: Land Information New Zealand, Ministry of Business, Innovation and Employment, Ministry of Foreign Affairs and Trade, Ministry of Justice, Parliamentary Counsel Office and the Overseas Investment Office. The Department of Prime Minister and Cabinet has been informed.

Chair
Cabinet Legislation Committee

Overseas Investment Amendment Bill: Approval for Introduction

Proposal

- 1 It is proposed to introduce the attached Bill that amends the Overseas Investment Act (OIA). The amendments focus on legislative changes to the OIA to redefine sensitive land to include residential land, and amend the screening criteria for sensitive land, so that overseas buyers of residential land (including land with dwellings on it) must first obtain consent from the Overseas Investment Office (OIO). Overseas persons who do not obtain consent will be prohibited from purchasing residential land. The Bill's other key features are measures intended to enable overseas investors to participate in projects that expand housing supply, provides mechanisms for buyers who are not New Zealand citizens and who hold certain types of New Zealand visa to purchase homes on the basis that they are ordinarily resident in New Zealand, and provides for an enhanced disclosure, compliance and enforcement regime.

Overview

- 2 The attached Bill amends the OIA to ensure that investments made by overseas persons in New Zealand will have genuine benefits for the country. The Bill has a focus on residential land, but also makes more general changes to the Act, including enhancing the enforcement powers of the OIO and changing the definition of who is considered to be ordinarily resident in New Zealand and therefore not an overseas person.
- 3 The Bill will ensure overseas persons who are not resident in New Zealand will generally not be able to own residential land. Residential land is defined with reference to the property classification given to a property by the registered valuer of each council, as is required by the Ratings Valuation Rules issued by the Valuer-General. Residential land will be defined as all properties classified as either "residential" or "lifestyle".
- 4 The OIA operates as a screening regime. An overseas person must apply to the OIO for consent before they can make certain investments. The OIO assess the investment against screening criteria in the Act and, if satisfied, will provide a consent that includes conditions. The OIO currently screens "overseas investments in sensitive land" and the Bill would make "residential land" a sub-set of "sensitive land" and subject to that screening process.

- 5 A natural person is an overseas person and requires consent if they are neither a New Zealand citizen nor “ordinarily resident in New Zealand”. The Bill changes the definition of “ordinarily resident in New Zealand” so that the test is easier to apply. Under the new definition, a person will be ordinarily resident here (and not subject to screening) if they hold a residence class visa and they have been residing in New Zealand for at least 12 months and have not been absent from New Zealand for more than 183 days in that 12 month period.
- 6 s6(a), s9(2)(h) + s9(2)(i)
- 7 The Bill also provides that overseas persons would be able to buy residential land if they will be developing the land and adding to New Zealand's housing supply, or if they will convert the land to another, non-residential use and are able to demonstrate this would have wider benefits to New Zealand.
- 8 The changes in Bill will apply beginning ten days after it receives Royal Assent.

Policy

- 9 On 31 October 2017 Cabinet (CAB-17-MIN-0489 refers) agreed that:
- the inward investment screening regime in the OIA be amended to prevent overseas investors from buying existing residential property (including residential land);
 - the screening regime changes include provisions enabling overseas investors to invest in the construction of new residential property for on-sale or letting, in some situations;
 - s6(a)
 - s9(2)(h) + s9(2)(i)
 - a group of Ministers consisting of the Prime Minister, Deputy Prime Minister, Minister of Finance, Associate Minister of Finance, Minister of Housing and Urban Development, Hon David Parker and the Minister of Land Information be authorised with Power to Act on further detailed policy matters that need to be addressed to enable the legislation to be drafted.
- 10 Legislative change is required in order to achieve this. Ministers with Power to Act have subsequently agreed a raft of design decisions outlined below and reflected in the attached Bill.

What land is captured?

- 11 The residential land captured by the expanded OIA definition of “sensitive land” would be land classified as either “residential” or “lifestyle” in information local councils use to support the District Valuation Roll.
- 12 Defining residential property through the District Valuation Roll is likely to capture almost all, but not all, properties that will be used for predominantly residential purpose, and will enable any interested party to access the data held by local councils to confirm the status of the relevant land for these OIA purposes.
- 13 More than just direct purchases of residential land will be captured. Consent is required under the OIA for overseas persons:
 - 13.1 owning sensitive land,
 - 13.2 leasing sensitive land for 3 years or more,
 - 13.3 acquiring 25% or more ownership or control of a company (or similar) that owns or leases (for 3 years or more) sensitive land, or
 - 13.4 having already obtained 25% or more ownership or control of such a company (or similar), increasing the ownership or control interest, or
 - 13.5 investing in such a company (or similar) that will result in the company being 25% or more owned or controlled by overseas persons.
- 14 The OIO screening will also cover flat-owning company arrangements, as well as ownership and leases. This is where a person buys shares in a flat-owning company that owns a building, and also obtains a right to occupy a residence (but not a true lease) in the building.
- 15 Overseas persons (which includes companies that are 25% or more owned by overseas persons) will be able to obtain consent to directly own residential land, or make the other investments described above, for the following purposes:
 - 15.1 living in a dwelling while they are living in New Zealand (with a requirement to sell the dwelling when they leave) – this will only be available to certain visa holders who meet test of demonstrating a commitment to [reside in] New Zealand;
 - 15.2 developing the land to increase the number of dwellings, including purchasing “off the plans” for existing developments, and developing a site to support new residential sections for sale (e.g. earthworks and road-laying, but a mere legal subdivision will not be sufficient);
 - 15.3 building or expanding retirement villages, residential care facilities, student accommodation, and similar facilities – this is a form of housing for many New Zealanders and so is treated as a new build;

- 15.4 converting the residential land to another use (for example to build a motel or retail operation) where the overseas investment benefits New Zealand – it is necessary to provide a pathway to consent in these situations as that the definition of residential land will capture a wide range of land.
- 16 Overseas buyers wanting to use the increasing housing screening criteria to obtain consent (15.2 and 15.3 above) will need to apply to the OIO before purchasing residential land, and meet the existing OIO investor and good character tests. An overseas person will also be able to obtain a ‘standing consent’ to purchase residential land later and notify the OIO when that occurs. That process will enable developers to engage in land purchasing programmes and individuals to make unconditional bids or bid at auction for houses, knowing that they already have the necessary OIO consent.
- 17 Where a developer intends to let rather than on sell the developed housing, the new build exemption is limited to commercial leases of dwellings, or to operating retirement villages, aged care facilities and student accommodation.
- 18 Where an investor wants to develop residential land for another use, the current OIO screening “benefits test” would apply.
- 19 Where residential land is also ‘sensitive land’ for other reasons – i.e. it is already screened under the OIA, e.g. because it borders a public reserve - the land will be screened as sensitive land under the existing screening criteria. However, if that land was being used for housing, then the OIO would [generally] impose a condition to on-sell or let it (as described in 17 above). The practical implications of this is that an overseas person would need to meet the existing sensitive land tests, and then either qualify as increasing housing, or converting the land to a beneficial non-housing use.

Whose residential property purchases will be subject to screening?

20

s6(a)

21

s6(a)

— Companies (or similar) that are 25% or more owned or controlled by overseas persons also require consent.

2322 However, a new set of screening criteria will allow holders of residence class visas and holders of certain (to be defined) temporary visas to purchase homes to live in. A proposed new regulation-making power would be used to define classes of visa holder and the test they must meet to provide a commitment to reside in New Zealand in order to purchase a home to live in. They must sell the home after a certain date (also defined in regulations), being a date they are considered to no longer be living in New Zealand. They could keep the house if, after purchasing it, they became a New Zealand citizen or met the test for being ordinarily resident in New Zealand.

s9(2)(h) + s9(2)(i)

2423

s6(a)

2524 It is also proposed that the following exemptions be added to the existing Overseas Investment Regulations 2005 for residential property investments by overseas persons:

25.424.1 the purchase of property by a foreign government for a diplomatic or consular mission or for housing for diplomatic or consular staff;

25.224.2 the purchase by a person of Māori descent who would otherwise be subject to the OIO screening regime as an “overseas person” of Māori freehold land which was previously communally-owned Māori land with which the purchaser has an ancestral connection with by descent. This exemption would apply to all sensitive land, not just residential land.

2625 It is likely that other class exemptions will be needed to allow the new law to operate effectively, and I have asked officials to prepare advice.

2726 The screening regime would also prevent a foreign-owned company from buying residential land to house its New Zealand-based staff. There is an existing exemption power that may be exercised by Ministers if there was a compelling case to permit those purchases.

2827 Where a residential premises is incidental to a commercial site, then either the land will not be residential land, or the purchase could obtain consent if it passed the current OIO screening “benefits test”.

Consequential changes to who is caught by the wider OIA regime

2928 The new test of “ordinarily resident in New Zealand” proposed for residential property (resident for the past 12 months and lived in New Zealand for more than 183 days during that period) – which defines people not subject to OIO screening - will also apply to other investments covered by the OIA (overseas investments in other sensitive land, in significant business assets, or in fishing quota).

29—The new test aligns with existing OIO practice, but is more certain than the current legislation which does not define with precision what “ordinarily resident” means. This means that, at present, buyers sometimes claim they meet the residency test (and therefore do not apply for OIO consent) when the OIO considers that they fail the residency test, and so should have applied for consent. The Bill will bring much more certainty to this test.

Enhanced Compliance and Enforcement Mechanisms

3029 The Bill includes a set of new compliance and enforcement powers:

- a. information gathering powers are strengthened to allow the OIO to require a person to provide information or documents when the OIO considers that it is necessary or desirable for the administration or enforcement of the OIA;
- b. the OIO will be able to “notify” an overseas person that if they dispose of property if the OIO has reasonable grounds to believe that the overseas person has purchased in breach of the OIA, that person is protected from further liability or penalty. This is intended to incentivise overseas persons who breach the residential property screening regime to agree to sell, avoiding the need for the OIO to routinely undertake lengthy and expensive court proceedings to force disposal. Conditions of consent imposed by the OIO on successful applications, for instance ‘increasing housing’, would also be enforceable through this notification and disposal power;
- c. the OIO will be able to serve documents using alternative mechanisms to personal service, such as service at a known electronic address or by leaving documents at the address of the relevant property. This is intended to give the OIO practical means of service where an “overseas person” is overseas or otherwise difficult to personally contact;
- d. the maximum civil penalty in the Overseas Investment Act is increased to three times the gain that the investor has made (the penalty is currently limited to the gain the investor has made, making non-compliance relatively low-cost);
- e. a third-party person who is ‘involved in a contravention’ of the OIA (for example, they aid or abet the contravention) would be liable for a civil penalty in the same way as the party who contravenes the Act (that is, the foreign investor). There will be protections for innocent third-parties who could be said to have been ‘involved’. Such a person will have a defence if the person’s involvement in the contravention was due to reasonable reliance on information supplied by another person, or if the person took all reasonable and proper steps to ensure compliance with the OIA; and

- f. conveyancers will be required to certify that, to the best of their knowledge, the purchase is not inconsistent with the ban. A conveyancer that fails to provide the required certificate or to keep a copy of the certificate on file will be liable for an offence. The requirement to certify is a matter that the Registrar-General of Land might in future specify as a statutory requirement for the transfer instrument, with the effect that the conveyancer would be required to confirm in the course of the e-dealing that the requirement to certify had been met.

Compliance and Enforcement Enhancements to Apply to all OIO Screening

[34.30](#) The Bill proposes that the new compliance and enforcement powers (with the exception of the proposed duty on conveyancers) are not limited to purchases of residential land, but are applied across the entire OIA regime (i.e. to overseas investments in other sensitive land, in significant business assets, or in fishing quota). Given this coverage is potentially wider than Cabinet envisaged, I seek Cabinet authorisation for those measures.

Implications for the Fisheries Act and Antarctic Marine Living Resources Act

[34.31](#) The Fisheries Act and the Antarctic Marine Living Resources Act incorporate by reference the OIA definition of “ordinarily resident in New Zealand”. The respective lead agencies have indicated that their preference is for the new definition of “ordinarily resident in New Zealand” included in this Bill to also apply to those Acts. Therefore consequential changes, to preserve the application of the existing OIA definition to those Acts, are not required.

Regulatory impact analysis

[34.32](#) [To come]

Compliance

[**Drafting note:** Officials are working on the text of this section and will provide it in the next draft.]

[34.33](#) [Indicate whether the bill complies with each of the following, with reasons if the bill does not comply (list each sub-heading):

[34.133.1](#) the principles of the Treaty of Waitangi;

[34.233.2](#) the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 (state the nature of any potential inconsistencies identified/state that there are none, note the steps taken to address any issues, or include information on any justifications for the bill infringing a right or freedom);

[34.333.3](#) the disclosure statement requirements (indicate that a disclosure statement has been prepared and is attached to the paper (if not, give a reason). Highlight any issues in the disclosure statement that may be of interest to Ministers);

[34.433.4](#) the principles and guidelines set out in the Privacy Act 1993 (if the bill raises privacy issues, indicate whether the Privacy Commissioner agrees that it complies with all relevant principles);

~~34.5~~33.5 relevant international standards and obligations;

~~34.6~~33.6 the *LAC Guidelines on the Process and Content of Legislation* (2014 edition), which are maintained by the Legislation Design and Advisory Committee (state whether there are any aspects of the legislation that depart from the default approach in the Guidelines, and provide justification for any variation).]

Consultation

~~35.3~~34 The following consultation that has taken place:

~~35.1~~34.1 Treasury has consulted the following departments in the development of the advice supporting the recommendations in this paper: Land Information New Zealand, Ministry of Business, Innovation and Employment, Ministry of Foreign Affairs and Trade, Ministry of Justice; Inland Revenue, Parliamentary Counsel Office, the Overseas Investment Office and Te Puni Kōkiri. The Department of Prime Minister and Cabinet has been informed;

~~35.2~~34.2 Due to the short timelines there has been no consultation with private sector organisations or public consultation process;

~~35.1~~34.1 The New Zealand First and Green parties have been consulted in the development of the proposal reflected in the attached draft bill. The Labour-New Zealand First coalition agreement includes a shared goal to “*Strengthen the Overseas Investment Act and undertake a comprehensive register of foreign-owned land and housing.*” The Deputy Prime Minister and Minister of Land Information were members of the group of Ministers Cabinet delegated power to act in developing the details of the proposal.

~~35.2~~34.2 [Any comment re consulting Government caucus]?

Binding on the Crown

~~36~~35 The Overseas Investment Act is currently binding on the Crown. The Bill will be binding on the Crown upon commencement.

Allocation of decision making powers

~~37~~36 The Bill proposes that new powers in the Act for Ministers already allocated powers under the Act, namely the Minister of Finance, the Minister of Fisheries (regarding fishing quota) and the Minister of Land Information.

Associated regulations

~~38~~37 Various new regulations, using existing or new regulation-making powers, will be required to give full effect to the policy that this Bill is intended to implement. Officials do not expect these regulations to be ready in time to accompany the Bill upon introduction.

Other instruments

~~39~~38 The Bill includes the following new regulation-making powers:

~~39.1~~38.1 _____ A [to come]

~~39.2~~38.2 _____ B

~~39.3~~38.3 _____ C

~~40.39~~ [If the bill includes such a provision:

~~40.1~~39.1 _____ state the reason for the provision, taking into account the principles identified in the Deemed Regulations Report of the Regulations Review Committee;

~~40.2~~39.2 _____ confirm that the explanatory note to the bill sets out the reasons.]

Commencement of legislation

~~41~~40 It is proposed that the Bill come into force 10 days after its assent. The new measures would apply to transactions entered into after that date. The current OIA rules will continue to apply to all transactions entered into before the commencement date, including 'conditional agreements' for sale and purchase where conditions precedent are not yet met and the contract is not yet enforceable at the commencement date.

~~42~~41 If necessary the commencement method or date may need to be amended during the Bill's passage through the House, for instance if the proposed commencement turns out to be incompatible with Land Information New Zealand's implementation programme, or ^{s9(2)(j)} [REDACTED]

Parliamentary stages

~~43~~42 The Bill should be introduced and referred to the Finance and Expenditure committee (FEC) prior to Christmas 2017, ^{s9(2)(f)(iv)} [REDACTED] ^{s9(2)(j)} [REDACTED]. This will require FEC to be instructed by the House, upon introduction, that the Bill is to be reported back to the House for its second reading by xx February 2018.

Recommendations

The Associate Minister of Finance (Hon David Parker) recommends that the Committee:

- 1 note that the Overseas Investment Amendment Bill amends the Overseas Investment Act (OIA) in order to deliver the Government's policy goals regarding overseas investment in residential land (including built-on land).
- 2 note that significant policy details included in the Bill were agreed by a group of Ministers delegated Power to Act by Cabinet, therefore have not been approved by a Cabinet policy committee;
- 3 note that some elements of the Bill, including the definition of "ordinarily resident" person, and improved compliance and enforcement powers will not be limited to transactions involving residential land, but will apply generally to all OIA business;
- 4 endorse the decisions made by Ministers with Power to Act;

- 5 approve the Overseas Investment Amendment Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;
- 6 agree that the Bill be introduced on 19 December 2017;
- 7 agree that the Government propose that the Bill be:
 - 7.1 referred to the Finance and Expenditure committee for consideration; and
 - 7.2 enacted by 1 March 2018.

Authorised for lodgement

Hon David Parker

Associate Minister of Finance

Treasury Report: Overseas Buyers Ban: Cabinet Legislation Committee Paper for Lodgement

Date:	30 November 2017	Report No:	T2017/2673
		File Number:	IM-5-1-1

Action Sought

	Action Sought	Deadline
Associate Minister of Finance (Hon David Parker)	Sign the attached Cabinet Legislation Committee Paper and Cabinet Submission Form, and lodge this with the Cabinet Office	10:00am, Friday 1 December 2017

Contact for Telephone Discussion (if required)

Name	Position	Telephone	1st Contact
Robbie Taylor	Senior Analyst	s9(2)(k)	s9(2)(a) ✓
Dasha Leonova	Manager, Financial Markets and International		s9(2)(a)

Actions for the Minister's Office Staff (if required)

Return the signed report to Treasury.

Refer a copy of the report to the Prime Minister, Deputy Prime Minister, Minister of Finance, Minister of Housing and Urban Development, Minister of Immigration and Minister of Land Information.

Note any feedback on the quality of the report

Enclosure: Yes

Treasury Report: Overseas Buyers Ban: Cabinet Legislation Committee Paper for Lodgement

Executive Summary

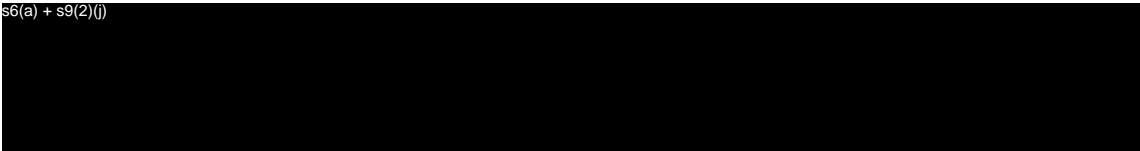
This report seeks your signature on the attached Cabinet Legislation Committee paper (the LEG Paper) and Cabinet Submission form, and agreement to lodge the LEG Paper, accompanying Overseas Investment Amendment Bill (the Bill), Departmental Disclosure Statement and Regulatory Impact Statement (RIS) with the Cabinet Office by 10:00am on Friday 1 December 2017, in order to meet the extended Cabinet Office deadline for this paper.

As per the Cabinet Manual, papers submitted to Cabinet by Associate Ministers must clearly indicate that the Portfolio Minister agrees with the submission of the paper. Your office has been in touch with the Minister of Finance's office to confirm his approval for the LEG Paper to be submitted to Cabinet and this is noted in the LEG Paper.

This report also summarises key changes to the LEG Paper since we last consulted with you on the draft, highlights design details that have attracted particular interest from other Ministers and agencies, and summarises commentary from stakeholders provided following public announcements of the Government's policy.

Key changes to the Bill and LEG Paper

Key changes to the Bill and LEG Paper since the versions provided to you on 24 November 2017 include:

- Definition of "ordinarily resident in New Zealand": at your instruction, we have changed the Bill so that the existing definition of "ordinarily resident in New Zealand" contained in the Overseas Investment Act (OIA) remains for land currently screened as sensitive, with the new 12 months/183 days bright line test applying only for residential (but not otherwise sensitive) land.
- Information sharing powers: to address concerns expressed by the Minister for Land Information, and following discussions with the Office of the Privacy Commissioner, we have instructed Parliamentary Counsel Office (PCO) to change the drafting of the relevant section.
- Te Puni Kōkiri comments: at TPK's suggestion, we have instructed the PCO to amend the Bill to add a clear regulation making power to exempt persons of Māori descent in respect of Māori freehold land they have an ancestral connection to. TPK also notes that it is important that this regulation comes into force at the same time as the Bill, and this is also set out in the LEG paper.
-  s6(a) + s9(2)(i)
- Definitions of "residential dwelling" and "long-term accommodation facility": we have clarified these definitions in the Bill to make clear that the new builds test requires a genuine increase in residential dwellings, rather than something less substantial e.g. a sleep-out.

- Clarification of ‘counter-factual’ for the new builds test: we have clarified that applications for consent under the new builds test require an absolute increase in the number of dwellings on residential land, rather than the “with and without overseas investment” counterfactual test applied to the benefits test (following the Crafar farms case).

We note that

s9(2)(f)(iv) + s9(2)(g)(i)

s9(2)(f)(iv) + s9(2)(g)(i)

s9(2)(f)(iv) + s9(2)(g)(i)

Stakeholder submissions

We summarise mail received from a number of stakeholders on the policy, including Fletcher Building (sale of new builds “off the plans”), Progress Enterprises Ltd (purchase of residential land for construction of supermarkets) and various stakeholders from Queenstown (exemptions for high value residential properties).

Recommended Action

We recommend that you:

- a **note** that officials have been working on a Bill to implement the Government’s 100 day commitment regarding overseas investment in residential land (the Bill), based on detailed design decisions made by delegated Ministers;
- b **note** that officials provided you with a draft Bill and Cabinet Legislation Committee (LEG Paper) for comment on 24 November;
- c **note** that a number of changes to the Bill and LEG Paper have been made following discussions with you and further consideration by officials, including in the following areas:
 - i. Information-gather powers of the OIO;
 - ii. Exemptions for Māori interests;
 - iii. Exemption making power to implement existing international agreements;
 - iv. Definitions of “residential dwelling” and “long-term accommodation facility”; and
 - v. Clarification of the ‘counter-factual’ for the new builds test.

- d **note** that Ministers agreed that the definition of “ordinarily resident in New Zealand” that applies to sensitive land that is residential land (the 12 months/183 days test) should be applied to investments currently screened under the OIA (T2017/2478);
- e **agree** that in response to concerns Ministers subsequently expressed with extending the 12 months/183 days test to all investments screened under the OIA, the attached Bill, LEG Paper and RIS reflect the approach previously agreed by Ministers in T2017/2389, therefore the 12 months/183 day test will only apply to sensitive land that is residential land;

Agree/disagree

- f **sign** the attached Cabinet’s Legislation Committee (LEG Paper) and a Cabinet Submission Form, and lodge these documents, the Bill and Regulatory Impact Statement (RIS) with Cabinet Office by 10:00am on Friday 1 December 2017;

Signed/not signed

- g **note** that the Bill has been prepared under very tight time constraints and that quality assurance and technical corrections to the draft Bill will continue between now and its consideration by Cabinet on 11 December 2017;
- h **note** that it is anticipated that significant new or amending material will be introduced into the Bill by way of Supplementary Order Paper during its passage in the House;
- i **refer** this report to the group of Ministers with Power to Act (the Prime Minister, Deputy Prime Minister, Minister of Finance, Minister of Housing and Urban Development and Minister for Land Information) and the Minister of Immigration, for information.

Referred/not referred

Dasha Leonova
Manager, Financial Markets and International

Hon David Parker
Associate Minister of Finance

Treasury Report: Overseas Buyers Ban: Cabinet Legislation Committee Paper for Lodgement

Purpose of Report

1. This report seeks your signature on the attached a Cabinet Legislation Committee paper (the LEG Paper) and Cabinet Submission form, and agreement to lodge the LEG Paper, accompanying Overseas Investment Amendment Bill (the Bill) and Regulatory Impact Statement (RIS) with the Cabinet Office by 10:00am on Friday 1 December 2017, in order to meet the extended Cabinet Office deadline for the LEG paper.
2. This report also summarises key changes to the LEG Paper since the draft we consulted you on, highlights design details that have attracted particular interest from other Ministers and agencies and summarises mail from stakeholders provided following public announcements of the Government's policy regarding overseas investment in residential land.
3. Unless otherwise communicated to officials or noted, this report assumes the recommendations in previous reports T2017/2389 *Banning Overseas Buyers of Existing Homes: Detailed Design Proposals*, T2017/2478 *Banning Overseas Buyers of Existing Homes: Further Detailed Design proposals* and T2017/2536 *Banning Overseas Buyers of Existing Homes: Design Details Report #3* are agreed.
4. Any slippage in the process for Cabinet consideration and introduction of the Bill is likely to put your commitment to introduce legislation to implement your policy regarding overseas investment in residential land this year at risk and may result in a further shortening of time for Select Committee consideration of the Bill in 2018.

Analysis

Background

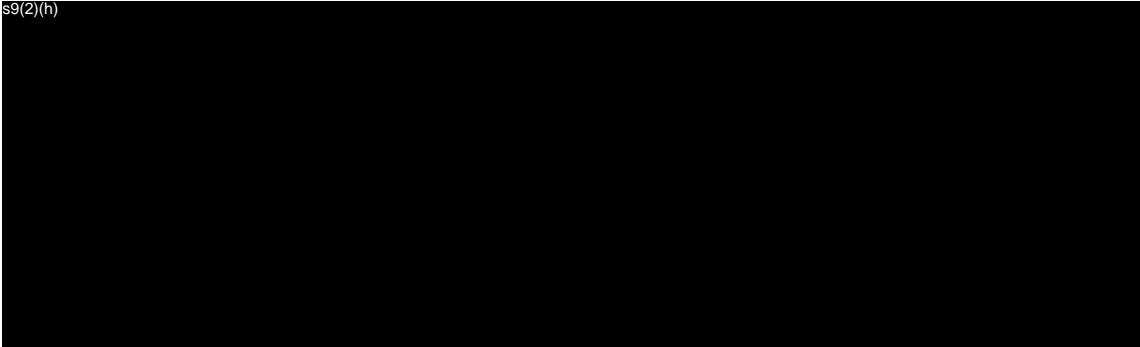
5. On 31 October 2017 Cabinet agreed to make legislative changes to deliver the Government's 100 day commitment regarding overseas investment in residential land. It also agreed the parameters of that policy and authorised a group of Ministers to make further detailed design decisions to enable the legislation to be drafted.¹
6. Delegated Ministers have made a number of detailed design decisions to give effect to the policy. The attached draft LEG Paper, Bill and RIS have been drafted consistent with these decisions. Key features of the Bill are summarised in the LEG Paper.

Summary of changes to the Bill and LEG Paper

7. There have been a number of changes to the Bill and LEG Paper since the version we provided you attached to T2017/2589. Summarised below are the key changes for your information:

¹ The Prime Minister, Deputy Prime Minister, Minister of Finance, Associate Minister of Finance, Minister of Housing and Urban Development, and the Minister of Land Information.

Definition of ordinarily resident in New Zealand

8. During your conversation with the Minister for Land Information and officials on 28 November, you expressed concern that extending the new definition of “ordinarily resident in New Zealand (i.e. the 12 month/183 day test) to all sensitive land captured by the OIA could be seen as a loosening of the Overseas Investment Act (OIA), because it removes from the definition the limb which allows an assessment of whether a person intends to reside in New Zealand indefinitely.
9. To address your concerns, we have amended the way the new definition of “ordinarily resident in New Zealand” (i.e. the 12 month/183 day test) is used. In the amended Bill, the new bright line 12 month/183 day test applies only for purchases of residential (but not otherwise sensitive) land. The existing test of “ordinarily resident in New Zealand” in the OIA is retained for purchases of land currently screened as sensitive (including any purchase that is residential and sensitive for other reasons).
10. You will recall that one of the reasons delegated Ministers agreed to create a bright line 12 month/183 day test for residential land in T2017/2389 was to facilitate the ability of overseas investors to self-assess whether they needed to seek consent to purchase residential land. This would promote compliance and manage enforcement costs for the Overseas Investment Office (OIO). We continue to consider that the bright line 12 month/183 day test is the best approach for residential land, when considered against the criteria of policy effectiveness, compliance with international obligations and minimising administrative and compliance costs.
11. s9(2)(h)

12. As we are retaining the existing test for “ordinarily resident in New Zealand” for purchases of land currently screened as sensitive, we no longer propose that the new bright line 12 month/183 day test applies for the purposes of the Fisheries Act 1996 and the Antarctic Marine Living Resources Act 1981. The existing OIA test will continue to apply to these Acts.
13. As this approach differs from the one agreed to by delegated Ministers in T2017/2478, we recommend you seek Cabinet’s agreement to this change in the LEG Paper.

Information sharing powers

14. s9(2)(f)(iv) + s9(2)(g)(i)
 following discussions with the Office of the Privacy Commissioner this week, we instructed PCO to amend the relevant provision of the Bill (new section 41C).

² This paragraph is subject to legal professional privilege.

15. The provision now provides that the OIO can provide information to a law enforcement or regulatory agency, or to any person who the OIO is satisfied has a proper interest in receiving the information. The provision also clarifies that, in relation to personal information, the Privacy Act 1993 applies (under that Act, personal information can be disclosed if necessary to avoid prejudice to the maintenance of the law).
16. We consider that the provision, as amended, balances privacy interests and enforcement needs. If necessary, this provision could be further refined through the Select Committee process, or the intended Supplementary Order Paper.

Exemption for Māori interests

17. TPK supports the inclusion of a clear and certain regulation-making power in the Bill to reflect the decision by delegated Ministers to provide an exemption to allow a non-citizen of Māori descent to acquire an interest in Māori freehold land that is residential land to which the person is associated in accordance with tikanga Māori. TPK also notes that it is important that this regulation comes into force at the same time the Bill comes into force to ensure that the interests of non-citizens of Māori descent are protected and to promote consistency with the principles of the Treaty of Waitangi and Te Ture Whenua Māori Act.
18. Expressly providing for the exemption in the regulation making power is consistent with decisions by delegated Ministers. We have instructed PCO to amend the Bill to include a clear regulation making power so that the exemption can be provided for in the regulations. We have also updated the LEG paper accordingly.
19. We will continue to work with TPK to ensure the regulations are drafted in an appropriate manner and to address any other issues that may arise through the Select Committee process.

20. s9(2)(f)(iv)

Exemptions where necessary to meet international obligations

21. The Bill includes a redrafted regulation-making power for exemptions where required to meet existing FTA commitments. This will be used to implement obligations to ensure that Australian citizens and permanent residents are treated the same as, respectively, New Zealand citizens and permanent residents. s6(a) + s9(2)(h)

22. s6(a) + s9(2)(h)


Definitions of “residential dwelling” and “long-term accommodation facility”

23. The Bill includes amended definitions of “residential dwelling” and “long-term accommodation facility” which are intended to make clear that the new builds exemption can only be used where the investment results in the construction of new dwellings on residential land that are separate from any existing dwellings. These changes seek to clarify that the construction of something less than a new, separately inhabitable dwelling, such as sleep-out, would not meet the new builds test.

Clarification of the ‘counter-factual’ assessment under the new builds test


24. The Bill includes new language which clarifies that investors using the new build test must increase the number of dwellings on residential land compared with the situation before the investment took place. This is to ensure the Courts do not apply the same “with and without overseas investment” counterfactual test applied to the benefits test (following the Crafar farms case). That counterfactual test would be unworkable for the new build test, as it could involve a comparison with a hypothetical New Zealand developer. This would add significant time and cost to OIO screening of new build consent applications.

s9(2)(f)(iv) + s9(2)(g)(i)



26. We have attempted to clarify new definitions in the Bill which will require a self-assessment by prospective buyers of residential land and which risk non-compliance if they are ambiguous. We have minimised changes to other existing definitions due to time constraints. Changes to the OIA to address any broader outstanding concerns could be made through either the Select Committee process, or the intended Supplementary Order Paper.

s9(2)(g)(i)



27. In T2017/2389 delegated Ministers agreed to establish a bright line definition of “ordinarily resident in New Zealand” for residence class visa holders (based on the 12 month/183 day test). They also agreed to allow residence class visa holders and some temporary visa holders (to be defined by Ministers in regulations) that do not meet the “ordinarily resident in New Zealand” test, to seek approval to purchase a residential property if they meet the “commitment to reside in New Zealand” test (to be defined by Ministers in regulations).

28.

s9(2)(f)(iv) + s9(2)(g)(i)

29.

s9(2)(g)(i)

30.

s9(2)(g)(i)

Proposed timings for the Bill

31. The LEG Paper proposes that the Bill be referred to the Finance and Expenditure Committee s9(2)(f)(iv)

32. If necessary the commencement method or date may need to be amended during the Bill's passage through the House, for instance if the proposed commencement turns out to be incompatible with Land Information New Zealand's implementation programme, o s9(2)(h) + s9(2)(i)

Stakeholder correspondence on the design of the policy

33. Since the Government's 100 day commitment regarding overseas investment in residential land, we have received correspondence from a number of stakeholders that relate to the design of the policy. We summarise key pieces of feedback below:

Fletcher Building – ability to buy off the plans

34. Fletcher has indicated interest in the ability of overseas persons to purchase residential land “off the plans” and recommended that new builds exemption follow the Reserve Bank’s loan-to-value (LVR) ratio rules. These allow an overseas person to purchase residential land under development, at any stage of its development up until 6 months after construction is complete, provided they purchase the land off the original developer.
35. Delegated Ministers agreed to allow an overseas person to purchase a house off-the plans before construction of a dwelling has begun, provided they complete the construction of the house. This is a more restrictive test than the LVR rules.

Progressive Enterprises Ltd – purchasing residential land for a non-residential use

36. Progressive Enterprises has indicated interest in the restrictions on overseas persons buying residential land in the context of their acquisition of parcels of residential land in order to expand and develop supermarkets. They have suggested exempting Australian companies or redevelopment of residential land for commercial use.
37. Delegated Ministers agreed to allow overseas persons to purchase residential land for conversion to a non-residential (e.g. commercial use) following screening to assess the benefits. ^{s9(2)(b)(ii)}

Queenstown

38. There have been various concerns raised by stakeholders from Queenstown on impacts of the policy on the local economy if it captured the holiday and luxury home industry. One suggestion was to apply restrictions on overseas investment on “affordable homes” only.
39. This submission appears to be inconsistent with Minister’s objectives for the policy.

Risks

40. The advice in this report, the attached LEG Paper, Bill and RIS have been completed under tight timeframes for a matter of this complexity. There is a risk that technical aspects of the Bill will need to be revisited during the Select Committee process or through the intended Supplementary Order Paper.

41. ^{s9(2)(h) + s9(2)(j)}

³ This paragraph is subject to professional legal privilege
T2017/2673 : Overseas Buyers Ban: Cabinet Legislation Committee Paper for Lodgement

Next Steps

42. Following your signature of the LEG Paper and Cabinet Submission Form, we recommend that these are lodged with Cabinet Office by 10:00am on Friday 1 December 2017.
43. PCO will continue to work on the Bill and the version that PCO submits to Cabinet Office will reflect corrections made for technical and quality assurance purposes.
44. As a next step, we will provide you with draft communications material that can be used when the Bill is introduced into the House on 11 December 2017, and draft points for your First Reading and special motion speeches.
45. We will provide further advice on draft regulations to ensure that key outstanding policy decisions have been made before Select Committee hearings take place. We will also provide advice on a possible vacancy charge regime by Christmas.

Consultation

46. The following departments have been consulted in the development of the advice and recommendations in this report: Land Information New Zealand, Ministry of Business, Innovation and Employment, Ministry of Foreign Affairs and Trade, Te Puni Kōkiri, the Office of the Privacy Commissioner, Ministry of Justice, Parliamentary Counsel Office and the Overseas Investment Office.

Chair
Cabinet Legislation Committee

Overseas Investment Amendment Bill: Approval for Introduction

Proposal

- 1 It is proposed to introduce the attached Bill that amends the Overseas Investment Act (OIA). Overseas persons who do not obtain OIA consent will be prohibited from purchasing residential land (including land with dwellings on it). The amendments focus on legislative changes to the OIA to redefine sensitive land to include residential land, and amend the screening criteria for sensitive land, so that overseas buyers of residential land (including land with dwellings on it) must first obtain consent from the Overseas Investment Office (OIO). The Bill's other key features are measures intended to enable overseas investors to participate in projects that expand housing supply, mechanisms for buyers who are not New Zealand citizens and who hold certain types of New Zealand visa to purchase homes on the basis that they are ordinarily resident in New Zealand, and an enhanced disclosure, compliance and enforcement regime.

Overview

- 2 The attached Bill amends the OIA to ensure that investments made by overseas persons in New Zealand will have genuine benefits for the country. The Bill has a focus on making residential land sensitive land, but also includes provisions enhancing the enforcement powers of the OIO that would also apply to other transactions and persons regulated by the OIA.
- 3 The Bill will ensure overseas persons who are not resident in New Zealand will generally not be able to own sensitive land that is residential. Residential land is defined with reference to the property classification given to a property by the registered valuer of each council, as is required by the Ratings Valuation Rules issued by the Valuer-General. Residential land will be defined as all properties classified as either "residential" or "lifestyle".
- 4 The OIA operates as a screening regime. An overseas person must apply to the OIO for consent before they can make certain investments. The OIO assesses the investment against screening criteria in the OIA and, if satisfied, will provide a consent that includes conditions. The OIO currently screens "overseas investments in sensitive land" and the Bill would make "residential land" a sub-set of "sensitive land" and subject to that screening process.

- 5 A natural person is an overseas person and requires consent if they are neither a New Zealand citizen nor “ordinarily resident in New Zealand”. The Bill changes the definition of “ordinarily resident in New Zealand” in respect of the expanded screening regime so that the test is easier to apply. Under the new definition, a person will be ordinarily resident here (and not subject to screening) if they hold a residence class visa¹ and they have been residing in New Zealand for at least 12 months and have not been absent from New Zealand for more than 183 days in that 12 month period.
- 6 s6(a)
- 7 The Bill also provides that overseas persons would be able to buy sensitive residential land if they will be developing the land and adding to New Zealand’s housing supply, or if they will convert the land to another, non-residential use and are able to demonstrate this would have wider benefits to New Zealand.
- 8 The changes in the Bill will apply ten days after it receives Royal assent.

Policy

- 9 On 31 October 2017 Cabinet (CAB-17-MIN-0489 refers) agreed that:
- s6(a)
 - the screening regime changes include provisions enabling overseas investors to invest in the construction of new residential property for on-sale or letting, in some situations;
 - s6(a)
 - s6(e)(vi) + 9(2)(i)
 - s6(e)(vi) + 9(2)(i)

¹ There are 11 residence class visa categories in three sub-groups: skilled/ business (skilled migrant, residence from work, investor and entrepreneur (including Global Impact Visa) visas), family (partnership, parent and dependent child visas), and international/ humanitarian (Samoan quota, Pacific access, refugees, and “other” visas).

- a group of Ministers consisting of the Deputy Prime Minister, Minister of Finance, Associate Minister of Finance, Minister of Housing and Urban Development, Hon David Parker and the Minister of Land Information be authorised with Power to Act on further detailed policy matters that need to be addressed to enable the legislation to be drafted.
- 10 Legislative change is required in order to achieve this. Ministers with Power to Act have subsequently agreed a raft of design decisions outlined below and reflected in the attached Bill.

What land is captured?

- 11 The residential land captured by the expanded OIA definition of “sensitive land” would be land classified as either “residential” or “lifestyle” in information local councils use to support the District Valuation Roll.
- 12 Defining residential property through the District Valuation Roll is likely to capture almost all, but not all, properties that will be used for predominantly residential purpose, and will enable any interested party to access the data held by local councils to confirm the status of the relevant land for these OIA purposes.
- 13 More than just direct purchases of residential land will be captured. Consent is required under the OIA for transactions that result in overseas persons:
- 13.1 owning sensitive land,
 - 13.2 leasing sensitive land for 3 years or more,
 - 13.3 acquiring 25 percent or more ownership or control of a company (or similar) that owns or leases (for 3 years or more) sensitive land, or
 - 13.4 having already obtained 25 percent or more ownership or control of such a company, increasing the ownership or control interest, or
 - 13.5 investing in such a company that will result in the company being 25 percent or more owned or controlled by overseas persons.
- 14 The OIO screening will also cover flat-owning company arrangements, as well as ownership and leases. This is where a person buys shares in a flat-owning company that owns a building, and also obtains a right to occupy a residence in the building but not a true lease.
- 15 Overseas persons (which includes companies that are 25 percent or more owned or controlled by overseas persons) will be able to obtain consent to buy sensitive residential land, or make the other investments described above, for the following purposes:
- 15.1 living in a dwelling while they are living in New Zealand (with a requirement to sell the dwelling when they leave) – this will only be available to certain visa holders who meet a test demonstrating a commitment to reside in New Zealand;

- 15.2 developing the land to increase the number of dwellings, including purchasing “off the plans” for existing developments, and developing a site to support new residential sections for sale (e.g. earthworks and road-laying, but a mere legal subdivision will not be sufficient);
 - 15.3 building or expanding retirement villages, residential care facilities, student accommodation, and similar facilities – this is a form of housing for many New Zealanders and so is treated as a new build;
 - 15.4 converting the residential land to another use (for example to build a motel or retail operation) where the overseas investment benefits New Zealand – it is necessary to provide a pathway to consent in these situations as that the definition of residential land will capture a wide range of land.
- 16 Overseas buyers wanting to use the increasing housing screening criteria to obtain consent (15.2 and 15.3 above) will need to apply to the OIO before purchasing residential land, and meet the existing OIO investor and good character tests. An overseas person will also be able to obtain a ‘standing consent’ to purchase residential land later and notify the OIO when that occurs. That process will enable developers to engage in land purchasing programmes and will enable individuals to make unconditional bids or bid at auction for houses, knowing that they already have the necessary OIO consent (and must then notify the OIO of the purchase).
- 17 Where a developer intends to let rather than on-sell the developed housing, the new build exemption is limited to commercial leases of dwellings, or to operating retirement villages, aged care facilities, student accommodation or similar long-term accommodation.
- 18 Where an investor wants to develop residential land for another use, the current OIO screening “benefits test” would apply.
- 19 Where residential land is also ‘sensitive land’ for other reasons – i.e. it is already screened under the OIA, such as because it borders a public reserve - the land will be screened as non-residential sensitive land under the existing screening criteria. However, if that land was being used for housing, then the OIO would generally impose a condition to on-sell or let it (as described in paragraph 17 above). The practical implications of this is that an overseas person would need to meet the existing sensitive land tests, and then either convert the land to a beneficial non-housing use, meet the conditions of increasing housing for on-sale or letting, or sell any surplus land.

Whose residential property purchases will be subject to screening?

- 20 Any buyer who is not exempt will be subject to OIO screening. Exempt buyers include New Zealand and Australian citizens (irrespective of where they live) and anyone of any other nationality who is deemed “ordinarily resident in New Zealand”, as discussed below. Therefore the policy will operate through OIO screening of proposed investments by an “overseas person” in residential land. A natural person is an “overseas person” if they are neither a New Zealand nor Australian citizen nor “ordinarily resident in New Zealand”.

- 21 The Bill introduces a new definition of “ordinarily resident in New Zealand” for application to transactions that are sensitive land only by virtue of being residential land. Under the new definition, a person will be ordinarily resident here (and not subject to screening) if they hold a residence class visa and they have been residing in New Zealand for at least 12 months and have not been absent from New Zealand for more than 183 days in that 12 month period.
- 22 This test incorporates the core test currently applied by the OIO, but is more certain than the current legislation which does not define with precision what “ordinarily resident” means. This approach is more suitable for residential land where the risks of non-compliance are heightened due to the large number of transactions and buyers that are potentially affected.
- 23 The OIA also classes as “overseas persons” companies (or similar) that are 25 percent or more owned or controlled by overseas persons.
- 24 Only some non-citizen New Zealand residents will be exempt from screening. These are people who hold a residence class visa (which Australian permanent residents receive automatically on arrival in New Zealand) who are ordinarily in New Zealand. That means residing in New Zealand for the past 12 months and being present in New Zealand for more than 183 days during that period.
- 25 However, a new set of screening criteria will allow holders of residence class visas and holders of certain temporary visas (the exact categories to be defined in regulation, but intended to be work-related rather than study-related) to purchase residential land, so they may live in the home on that land.
- 26 This would be done through a proposed new regulation-making power, which would define classes of visa holder and the test they must meet to demonstrate a commitment to reside in New Zealand. It is intended that buyers approved under these provisions would be required to sell the home within 3 months of a “trigger event” (to be defined in regulations) if they are no longer being considered to be living in New Zealand. This disposal requirement would not apply if the screened buyer subsequently became a New Zealand citizen or met the test for being ordinarily resident in New Zealand.

27 s9(2)(f)(iv)



- 28 The approach in the Bill is intended to allow pathways to consent for people with a genuine commitment to reside in New Zealand. It is intended that the regulations would provide clear bright line tests with limited scope for discretion, ^{s6(a)} [REDACTED]. Also, these visa holders would continue to be able to make commercial investments in New Zealand businesses without screening (unless significant business assets or sensitive land are involved), and would be able to purchase residential land provided they meet the 12 months/183 days bright line test for residence class visa holders or the “commitment to reside in New Zealand” test to be defined by Ministers in regulations.
- 29 The Bill also includes a new regulation-making power for exemptions where required to meet existing FTA commitments. This will be used to implement obligations to ensure that Australian citizens and permanent residents are treated the same as, respectively, New Zealand citizens and permanent residents. ^{s6(a) + 9(2)(j)} [REDACTED]
- 30 It is also proposed that an exemption be added to the existing Overseas Investment Regulations 2005 for overseas persons of Māori descent who would otherwise be subject to the OIO screening regime as an “overseas person” acquiring residential Māori freehold land² where the purchaser has an ancestral connection by descent.
- 31 It is likely that other class exemptions will be needed to allow the new law to operate effectively, and I have asked officials to prepare advice on those issues.
- 32 It is important that these new regulations come into effect at the same time as the Bill. For example, if the exemption for non-citizens of Māori descent were not in place in time, potentially such a person could be prevented from having their ancestral connection to Māori freehold land, which would be inconsistent with the principles of the Treaty of Waitangi and the principles underpinning the Te Ture Whenua Māori Act 1993.
- 33 The screening regime would also prevent a business that is an overseas person for the purposes of the OIA from buying residential land to house its New Zealand-based staff. There is an existing exemption power that may be exercised by Ministers if there was a compelling case to permit those purchases.

² “Māori freehold land” is a category of land defined by section 129 of the Te Ture Whenua Māori Act 1993. Māori Land (including Māori freehold land) tends to have characteristics not associated with other forms of privately owned land, and is subject to a range of unique restrictions and protections. Māori Land generally has multiple owners, and ownership of such land is generally obtained through succession. Māori land is referred to in Te Ture Whenua Māori Act 1993 and by Māori generally as a *taonga tuku iho* which denotes a treasure handed down through the generations.

- 34 Where a residential premises is incidental to a commercial site, e.g. a motel with manager's unit, and is on sensitive land, then the purchase could obtain consent if it passed the current OIO screening "benefits test" for sensitive land.

Enhanced Compliance and Enforcement Mechanisms

- 35 The Bill includes a set of new compliance and enforcement powers:

- a. information gathering powers are strengthened to allow the OIO to require a person to provide information or documents when the OIO considers that it is necessary or desirable for the administration or enforcement of the OIA;
- b. the OIO will, at its discretion, be able to "notify" an overseas person that if they dispose of property if the OIO has reasonable grounds to believe that the overseas person has purchased in breach of the OIA, that person is protected from further liability or penalty. This is intended to incentivise overseas persons who breach the residential property screening regime to agree to sell, avoiding the need for the OIO to routinely undertake lengthy and expensive court proceedings to force disposal. The OIO would have the discretion to issue a disposal notice for a failure to meet conditions of consent, for instance in relation to conditions for 'increasing housing';
- c. the OIO will be able to serve documents using alternative mechanisms to personal service, such as service at a known electronic address or by leaving documents at the address of the relevant property. This is intended to give the OIO practical means of service where an "overseas person" is overseas or otherwise difficult to personally contact;
- d. the maximum civil penalty in the OIA is increased to three times the gain that the investor has made (the penalty is currently limited to the gain the investor has made). This means the penalty will act as an incentive to comply with the OIA, rather than allowing someone to break even (or less) through a breach;
- e. a third-party person who is 'involved in a contravention' of the OIA (for example, they aid or abet the contravention) would be liable for a civil penalty as well as the overseas person who contravenes the OIA. There will be protections for innocent third-parties who reasonably relied on apparently sound information. Such a person will have a defence if the person's involvement in the contravention was due to reasonable reliance on information supplied by another person, or if the person took all reasonable and proper steps to ensure compliance with the OIA; and
- f. conveyancers will be required to certify that, to the best of their knowledge, the purchase is not inconsistent with the proposed rules. A conveyancer that fails to provide the required certificate or to keep a copy of the certificate on file will be liable for an offence. The requirement to certify is a matter that the Registrar-General of Land might in future specify as a statutory requirement for the transfer instrument, with the effect that the conveyancer would be required to confirm in the course of the e-dealing that the requirement to certify had been met.


Compliance and Enforcement Enhancements to Apply to all OIO Sensitive Assets

- 36 The Bill proposes that the new compliance and enforcement powers (with the exception of the proposed duty on conveyancers) are not limited to purchases of sensitive residential land, but are applied across the entire OIA regime (i.e. to overseas investments in other sensitive land, in significant business assets, or in fishing quota). Given this coverage is potentially wider than Cabinet envisaged, I seek Cabinet authorisation for those measures.

International Relations and Obligations

- 37 s6(a) 
- 38 s6(a) + s9(2)(h) 
- 39 s6(a) 

Related Processes

- 40 s6(a) 
- 41 In addition, due to the speed of the policy and drafting process supporting this Bill, PCO intends to continue to make changes to the Bill of a minor technical nature after LEG and before Cabinet, and officials are anticipating that some of the current content of this Bill will also be amended by SOP.
- 42 Therefore, it is anticipated that significant new or amending material will be introduced into the Bill by way of SOP during its passage in the House.

Regulatory impact analysis

- 43 The Regulatory Quality Team at the Treasury has reviewed the Regulatory Impact Statement “Screening Overseas Investment in Sensitive Residential Land” by the Treasury in accordance with revised expectations for Regulatory Impact Assessments covering 100-day priorities.
- 44 The Regulatory Impact Statement clearly sets out the implementation choices and the reasoning for the selection of preferred options from among those. Within the constraints set out in the section “Key Limitations or Constraints on Analysis”, the analysis of the likely impact of the proposed approach on the New Zealand housing market is more limited, for instance through the impact on investor incentives and the commercial attractiveness and viability of building new houses under the new system.
- 45 It will be important to continue to focus on ways of monitoring the impact of this policy on overall housing market outcomes to help address this, for example to assess whether new housing built with funding from overseas is additional to, or a substitute for, housing that would otherwise have been built using domestically sourced funding, in addition to continued attention on managing implementation risks.

Compliance

- 46 The Treasury considers that the Bill is consistent with:
 - 46.1 *the principles of the Treaty of Waitangi*. This is provided that the regulations for an exemption for non-citizens of Māori descent in relation to Māori freehold land come into force at the same time as the Bill. The addition of a regulation-making power for this purpose was prompted by consultation with Te Puni Kōkiri. The Treasury also proposes to seek Crown Law’s confirmation, after introduction, that the Bill does not raise any other inconsistencies with the principles of the Treaty. If necessary, the Treasury proposes that any such matters be addressed by amendment to the Bill;
 - 46.2 *the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993*. Rights that are potentially engaged include the right to freedom from discrimination (on the grounds of national origin), freedom of expression, and freedom from unreasonable search and seizure (in relation to the amendment to the information gathering power in proposed new section 41(1)). In relation to discrimination, the limitation on the freedom is connected to the Bill’s objective and proportionate. In relation to freedom of expression and freedom from unreasonable search and seizure, the inclusion of a requirement that the regulator have reasonable grounds before exercising the power means that the limitation is not unreasonable and is justified in light of the Bill’s objective;
 - 46.3 *the disclosure statement requirements*. A draft disclosure statement had been prepared and is attached to this paper. There may be consequential changes to it as a result of further work on the Bill;

- 46.4 *the principles and guidelines set out in the Privacy Act 1993.* The Treasury has engaged with the Privacy Commissioner on the development of the policy, in particular to ensure that the information gathering power is proportionate to the policy need. Much of the Privacy Commissioner's feedback has been incorporated into the Bill, including a provision to clarify that, in relation to use and disclosure of personal information gathered under the power, the Privacy Act 1993 applies. The Privacy Commissioner has indicated that he is pleased with the level and nature of engagement. He has however expressed the view that the information gathering power could be further limited and has indicated that he intends to submit to the Select Committee. Officials have advised that they intend to continue to work with the Privacy Commissioner to anticipate and respond to this residual concern.
- 46.5 *relevant international standards and obligations.* Refer to the discussion above in the *International Relations and Obligations* section; and
- 46.6 *the LAC Guidelines on the Process and Content of Legislation (2014 edition).* In particular, officials consider that the regulation-making powers proposed in the Bill comply with LAC guidelines.

Certain of the regulation-making powers could be seen as covering matters of significant policy and accordingly better suited for primary legislation ^{s9(2)(j)}

However, officials consider that such matters will be technically complex and, possibly, subject to change; both of which are factors that weigh in favour of locating them in regulations.

For the purposes of the definitions of 'accommodation facility' and 'residential dwelling', the Bill makes provision for regulations to declare a class of premises to be treated as not falling within those definitions. Such regulations-making powers risk comment from the Regulations Review Committee on the grounds that they allow for regulations to determine the circumstances in which the Bill will apply, a matter more appropriate for primary legislation. Officials' view is that the definitions in the Bill are well developed and the regulations would deal with technically complex matters to address potential uncertainty about the precise boundaries of the terms.

However, the new screening tests in the Bill could be criticised for being too prescriptive for primary legislation, and instead matters of detail could be provided for in regulations and be adjusted over time.

Consultation

47 The following consultation has taken place:

- 47.1 Treasury has consulted the following departments in the development of the advice supporting the recommendations in this paper: Land Information New Zealand, Ministry of Business, Innovation and Employment, Ministry of Foreign Affairs and Trade, Ministry of Justice; Inland Revenue, Parliamentary Counsel Office, the Overseas Investment Office, the Ministry for Primary Industries, and Te Puni Kōiri. The Department of Prime Minister and Cabinet has been informed;
- 47.2 Due to the short timelines there has been no consultation with private sector organisations or public consultation process;
- 47.3 The New Zealand First and Green parties have been consulted in the development of the proposal reflected in the attached draft Bill. The Labour-New Zealand First coalition agreement includes a shared goal to “*Strengthen the Overseas Investment Act and undertake a comprehensive register of foreign-owned land and housing.*” The Deputy Prime Minister and Minister of Land Information were members of the group of Ministers Cabinet delegated Power to Act in developing the details of the proposal.
- 47.4 The Minister of Finance, as portfolio Minister, agrees with the submission of this paper.

Binding on the Crown

48 The OIA is currently binding on the Crown. The Bill will be binding on the Crown upon commencement.

Allocation of decision making powers

49 No changes to the current allocation of decision-making powers are proposed.

Associated regulations

50 Regulations are not necessary to bring the Bill into operation.

51 However, various new regulations, using existing and amended regulation-making powers, will be required to give full effect to the policy that the Bill is intended to implement. It is anticipated that many of those regulations will come into force at the same time that the Bill comes into force.

52 The Bill amends the existing regulation-making powers to provide for the following matters:

52.1 prescribing, for the purposes of the OIA:

52.1.1 classes of dwellings not to be treated as residential dwellings;

- 52.1.2 classes of facilities to be treated as excluded accommodation facilities;
- 52.2 for the purposes of the commitment to New Zealand test (relevant to the acquisition of interests in residential (but not otherwise sensitive) land):
 - 52.2.1 prescribing visa classes and types and persons with a specified nationality status (“qualifying individuals”), and factors for assessing commitment to reside in New Zealand for each type of qualifying individual;
 - 52.2.2 trigger events (being events that, in relation to a qualifying individual that has acquired an interest in residential (but not otherwise sensitive) land, trigger the requirement to dispose of the interest);
- 52.3 to provide for the acquisition by a Māori person of an interest in residential land that is Māori freehold land for which the person is a member of the preferred classes of alienees (where those terms have the same meaning as in Te Ture Whenua Māori/Māori Land Act 1993). The intent of this provision is to enable regulations to be made that ensure Māori persons are not inadvertently prevented from acquiring that kind of interest as a consequence of the changes made in relation to residential land; and
- 52.4 to provide for the implementation of obligations in existing international agreements and that relate to overseas investments in sensitive land and overseas investments in significant business assets. ^{s9(2)(j)}

Other instruments

- 53 The Bill does not introduce any provision empowering other legislative instruments.
- 54 However, clause 21 of the Bill amends section 34 of the OIA. Section 34 provides the Minister with the ability to direct the OIO in relation to certain matters by a Ministerial directive letter. The OIO must comply with the directive letter. The directive letter is a type of delegated legislation.
- 55 The Bill will add, to the matters that are already set out in section 34, the following matters in relation to which the Minister can direct the OIO:
 - 55.1 conditions of consent; and
 - 55.2 whether, and in what circumstances, the proposed new section 16A(3)(b) (which relates to the “commitment to New Zealand” test for certain overseas investments in sensitive land) may be applied.

Definition of Minister/ department

- 56 No changes to the current definition of Minister are proposed. The OIA does not contain a definition of department.

Commencement of legislation

- 57 It is proposed that the Bill come into force 10 days after its assent. The new measures would apply to transactions entered into after that date. The current OIA rules will continue to apply to all transactions entered into before the commencement date, including 'conditional agreements' for sale and purchase where conditions precedent are not yet met and the contract is not yet enforceable at the commencement date.
- 58 If necessary the commencement method or date may need to be amended during the Bill's passage through the House, for instance if the proposed commencement turns out to be incompatible with Land Information New Zealand's implementation programme, s9(2)(j)

Parliamentary stages

- 59 The Bill should be introduced and referred to the Finance and Expenditure committee (FEC) prior to Christmas 2017, and s9(2)(f)(iv) s9(2)(j). This will require FEC to be instructed by the House, upon introduction, that the Bill is to be reported back to the House for its second reading s9(2)(f)(iv)

Recommendations

The Associate Minister of Finance (Hon David Parker) recommends that the Committee:

- 1 note that the Overseas Investment Amendment Bill amends the Overseas Investment Act (OIA) in order to deliver the Government's policy goals regarding overseas investment in residential land (including built-on land).
- 2 note that significant policy details included in the Bill were agreed by a group of Ministers delegated Power to Act by Cabinet, therefore have not been approved by a Cabinet policy committee;
- 3 s6(a) + s9(2)(h)
- 4 endorse the decisions made by Ministers with Power to Act;
- 5 s6(a)
- 6 approve the Overseas Investment Amendment Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;
- 7 agree that the Bill be introduced on 11 December 2017;

- 8 agree that the Government propose that the Bill be:
- 8.1 referred to the Finance and Expenditure committee for consideration; and
 - 8.2 s9(2)(f)(iv)
- 9 note that if necessary the commencement method or date may be amended during the Bill's passage through the House; and
- 10 note it is anticipated that significant new or amending material will be introduced into the Bill by way of SOP during its passage in the House.

Authorised for lodgement

Hon David Parker

Associate Minister of Finance

Departmental Disclosure Statement

Overseas Investment Amendment Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Treasury.

The Treasury certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

7 December 2017

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DRAFT

Part One: General Policy Statement

This Bill amends the Overseas Investment Act 2005 (the Act) to ensure that investments made by overseas persons in New Zealand will have genuine benefits for the country. The Bill has a focus on residential land, but also makes more general changes to the Act, including enhancing the information-gathering and enforcement powers of the Overseas Investment Office.

The Bill will ensure that overseas persons who are not resident in New Zealand will generally not be able to buy existing houses or other pieces of residential land. This will lead to a housing market with prices shaped by New Zealand-based buyers. The Bill will therefore make homes more affordable for New Zealand buyers at some times in the property market cycle, including for first home buyers, while also supporting our efforts to build a more productive economy, by helping redirect capital to productive uses.

Sensitive land that is residential land will be all properties classified as either “residential” or “lifestyle” for rating valuation purposes under the Rating Valuations Rules, which are issued by the Valuer-General. A property’s classification is held by the relevant territorial authority and could be obtained directly from them, or from various property-information websites.

A natural person is an overseas person under the Act if they are neither a New Zealand citizen nor “ordinarily resident in New Zealand”. The Bill modifies the definition of “ordinarily resident in New Zealand” for the purposes of the new residential land provisions. Under that new definition, a person will be ordinarily resident here if they hold a residence class visa and have been residing in New Zealand for at least a year and have been present in New Zealand for at least 183 days in the past year. The definition of “ordinarily resident in New Zealand” remains as it is in the current Act for all other purposes.

The policy in the Bill will be implemented in a way that is consistent with New Zealand’s existing international obligations, and the Bill contains the power to make regulations where necessary to implement those obligations.

The Bill provides that overseas persons would be able to buy sensitive land that is residential land in certain situations. These are—

- if they will be developing the land and adding to New Zealand’s housing supply; or
- if they will convert the land to another use and are able to demonstrate this would have wider benefits to the country; or
- if they can show they have committed to reside in New Zealand.

The Bill requires that conditions be imposed if an overseas person purchases residential land utilising one of these exemptions, for example, if an overseas person purchases residential land for development, they will be required to on-sell or let the new houses that they build.

The Bill enhances the information-gathering and enforcement powers of the Overseas Investment Office, including by providing for civil liability for those involved in a contravention of the Act. These enhancements will assist in ensuring compliance with the Act.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	NO
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Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
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Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>“Screening Overseas Investment in Sensitive Residential Land”, The Treasury, 30 November 2017</p> <p>Available from: http://www.treasury.govt.nz/publications/informationreleases/ris</p>	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	YES
<p>The Regulatory Quality Team at the Treasury has reviewed the Regulatory Impact Statement “Screening Overseas Investment in Sensitive Residential Land” by the Treasury in accordance with revised expectations for Regulatory Impact Assessments covering 100-day priorities.</p> <p>The Regulatory Impact Statement clearly sets out the implementation choices and the reasoning for the selection of preferred options from among those. Within the constraints set out in the section “Key Limitations or Constraints on Analysis”, the analysis of the likely impact of the proposed approach on the New Zealand housing market is more limited, for instance through the impact on investor incentives and the commercial attractiveness and viability of building new houses under the new system.</p> <p>It will be important to continue to focus on ways of monitoring the impact of this policy on overall housing market outcomes to help address this, for example to assess whether new housing built with funding from overseas is additional to, or a substitute for, housing that would otherwise have been built using domestically sourced funding, in addition to continued attention on managing implementation risks.</p>	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	NO
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Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	NO
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
These matters are considered at a high level in the Regulatory Impact Statement, available through the link above.	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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The Ministry of Foreign Affairs and Trade has been involved in the development of the changes this Bill gives effect to, to ensure that the changes are consistent with policy space preserved in trade agreements for the operation of our overseas investment screening regime.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

Treasury officials consulted with Te Puni Kōkiri to determine whether the changes in the Bill (in particular, the restriction on overseas person purchasing residential property) are consistent with the principles of the Treaty of Waitangi. Through this, a potential problem was identified: the policy could potentially prevent a non-citizen of Māori descent acquiring an interest in Māori freehold land with which the person is associated in accordance with tikanga Māori. Accordingly, it is intended that an exemption to the policy will be introduced through regulations to ensure that this does not occur.

Te Puni Kōkiri have noted that it is important for this exemption to apply from when this Bill takes effect, as otherwise there is a risk that the non-citizens of Māori descent could be prevented from having their ancestral connection to Māori freehold land recognised.

Due to time constraints, it has not been possible to consult more widely on this. However, interested parties will have an opportunity to make submissions on the Bill as part of the Select Committee process.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	YES
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Advice provided to the Attorney-General by the Ministry of Justice, or a section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. Such advice, or reports, will be accessible on the Ministry's website at <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/>

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
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(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
--	-----

(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	NO
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Clauses 27, 28 and 31

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
<p>The Ministry of Justice was consulted during both the policy development and the drafting of the Bill.</p> <p>The Ministry received draft versions of the Bill for their comment. The Ministry's feedback was incorporated in some of the provisions of the Bill where this was feasible in the time available.</p>	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
Clauses 21 to 25	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
<p>The Privacy Commissioner was consulted on the content of the Bill.</p> <p>As a result of the consultation, provisions that confirm the confidentiality of information obtained under the Bill's information gathering powers have been amended to ensure that personal information is subject to the Privacy Act 1993.</p> <p>However, the Commissioner considers that expressly limiting the purpose of the information gathering powers to determining eligibility to purchase would be beneficial from a privacy perspective. The Commissioner will present proposed drafting improvements to Select Committee.</p>	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	NO
<p>Due to the short timelines for developing this Bill, there has been no consultation with private sector organisations or public consultation process. However, we understand that the Bill will be referred to a select committee, so there will be an opportunity for the public to make submissions on the policies this Bill gives effect to.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
<p>These changes were developed in close consultation with the Overseas Investment Office (the regulator under the Overseas Investment Act) with the aim of trying to ensure that they are workable. We note the changes have been developed in a very short timeframe.</p>	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
--	----

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
--	----

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
---	----

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	YES
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	YES

Clauses 28, 29 and 31

The Bill provides for civil liability for people who are 'involved' in a contravention of the Act, the commission of an offence, or a failure to comply with a notice or condition. Some of the contraventions, offences, and failures (already in the Act) are strict liability matters. The concept of involvement in the civil liability context reflects the party liability concept in the criminal context.

In order to ensure that people who have a good excuse do not unfairly have civil liability imposed on them, the Bill contains 2 defences on which an 'involved person' could rely. The defences are:

- that the involved person reasonably relied on information supplied by another person; or
- that the involved person took all reasonable and proper steps to ensure that the person primarily responsible for the contravention, offence, or failure complied with the Act, did not commit the offence, or complied with the relevant notice or condition (as the case may be).

In both cases, the burden of proving that the defence applies is on the 'involved person', because the accused person is best placed to give evidence as to the existence of the defence.

The Bill imposes a duty on conveyancing practitioners in relation to transactions involving residential land. The practitioner is required to certify that, to the best of their knowledge, the transaction does not contravene the Act. A practitioner who, without reasonable excuse, fails to certify, or to retain the certificate for 7 years, commits an offence. The 'without reasonable excuse' component of the offence requires the conveyancing practitioner to establish that they have a "reasonable excuse" if they want to rely on that. The offence is treated in this way because the accused person is best placed to establish the existence of a reasonable excuse.

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	YES
<p>Clause 26</p> <p>The Bill provides for immunity for civil and criminal liability for a person who complies with a notice to dispose of property. Under new section 41E, the regulator would be able to issue a notice to dispose of property to a person where the regulator has reasonable grounds to believe that the person has, in relation to the property, contravened the Act, committed an offence under the Act, or failed to comply with a condition of a consent or of an exemption. If the person complies with the notice (by disposing of the property), new section 41F(1) would provide that they have immunity from civil or criminal liability in relation to the contravention, offence, or failure to comply on which the notice was based.</p> <p>The purpose of the provision is to provide the regulator with an option that encourages a non-compliant purchaser to comply with the Act, without the need for prosecution.</p>	

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
<p>Clauses 11, 14 and 16</p> <p>The Bill provides the relevant Minister with new decision making powers – in particular, the threshold for various tests in the Bill are that the relevant Minister is satisfied that various criteria are satisfied.</p> <p>This is consistent with the approach currently taken in the Overseas Investment Act, where the ultimate decision making rests with the relevant Ministers (such as under section 14 of the Act).</p>	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	YES
<p>Clause 33</p> <p>The Bill amends the existing regulation-making powers to provide for the following matters:</p> <ul style="list-style-type: none"> • prescribing, for the purposes of the Act,— <ul style="list-style-type: none"> ◦ classes of dwellings not to be treated as residential dwellings: ◦ classes of facilities to be treated as excluded accommodation facilities: • for the purposes of the commitment to New Zealand test (relevant to the acquisition of interests in residential (but not otherwise sensitive) land)— <ul style="list-style-type: none"> ◦ prescribing visa classes and types and persons with a specified nationality status (“qualifying individuals”), and factors for assessing commitment to reside in New Zealand for each type of qualifying individual: ◦ trigger events (being events that, in relation to a qualifying individual that has acquired an interest in residential (but not otherwise sensitive) land, trigger the requirement to dispose of the interest) • to provide for the acquisition by a Māori person of an interest in residential land that is Māori freehold land for which the person is a member of the preferred classes of alienees (where those terms have the same meaning as in Te Ture Whenua Māori/Māori Land Act 1993). The intent of this provision is to enable regulations to be made that ensure Māori persons are not inadvertently prevented from acquiring that kind of interest as a consequence of the changes made in relation to residential land. • s6(a) + s9(2)(j) <p>It is necessary for these matters to be dealt with through regulations because they will be technically complex and potentially subject to change, both of which are factors that weigh in favour of locating them in regulations. These new regulation-making powers are limited in scope, constraining their use.</p>	

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>Clause 29 of the Bill amends section 34 of the Act.</p> <p>Section 34 provides the Minister with the ability to direct the regulator (the Overseas Investment Office) in relation to certain matters by a Ministerial directive letter. The regulator must comply with the directive letter. The directive letter is a type of delegated legislation.</p> <p>The Bill will add, to the matters that are already set out in section 34, the following matters in relation to which the Minister can direct the regulator:</p> <ul style="list-style-type: none"> • conditions of consent • whether, and in what circumstances, proposed new section 16A(3)(b) (which relates to the commitment to New Zealand test for certain overseas investments in sensitive land) may be applied. 	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO
--	----

Coversheet:

s6(a), s6(c) + s9(2)(h)

Advising agencies	
Decision sought	
Proposing Ministers	

Glossary

CER
CPTPP
LINZ
OIA
OIO

Impact Statement:

s6(a), s6(c) + s9(2)(h)

Section 1: General information

Purpose

The Treasury is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing final decisions to proceed with a policy change to be taken by or on behalf of Cabinet.

Key Limitations or Constraints on Analysis

Describe any limitations or constraints, for example:

- *Scoping of the problem*
- *Evidence of the problem*
- *Range of options considered*
- *Criteria used to assess options*
- *Assumptions underpinning impact analysis*
- *Quality of data used for impact analysis*
- *Consultation and testing*

To come

Responsible Manager (signature and date):

[Name]

[Team]

[Branch/Directorate]

[Agency]

Section 2: Problem definition and objectives

2.1 What is the context within which action is proposed?

The Government has made a commitment to deliver on a number of policy objectives within the first 100 days following the 2017 election. As part of this plan, the Government committed to *ban overseas speculators from buying existing houses*.

s9(2)(h) + s9(2)(j)

2.2 What regulatory system, or systems, are already in place?

There are currently no regulations specifically targeted at banning the sale of residential property to overseas speculators in New Zealand. However, two existing regulatory systems address related issues.

Benefits test for overseas investment in sensitive land

Foreign investment in New Zealand is regulated by the Overseas Investment Act 2005. The Act requires prior approval for foreign investment in three categories of investments. In order to be granted consent to invest in these assets, applicants must meet certain tests for each type of investment (outlined below).

s6(a) + s9(2)(h)

Category of Investment	Test(s) required
Significant business assets Assets valued over \$100 million ¹	Investor Test Investors must demonstrate: <ul style="list-style-type: none">- business experience or acumen,- a financial commitment to the investment,- they are of good character,- absence of ineligible individual(s) for visas or entry permissions under the Immigration Act 2009.
Sensitive land This is defined by the Act and includes non-urban land over 5 hectares, certain offshore islands, foreshore and seabed, reserves, and historic areas	+ Benefit Test² Investors must demonstrate: <ul style="list-style-type: none">- the investment will provide substantial and identifiable (in most instances) benefit for New Zealand
Fishing quota	+ National Interest Test is similar to the benefit test.

The Overseas Investment Office assesses applications from overseas investors to invest in sensitive New Zealand assets to make sure they meet the criteria in the Overseas Investment Act 2005. Applications are determined by the Minister of Finance for significant business applications, and the Minister of Finance and the Minister for Land Information in the case of sensitive land applications. Certain decisions are also delegated to the Office for determination.

Bright-line test for the taxation of residential property



In 2015, a two-year bright-line test for the taxation of residential investment property was introduced. This test provides an unambiguous rule to supplement the “intention” test for taxing capital gains in the current land sale rules. Many taxpayers did not appear to be self-assessing their sales as taxable, while the subjective nature of the ‘intention test’ made it difficult to enforce. The bright-line test was targeted towards the problems of enforcement in relation to the significant churn and short term speculation in residential property.

¹ Thresholds are higher for Australian investors: threshold for non-government investors is \$501 million and threshold for government investors is \$105 million.

² These benefits can be economic, such as additional jobs or improved market access, but can also include other benefits such as providing walking access, undertaking pest control, protecting and enhancing indigenous fauna and vegetation.


2.3 What is the policy problem or opportunity?

s6(a), s6(c) + s9(2)(h)



- I.
- II.
- III.

s6(a), s6(c) + s9(2)(h)



2.4 Are there any constraints on the scope for decision making?

s6(a)



s6(a) + s9(2)(i)



2.5 What do stakeholders think?

The Treasury has consulted the following departments in the development of the advice: Land Information New Zealand, Ministry of Business, Innovation and Employment, Ministry of Foreign Affairs and Trade, Ministry of Justice; Inland Revenue, Parliamentary Counsel Office, the Overseas Investment Office and Te Puni Kokiri.

Due to the short timelines that this advice has been prepared under, there has been no consultation with private sector organisations or public consultation process. However, a public consultation process will occur through the select committee process etc.

Section 3: Options identification

The following section examines the various issues with respect to meeting the policy objectives. We identify and discuss options to address each issue.

I.

s6(a), s6(c) + s9(2)(h)

II. The new builds exemption

What qualifies as a new build?

D. How to apply the new build exemption?

E. How to apply the ability to let under the new build exemption?

We then evaluate these options against the following criteria:

Criteria:

- **Policy effectiveness** s6(a), s6(c) + s9(2)(h)
- **Compliance with New Zealand's international obligations:** Obligations in a number of existing trade and investment agreements include the obligation not to discriminate on the basis of nationality.
- **Minimising compliance and administration costs:** Supported by clear and simple rules that fit in with existing regulatory frameworks and land sale processes.

The role of real estate agents and conveyancers is dealt with subsequently as these options are considered against a different set of criteria.

I. s6(a), s6(c) + s9(2)(h)

A. s6(a), s6(c) + s9(2)(h)

Issue: The first issue is to identify an appropriate regulatory framework to delivery this policy. A critical element of this is determining whether the regime has existing compliance and enforcement mechanisms which could be used.

Option A1: Overseas investment screening regime	<ul style="list-style-type: none">• s6(a), s6(c) + s9(2)(h)• This approach would utilise existing features of the OIA, including the screening regime, which requires overseas investors to obtain government consent before acquiring certain investments, including defined “sensitive land”.
Option A2: Conveyancing agents eligibility check	<ul style="list-style-type: none">• This option would require conveyancing agents to undertake an eligibility check on housing transactions. This would require changes to the Land Transfer Act (or an alternative new piece of legislation) requiring a certificate that the new beneficial owner is not an overseas person for the sales transfer to proceed.

Preferred – Option A1: On balance, we favour option A1 – the overseas investment screening regime, s6(a) + s9(2)(h)

We consider that Option A1 provides the best balance against the three policy criteria:

- *Policy effectiveness:* Option A1 allows this policy to utilize a number of useful anti-avoidance provisions already embedded in the Overseas Investment regime including capturing beneficial owners and transactions on behalf of associates. In comparison, the Land Titles Register under Option A2 doesn’t currently record beneficial interests and there would be some additional complexity adding that requirement. With respect to new builds, it would be easier to include new builds under Option A1 than under Option A2.
- *International obligations:* s6(a) + s9(2)(h)
- *Minimizing compliance and administrative costs:* Additional resources would be needed for the OIO to implement Option A1 but the cost of the policy would be borne primarily by overseas persons who make applications. Compliance levels could be increased through involvement of the conveyancing sector. In comparison, Option A2 the compliance regime would be outside of the Government’s control which may necessitate a new oversight regime for the conveyancing industry. s6(a)

s6(a), s6(c) + s9(2)(h)

<p>Option B1: Using the Rating Valuation Rules</p>	<ul style="list-style-type: none"> • s6(a), s6(c) + s9(2)(h) • These classifications are performed according to the Rating Valuations Rules, which are issued by the Valuer-General under the Rating Valuations Act. These rules require councils to assign a “property category” to each property based on its highest and best use (which can be different from its actual use). • Residential property is defined in the Rules as “residential land of a domestic type”. Lifestyle property is land that is larger than an ordinary residential allotment, generally in a rural area, and where the predominant use is for a residence.
<p>Option B2: Using the Income Tax definition of residential property</p>	<ul style="list-style-type: none"> • s6(a), s6(c) + s9(2)(h) <ul style="list-style-type: none"> i. land that has a dwelling on it; ii. land for which the owner has an arrangement that relates to erecting a dwelling; iii. bare land that may be used for erecting a dwelling under rules in the relevant operative district plan; • Land used predominately as business premises or is farmland is excluded from being “residential land”. This definition is used in the 2-year bright-line rule and in the residential land withholding tax rules.
<p>Option B3: Zoning basis definition</p>	<ul style="list-style-type: none"> • s6(a), s6(c) + s9(2)(h)
<p>Option B4: Definition based on intention of use</p>	<ul style="list-style-type: none"> • s6(a), s6(c) + s9(2)(h) • In contrast to the options above, the classification of a property would not turn on the characteristics of the land itself, but rather on how that land is intended to be used. This means, for example, that a large farm would be classified as “residential property” if it is purchased by a person with no intention to actively farm the land. Similarly, a house would not be classified as “residential property” if it is purchased by a person who intends to operate a business from the property.

Preferred – Option B1: On balance, we favour option B1 which defines residential land as land that has a property category in the relevant council's District Valuation Roll as either “residential” or “lifestyle” under the Rating Valuation Rules.³

We consider option B1 to be the strongest option when assessed against the policy criteria established for this policy:

- *Policy effectiveness:* s6(a), s6(c) + s9(2)(h)
[Redacted]
- *International obligations:* s6(a), s6(c)
[Redacted]
- *Minimizing compliance and administrative costs:* s6(a), s6(c) + s9(2)(h)
[Redacted]

While this is a new use for the District Valuation Roll, we note that it is designed to underpin a form of taxation (Council rates). Because of this, each council's Roll is audited periodically by the Valuer General to ensure national consistency and registered valuers are required to maintain it.

We also note that a property owner can object to how their property has been classified on the Roll – for example, if a property has been classified as lifestyle but would be better classified as pastoral. An objection does not mean that the classification will necessarily be changed, however; it means that the relevant councils' valuation provider will consider what its classification should be.

³ Strictly speaking, a property's classification is not recorded in the DVR but is recorded as part of the “supporting information” that councils are required to maintain for each property alongside the DVR.

Residence class visas include two categories:

- **permanent resident visas** (which have no conditions and do not expire if the person is outside New Zealand); and
- **residence visas** (which may have conditions and can expire if the person is outside of New Zealand). As long as they remain in New Zealand people with Resident Visas have a right to reside in New Zealand indefinitely (provided certain conditions are met). They can be eligible for a Permanent Resident Visa if they spend enough time in New Zealand over two consecutive years or meet other specified criteria demonstrating a commitment to New Zealand.

Note that the treatment of Australian citizens and permanent residents will be treated the same as New Zealand citizens and permanent residents in accordance with commitments under the CER.

Option C1: <i>Use definition of “ordinarily resident in NZ” from OIA</i>	<ul style="list-style-type: none"> • This option would adopt the definition of “ordinarily resident in New Zealand” used by the OIA. The test determines whether a residence class visa holder is resident or domiciled in New Zealand and therefore eligible to invest without screening. • The existing definition of “ordinarily resident in New Zealand” requires an investor to judge whether they are ‘residing in New Zealand with the intention of residing there indefinitely’. • Current OIO practice in assessing applications is that an investor that resides in New Zealand for 183 or more days within the last 12 months is likely to meet this test.
Option C2: <i>Establish a bright line test solely based on visa status</i>	<ul style="list-style-type: none"> • This option would permit holders of New Zealand residence class visas, including permanent residents, to invest without consent, whether or not the visa holder resided in New Zealand.
Option C3: <i>Establish a bright line test based on visa status and actual residence</i>	<ul style="list-style-type: none"> • This option would allow a person to invest if they hold a residence class visa <u>and</u> have been in New Zealand for a certain period of time. • A bright line version of the existing OIA test could be used. Legislating current OIO practice would require a person to have been resident in New Zealand for 12 months, and present in New Zealand for at least 183 days in that period. This test is more difficult to meet than the test for tax residency but is consistent with the purpose of the OIA.

Option C4: *Option C3, plus a mechanism to allow others with strong commitment to New Zealand to buy a home in some circumstances*

- This option extends option C3, so that holders of some classes of temporary entry visa that have strong long-term commitment to residence in New Zealand (and so are considered to be on a path to residence or citizenship) can also buy a home if they meet the time resident in New Zealand test (which is proposed to be 183 days within the last 12 months),
- Home buyers holding certain types of temporary work visas (to be defined in regulation) would need to notify the OIO of their investment (to enable compliance to be monitored) and would be subject to a requirement that they sell their property within a specified time of ceasing to be resident in New Zealand (the Australian regime requires sale within three months of ceasing to be resident).

Preferred – Option C4: On balance, we favour adopting option C4. This would involve establishing a bright line test based on visa status and actual residence, plus a mechanism to allow others with a strong commitment to New Zealand to buy a home in some circumstances.

We consider that Option C4 provides the best balance against the three policy criteria:

- *Policy effectiveness:* the test clearly establishes those that can invest in New Zealand and provides a pathway for others.
- *International obligations* ^{s9(2)(h)} [REDACTED]
- *Minimizing compliance and administrative costs:* the 183 day test would make little practical difference to the way the “ordinarily resident in New Zealand” test in the OIA is currently applied, but would be far more clear.

^{s9(2)(g)(i)} [REDACTED]

II. The new builds exemption

s6(a), s6(c) + s9(2)(h)

What qualifies as a new build?

Issue: A clear definition of “new builds” is needed to deliver the policy objective of allowing overseas persons to still purchase new builds.

The intention of this policy is for the definition to extend to vacant land, and land with an existing dwelling if the investment results in a greater number of dwellings on the land.

We also recommend that the exemption apply to investments that result in development of retirement villages, aged care facilities, student accommodation and similar facilities. These facilities provide medium to long term accommodation for their residents, and so effectively represent an increase in the supply of residential property.

We recommend that the Government have the ability to direct to OIO as to the types of dwellings that will meet the ‘new build’ test, and be able to amend that directive over time in order to maintain consistency with the Government’s wider housing policy.

We think it’s important that newly built dwellings not only increase the supply of residential housing, but are also the right types of residential dwellings. While the majority of new dwellings are likely to be suitable, the OIO is aware of cases in Auckland where low quality relocatable buildings are being moved onto properties. The ‘new build’ exemption should not be allowed to facilitate investment of that nature.

D. How to apply the new build exemption?

Issue: The mechanism for delivering the new build exemption is for it to operate as a criterion to be assessed by the OIO through the screening of investments (rather than, for example, a self-judging exemption from the ban on purchasing existing homes).

The current screening process under the OIA involves an assessment of a number of criteria against which applications to invest are assessed. One of these criteria is that the investment will benefit New Zealand, which is in turn assessed against a number of factors including the creation of jobs, increasing investment and export receipts, and a range of environmental and other factors. Approval is granted if all of the criteria are met, and is subject to conditions that are monitored to ensure compliance. The process is a comprehensive one, and takes on average five months to complete.

We have considered the OIA screening process against the objectives of reducing administration and compliance costs, and supporting increased housing supply. We prefer an option that minimises additional costs on developers.

<p>Option D1: <i>Consent after screening in all cases</i></p>	<ul style="list-style-type: none"> <div>s6(a), s6(c) + s9(2)(h)</div> <p>However, overseas persons could satisfy a simpler test than the existing test in the OIA recognising the type of land there are acquiring, and the significance of the Government's policies to increase the supply of residential property. Investors would need to satisfy to the OIO that it:</p> <ol style="list-style-type: none"> met the 'investor test', comprising financial commitment, business experience and acumen, good character, and compliance with certain sections of the Immigration Act; would increase the number of dwellings on the land; and the overseas person intends to on-sell or let the property.
<p>Option D2: <i>Consent as per Option D1, with a power to pre-approve developers</i></p>	<ul style="list-style-type: none"> The intention of this option is to provide a pre-approval process for overseas developers looking to engage in a programme of development. Investments by these investors are likely to be of low risk. This would minimise additional costs imposed on developers, which could work against the objective of increasing housing supply. Option D1 would apply in all other cases. <div>s6(a), s6(c) + s9(2)(h)</div> The pre-approval screening would be subject to similar conditions as a normal consent. Investors would be required to notify the OIO each time they acquire property so that the OIO can monitor the development and on-sale of lots in each case. The pre-approval would be for a limited time, but could be renewed by the OIO provided it was satisfied that the investor had complied with the conditions, and could be revoked if they had not.

Experience from Australia: The Australian overseas investment regime also makes available a similar exemption for programmes of land acquisition by developers. There have been criticisms in Australia of how this has operated, with significant proportions of newly built properties being sold to foreigners in some parts of Australia. We do not anticipate similar issues if this option was adopted in New Zealand as overseas persons would be subject to the requirement that they on-sell or let.

Preferred – Option D2: On balance, we favour adopting option D2 which requires investors to apply for consent before purchasing residential land and also provides a process to pre-approve overseas developers with a proven track record of developing residential property.

We consider option D2 to be the strongest option when assessed against the policy criteria established for this policy:

- Policy effectiveness:**

s6(a), s6(c) + s9(2)(h)

- International obligations:**

s6(a)

- *Minimizing compliance and administrative costs:* Option D2 would minimise the number of new applications for consent that the OIO would need to consider under the new builds exemption. This will reduce compliance costs for investors and administration costs for the OIO relative to option D1.

The OIO also has a wide power to impose conditions of consent. In order to ensure that the objectives of the new build exemption are met, we propose that the OIO would impose the following enforceable conditions on the investor, with the timeframes for each condition to be set on a case by case basis:

- That on-sale or letting of the property take place within a defined timeframe;
- the investment be disposed of if it is not developed as provided for in the consent; and
- developers report on their progress.

E. How to apply the ability to let under the new build exemption?

Issue: We understand that the policy intention is that the exemption allows overseas investors to invest in the construction of new residential property for letting to others. ^{s6(a), s6(c) + s9(2)(h)}

In general, we do not anticipate that the option to let a newly built property under the new build exemption would be used by many established developers. We understand the majority of developers to use a business model based around the construction and sale of properties, with any letting taking place by subsequent purchasers ^{s6(a), s6(c) + s9(2)(h)}. There may be some developers that use commercial leases or licensing arrangements, such as developers of retirement villages and student accommodation. A leasing arrangement may also be used by other developers offering innovative or niche rental services or seeking to maximise the value they derive from their investment prior to sale for capital gain.

Option E1: <i>Broad definition of lease, including residential tenancies and commercial leases</i>	<ul style="list-style-type: none"> • This option would allow an overseas person granted consent under the new builds exemption to lease their residential property through a residential tenancy or commercial lease. Commercial leases of residential property are relatively uncommon, as almost all tenancies are made under the Residential Tenancies Act.
Option E2: <i>Commercial leases, retirement villages and student accommodation only</i>	<ul style="list-style-type: none"> • This option would only allow the overseas person to “let” the underlying residential land, as well as the newly built dwellings under a commercial lease or arrangement used by an operator of a retirement village, aged care facilities and student accommodation. • This option would allow overseas person developers to retain ownership of the land and profit from any capital gains in land value over a longer period of time (compared with on-selling), which would better incentivise such investment. However, the interest of the developer could not be freely traded in an international market, as on-sale or leases for longer than three years to an overseas persons would be screened under the OIA.
Option E3: <i>Require overseas investors who wish to let newly built residential properties to meet the existing criteria for sensitive land by showing ‘benefit to New Zealand’</i>	<ul style="list-style-type: none"> • Under this option, investors would be required to meet the existing criteria for sensitive land by showing ‘benefit to New Zealand’. Relevant factors would likely include the creation of jobs, the introduction of investment for development purposes, and giving effect to significant Government policies or strategy (in the housing space). If the benefits were sufficient, then the OIO could consider granting consent without a requirement to on-sell the property, allowing the investor to lease or let the property.

Preferred – Option E2: On balance, we favour adopting option E2 which allows a developer to let (rather than on sell) the developed accommodation under a commercial leases or similar arrangement used by retirement villages, aged care facilities and student accommodation.

We consider option E2 to be the strongest option when assessed against the policy criteria established for this policy:

- *Policy effectiveness:* Option E2 will prevent an overseas person from assigning a tenancy to a relative or related party and residing in the property themselves or leaving vacant. It targets the class of investors – large developers – that we understand the exemption is intended to capture.
- *International obligations:* ^{s6(a)} [REDACTED]
- *Minimizing compliance and administrative costs:* Option E2 limits the applicability of this part of the new build exemption to a relatively narrow class of investments, reducing the number of transactions that would need to be screened. It also creates the largest number of bright lines for developers and limits screening.

III. Role of real estate agents and conveyancers

Property transactions generally involve two types of third-party agent: real estate agents and conveyancers.

- The Real Estates Agent Act 2008 provides the framework for the real estate industry in New Zealand.
- The Lawyers and Conveyancers Act 2006 provides the framework for the conveyancing profession in New Zealand. Conveyancing is the term used to describe the legal work required to transfer the ownership of real estate from one person or entity to another, which also includes the processing of subdivisions, leases and refinancing of mortgages.

We have considered the role these third parties could play in relation to the overseas buyers ban. Options span from imposing no formal obligations to requiring verification or certification. We have evaluated the options against the following criteria.

Criteria:

- **Ensuring compliance with the ban:** s6(a), s6(c) + s9(2)(h)
[Redacted]
- **Minimising the number of land transactions that fail because of the ban:** s6(a), s6(c) + s9(2)(h)
[Redacted]

F. Role of real estate agents?

Issue: Real estate agents are often – but not always – involved at the beginning of a property transaction, finding prospective purchasers and facilitating the signing of agreements to purchase.

Option F1: <i>No formal obligations</i>
Option F2: s6(a), s6(c) + s9(2)(h) [Redacted]
Option F3: s6(a), s6(c) + s9(2)(h) [Redacted]

We note that in Australia, real estate agents have no formal obligations under their overseas buyers ban, but they do play an informal role.

Preferred – Option F1: On balance, we favour adopting option F1 which places no formal obligations on real estate agents as part of this process. The informal role that real estate agents will be expected to play by the vendors of a property means this option will still support the objective of ensuring transactions do not fail, and it eliminates the risk that an obligation will be imposed on agents that they are unable to fulfil.

Option F1 does not preclude obligations being imposed on real estate agents subsequently. The Minister of Justice has the power under the Real Estate Agents Act 2008 to amend the practice rules for real estate agents, which impose certain obligations. s6(a), s6(c) + s9(2)(h)

s6(a), s6(c) + s9(2)(h)

- Option F2 – we do not consider that requiring verification from real estate agents – is a workable option. Real estate agents are generally engaged by the vendors of a property, not prospective purchasers. s6(a), s6(c) + s9(2)(h)
[Redacted]
In addition, we are concerned that this option would require real estate agents to verify something that may be outside their area of expertise.
- Option F3 – requiring notification from real estate agents s6(a), s6(c) + s9(2)(h)
[Redacted]
There are risks, however, with imposing obligations on real estate agents. For example, there are risks that an obligation may be impossible to comply with in certain circumstances (such as when an offer is received with little involvement from the agent).

G. Role of conveyancers?

Issue: Conveyancers are often engaged only after an unconditional agreement has been entered into. The conveyancer may not meet with his or her client to sign transfer documents until a few days before settlement.⁴

Option G1: s6(a), s6(c) + s9(2)(h) [Redacted]	
Option G2: s6(a), s6(c) + s9(2)(h) [Redacted]	<ul style="list-style-type: none">• s6(a), s6(c) + s9(2)(h) [Redacted]
Option G3: s6(a), s6(c) + s9(2)(h) [Redacted]	<ul style="list-style-type: none">• s6(a), s6(c) + s9(2)(h) [Redacted]

We note that in Australia, conveyancers are not required to make any formal certification – but they may face penalties if they proceed with a property transaction knowing that it is in contravention of the ban.

We have not engaged in any consultation with relevant stakeholders (such as the New Zealand Law Society). This means there is a risk that places additional obligations on conveyancers will have unintended consequences. This risk varies with the scale of obligations placed on conveyancers.

Agency preferred – Option G1: On balance, we favour adopting option G1, s6(a), s6(c) + s9(2)(h)

Government preferred – Option G2: On balance, the Government favours adopting option G2.

- s6(a), s6(c) + s9(2)(h)
[Redacted]

s6(a), s6(c) + s9(2)(h)

- s6(a), s6(c) + s9(2)(h)
[Redacted]

⁴ Note that a small number of transfers are lodged manually without the involvement of a conveyancer. Due to system constraints, we would not expect the number of these transfers to increase.

- Option G1 – requiring the conveyancer to certify that they have informed the purchaser –would help compliance with the regime from some overseas persons. s6(a), s6(c) + s9(2)(h)

- Option G2 – we anticipate that requiring certification to the best of the conveyancer's knowledge will operate similarly to options G1 or G3, depending on the circumstance. s6(a), s6(c) + s9(2)(h)

On the other hand, less cautious conveyancers may adopt a “don’t ask, don’t tell” approach, making no efforts to ascertain the status of the person. In this case, it would operate similarly to option G1.

[Section 4 is intentionally missing]

⁵ Even in the case of New Zealand citizens, they may not have a valid passport so may find proving this difficult. A transaction could be delayed while suitable evidence was obtained, even where there was no suggestion that a foreign buyer was involved.

Section 5: Conclusions

What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

s6(a), s6(c) + s9(2)(h)

• s6(a), s6(c) + s9(2)(h)

• s6(a), s6(c) + s9(2)(h)

- All other nationalities will be subject to screening unless they hold a New Zealand residence class visa⁶ (this includes permanent residents) and have been resident in New Zealand for the past 12 months and lived in New Zealand for more than 183 days during that period.

There will be three types of screening applications

- There will be an approval process for certain visa holders that do not meet the time in New Zealand test but demonstrate a long-term commitment to New Zealand:

Commitment to New Zealand applications	
Eligibility	<ul style="list-style-type: none">• Approve applications for consent for holders of relevant visas who have also demonstrated a long-term commitment to New Zealand.• Relevant parties are holders of residence class visas that do not meet the time in New Zealand requirement, and holders of certain (to be defined) work-related temporary visas. The eligible visa holders will be defined under a proposed new regulation-making power.
Conditions of purchase	<ul style="list-style-type: none">• Visa holders exempt through this process will be subject to a condition that they sell their investment within three months of ceasing to be resident in New Zealand (unless subsequent to the purchase they graduated to a residence class visa or became a New Zealand citizen);

⁶ Australian permanent residents are automatically eligible for a New Zealand residence class visa upon arrival

- There was also be an exemption for developments that increase the stock of residential property:

<i>New Build applications</i>	
<i>Eligibility</i>	<ul style="list-style-type: none"> • Overseas persons will be able to seek approval to buy residential land for the following purposes: <ul style="list-style-type: none"> ○ any development that increases the number of dwellings on the relevant site(s), including subdivisions that develop new residential sections for sale; ○ new or expansions to retirement villages, residential care facilities, student accommodation, and similar facilities; ○ conversion of the residential land to another use (example to build a motel or retail operation) • Overseas buyers wanting to use the new builds exemption will need to apply for OIO approval before purchase, and meet the existing OIO 'investor test' comprising financial commitment, business experience and acumen, good character, and compliance with certain sections of the Immigration Act. • Developers that are overseas persons will be able to be pre-approved to make multiple purchases of residential property in the course of their business without needing to screen each individual land purchase. • An overseas person be allowed to purchase a house before construction has begun ("off the plans"), subject to the obligations to sell or let the completed property.
<i>Conditions of purchase</i>	<ul style="list-style-type: none"> • There will be an obligation to on-sell or let the developed accommodation the completed property, • The ability to let is limited to commercial leases, or retirement villages, aged care facilities and student accommodation.

- **Beneficial use application:** s6(a), s6(c) + s9(2)(h) [REDACTED]
- s6(a), s6(c) + s9(2)(h) [REDACTED]
- **Role of real estate agents and conveyancers** - to come

5.2 Summary table of costs and benefits of the preferred approach, compared to taking no action

Affected parties (identify)	Comment: nature of cost or benefit (eg ongoing, one-off), evidence and assumption (eg compliance rates), risks	Impact \$m present value, for monetised impacts; H/M/L for non-monetised impacts	Evidence certainty (H/M/L)
<i>Regulated parties</i>			
<p>Holders of NZ residence class visas that do not meet time in NZ requirement; and</p> <p>Holders of certain (to be defined) work-related temporary visas</p>	<p>Costs – Will need to submit a <u>commitment to New Zealand application</u> to the OIO to be able to gain consent to purchase existing residential property.</p> <p>Approval to purchase a residential property will be subject to certain conditions which the OIO will monitor. Must sell within specific period of time after leaving the country.</p>	<p>Cost of application fee (TBD) and increased compliance costs.</p> <p>Limitations on ownership rights.</p>	H
<p>All holders of NZ residence class visas that do not meet time in NZ requirement;</p> <p>Temporary visa holders; and</p> <p>Other overseas buyers.</p>	<p>Costs – Unable to purchase existing residential property. Only eligible to purchase residential land in accordance with the <u>new builds exemption</u>.</p> <p>Will need to submit an application to the OIO that demonstrates they have met the criteria, as well as the existing investor test.</p> <p>Approval to purchase/develop will be subject to certain conditions which the OIO will monitor. Must on-sell new residential development unless meet criteria for commercial leases, or retirement villages, aged care facilities and student accommodation.</p> <p>Regular overseas developers will be able to be pre-approved to make multiple purchases of residential property.</p>	<p>Cost of application fee (TBD) and increased compliance costs.</p>	H
<i>Regulators</i>			
Overseas Investment Office	<p>Costs – significant increase in volume of transactions expected. Will also have expanded role around compliance, audit and enforcement.</p>	<p>Approx. \$18m for first two years (including implementation costs of new regime).</p>	H

<i>Wider government</i>			
	Benefits – Preserved policy space ahead of CPTPP. Stock of new residential property may increase...	Potential for displacement?	
<i>Other parties</i>			
Real Estate agents	Costs – TBC	TBC	
Conveyancers	TBC	TBC	
MBIE	TBC	TBC	
NZ & Australian citizens; and Holders of NZ residence class visas that meet time in NZ requirement	No change in ability to purchase residential property.	TBC	
Total Monetised Cost			
Non-monetised costs		(High, medium or low)	

5.3 What other impacts is this approach likely to have?

n/a

5.4 Is the preferred option compatible with the Government's 'Expectations for the design of regulatory systems'?

n/a

Section 6: Implementation and operation

6.1 How will the new arrangements work in practice?

Giving effect to the preferred option

Legislative process: The preferred option will be given effect through amendments to the Overseas Investment Act 2005. A Select Committee process commence in late December, with hearings commencing in late January 2018.

Commencement: The intended commencement date for this legislation is ##. The new legislation will not have retrospective effect as ###

Education: The OIO will undertake education for real estate agents and conveyancers on the new regime and their obligations under the regime, as this will be critical to ensure compliance. In addition, it is recommended that others involved in property transactions, including banks, financial advisors, accountants and immigration advisors are educated on the new regime. Lastly, it is important that the public is aware of the new requirements.

Role of the Overseas Investment Office

Once implemented, the Overseas Investment Office (OIO) will hold the primary responsibility for the ongoing operation and enforcement of the new arrangements. s6(a), s6(c) + s9(2)(h)

Overseas buyers will be eligible to seek approval from the OIO s6(a), s6(c) + s9(2)(h)

The OIO will need to update their current IT system to accommodate the increased volume of applications and additional functionality required. The OIO will receive additional resourcing to undertake this expanded role. There are three key components required under this expanded role:

A detailed screening regime: s6(a), s6(c) + s9(2)(h)

. Screening includes an investor test (including good character assessment) and, depending on which stream, a new builds test, a commitment to New Zealand test, or benefits test (under the existing regime).

A comprehensive compliance and audit system: All overseas buyers granted consent will have conditions attached to that consent. This will require the OIO to undertake activities to ensure compliance.

<i>Commitment to New Zealand applications</i>	<ul style="list-style-type: none">• Checks will be needed to ensure that the house is lived in (such as checks of utility bills) and that the property is on-sold when the person leaves.
<i>New builds applications</i>	<ul style="list-style-type: none">• The OIO will need to monitor progress on the build (eg. getting resource/building consent, and progress on the building of the house(s)) to ensure land banking does not occur, and that the houses are built in a timely manner, and on-sold or leased.

A robust enforcement regime:

s6(a), s6(c) + s9(2)(h)

The types of things that will need to be investigated include checking situations where people do not get consent when needed, do not comply with conditions imposed on consent, mislead the OIO or adopt avoidance mechanisms to get around the Act. Engagement with overseas persons and their advisors will be required. The fact that the people will often be overseas, and will often involve exchanges with people with a range of languages, adds to the time and cost involved. In addition, the OIO must have the ability to take legal action against overseas persons, otherwise the enforcement aspect of the regime will be seen as toothless.

Role of other parties

Impact on Conveyancers/real estate agents...

MBIE

6.2 What are the implementation risks?

- *What issues concerning implementation have been raised through consultation and how will these be addressed?*
- *What are the underlying assumptions or uncertainties, for example about stakeholder motivations and capabilities?*
- *How will risks be mitigated?*

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?

- *How will you know whether the impacts anticipated actually materialise?*
- *System-level monitoring and evaluation*
- *Are there already monitoring and evaluation provisions in place for the system as a whole (ie, the broader legislation within which this arrangement sits)? If so, what are they?*
- *Are data on system-level impacts already being collected?*
- *Are data on implementation and operational issues, including enforcement, already being collected?*
- *New data collection*
- *Will you need to collect extra data that is not already being collected? Please specify.*

TBC: *OIO will monitor the regime through the applications for exemptions and enhanced monitoring tools... also wider review of the OIO, may enhance data collection*

7.2 When and how will the new arrangements be reviewed?

- *How will the arrangements be reviewed? How often will this happen and by whom will it be done? If there are no plans for review, state so and explain why.*
- *What sort of results (that may become apparent from the monitoring or feedback) might prompt an earlier review of this legislation?*
- *What opportunities will stakeholders have to raise concerns?*



Cabinet

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Banning Overseas Buyers from Buying Existing Houses

Portfolio Associate Finance (Hon David Parker)

On 31 October 2017, Cabinet:

Policy

1 **noted** that the government's 100 day plan includes the commitment to "Ban overseas buyers from buying existing homes";

2 9(2)(h) [Redacted]

3 9(2)(h) [Redacted]

4 9(2)(f)(iv) [Redacted]

5 9(2)(j) [Redacted]

6 6(a) [Redacted]

7 **agreed** that the screening regime changes include provisions enabling overseas investors to invest in the construction of new residential property for on-sale or letting, in some situations;

8 6(a) [Redacted]

9 6(a) [Redacted]

9(2)(h),9(2)(j)

[REDACTED]

[REDACTED]

- 11 **noted** that the use of the existing definitions in the Act of “ordinarily resident” (in New Zealand) and “overseas person” will mean that people temporarily resident in New Zealand without permanent residence will be “overseas persons” for the purposes of the Act, and so subject to the enhanced residential property screening regime;
- 12 **noted** that further decisions are required on a range of detailed and technical issues;
- 13 **agreed** that Treasury will provide a regulatory impact analysis to help inform Ministerial decisions on the remaining policy details;

Legal

- 14 **invited** the Associate Minister of Finance (Hon David Parker) to issue drafting instructions to the Parliamentary Counsel Office to give effect to the proposal by amendments to the Act (including its regulations);
- 15 **authorised** a group of Ministers comprising the Deputy Prime Minister, Minister of Finance, Minister of Housing and Urban Development, Associate Minister of Finance (Hon David Parker) and the Minister for Land Information (joint Ministers) to have Power to Act to take decisions on further detailed policy matters that need to be addressed to enable the legislation to be drafted;
- 16 **invited** the Associate Minister of Finance (Hon David Parker) to present a draft bill to the Cabinet Business Committee on or before 11 December 2017;

Publicity

- 17 **agreed** that an announcement of the policy be made after Cabinet has taken decisions;
- 18 **noted** that many details of how the overseas buyer ban will be implemented are yet to be finalised;
- 19 **noted** the following points, which could be noted publicly:
- 19.1 confirming that legislation implementing the overseas buyer ban will be introduced before Christmas;
 - 19.2 the proposal will use the Overseas Investment Act regime;
 - 19.3 there will be an exemption for new build properties purchased for on-sale or letting in some circumstances;
 - 19.4 the detailed design will be worked through in the coming weeks;

6(a)

Implementation

- 20 9(2)(g)(i)
- 21 **noted** that giving effect to paragraph 20 will likely require a new regulation making power;
- 22 **authorised** joint Ministers to take decisions around design, implementation and associated charges;
- 23 **noted** that Land Information New Zealand estimates that implementing the policy will require around 9(2)(f)(iv) in capital and operating expenses over two years;
- 24 **noted** that the estimated costs referred to in paragraph 23 are subject to review by the Minister of Finance and the Treasury;
- 25 **authorised** joint Ministers to determine the final amount of the capital injection and/or agree to the necessary changes to appropriations to give effect to decisions taken under paragraph 22;
- 26 **noted** that the Fiscal Plan, consistent with the Budget Responsibility Rules, will ensure that the government is delivering a sustainable operating surplus across an economic cycle and reduce the level of net core Crown debt to 20% of GDP within the next five years;
- 27 **noted** that the financial implications in paragraph 25 (subject to decisions by joint Ministers) will be managed against the operating and capital funding set out in the Fiscal Plan;
- 28 **noted** that where costs exceed the financial implications in paragraph 25, the additional impact on operating balance before gains and losses and net core Crown debt will need to be managed;
- 29 **agreed** that Cabinet confirm ongoing funding implications, based on the details agreed by joint Ministers;
- 30 **directed** officials to review Australia's experience with compliance and enforcement of their ban on foreign home buyers and to report back to joint Ministers.

Michael Webster
Secretary of the Cabinet

Hard-copy distribution:

Prime Minister
Deputy Prime Minister
Minister of Finance
Minister of Housing and Urban Development
Associate Minister of Finance (Hon David Parker)
Minister for Land Information