Office of the Minister of Finance

Chair
CABINET POLICY COMMITTEE

REVIEW OF THE OVERSEAS INVESTMENT ACT

PROPOSAL

1. The Overseas Investment Act ("the Act") regulates the investment in certain New Zealand assets by overseas persons. An "overseas person", broadly, is an individual who is neither a citizen nor has the right of permanent residence, and a company that is 25% owned by individuals who are overseas persons.

2. I propose to limit the scope of the regime but strengthen its impact by requiring conditions to be imposed on overseas investors and requiring that compliance with these conditions is enforced. This is to acknowledge that certain standards are required of overseas investors and to ensure that the benefits of these standards actually accrue to New Zealand. Accordingly I propose that the overseas investment regime be modified to:

   - Acknowledge the standard required of overseas investors purchasing certain New Zealand assets, by requiring compliance with agreed plans;
   - Develop more specific remedies for instances when agreed plans are not reasonably complied with;
   - Expand the criteria for land to also take account of natural and historic heritage and walking access, and the possibility of a Crown right of first purchase of foreshore and seabed land, as appropriate;
   - Focus the regime on sensitive land, including all foreshore and seabed, fishing quota and significant (over $250 million) business transactions;
   - Disestablish the Overseas Investment Commission ("OIC") and have the relevant functions performed within Land Information New Zealand ("LINZ"). The Minister responsible for the Act would continue to be the Minister of Finance, with the policy function remaining with Treasury;
   - Maintain the scope for ministerial involvement in all decisions.

3. I do not propose any changes to the treatment of fishing quota under the regime, except to the extent the monitoring and enforcement provisions apply to all consents given under the Act.

EXECUTIVE SUMMARY

4. The main change proposed to the regime is to impose conditions on overseas persons making investments in sensitive New Zealand assets. Currently, certain criteria have to be met before an investment is approved. The proposal is that representations made, and plans submitted by the applicant in support of their application will be made conditions of consent that can be monitored.

5. The criteria for approval will be expanded so that it is clear that natural and historic heritage, and walking access proposals, can be taken into account. The current concessional treatment for potential migrants is to be continued, but will be tightened so that it is only available where an appropriate visa or work permit has been granted. However, there will not be a specific time limit to become a resident, provided in the opinion of the New Zealand Immigration Service the applicant is progressing towards residency.

6. The coverage of the regime will focus more on sensitive assets and as a result will reduce slightly. The threshold for business investments will increase so that screening is required for (non-land) business assets only where they are valued at over $250 million. Screening will remain over all sensitive land but not on land adjoining that some reserves. Land will not be screened based on value alone. The categories of land that will still be screened are listed in paragraph 23.

7. Coverage of the regime will encompass all foreshore and seabed land, irrespective of the size of the parcel. Further, the Crown will have the right of first refusal over the purchase of foreshore and seabed land that would otherwise be sold to an overseas person.

8. Reasonable compliance with representations and plans will be monitored, with levels of monitoring to be set by Ministers. Investors will be asked to certify on an ongoing basis that they are continuing to comply. There will be more flexibility for the courts in imposing fines for non-compliance.

9. All final decisions will continue to rest with Ministers, but with a power to delegate to a regulator. The current Overseas Investment Commission will be disestablished, and the functions of the regulator carried out within a government department. At this stage I propose that LINZ is the appropriate department, given the significant focus of the Act on land transactions. The functions of the regulator will include receiving and processing applications; consultation with relevant government departments and other agencies as appropriate; and providing information to applicants and the public generally. The current legislative policy advice function of the OIC will not remain, as the government's primary advisor on overseas investment is the Treasury, in consultation with MED and MFAT.

CONTEXT

10. On 10 November 2003, I announced a review of the Act. The purpose of the review is two-fold:

    First, to ensure that the overseas investment regime focuses on those assets of critical interest, such as certain sensitive land areas, natural

resources (e.g. fish) and assets with historical or cultural significance (e.g. heritage buildings).

Second, to further reduce compliance costs in areas where this is feasible, while ensuring the government's global connectedness objectives are achieved.

11. The current overseas investment regime raises the following problems:
    - overseas business investors are subject to some unnecessary compliance costs;
    - the legislation as it applies to land focuses on economic development, and ignores other important factors, such as its heritage value and public access;
    - the monitoring and enforcement provisions do not require proposed plans on which consent is given to be completed to a reasonable standard, and the Courts lack the ability to impose penalties commensurate with any breach by the applicant;
    - Ill defined accountability and governance structures.

12. Overall, the overseas investment regime lacks transparency, may provide a small disincentive for foreign investment into small and growing companies, and may promote non-optimal foreign investment outcomes.

13. The public policy objectives behind the changes to the Overseas Investment Act are to:

    - encourage foreign investment into New Zealand through reducing unnecessary compliance costs on businesses, recognising the growth benefits that foreign investment brings;

    - ensure that the value of sensitive New Zealand property is recognised and enhanced by any overseas owners. This recognises that for some land in New Zealand there is an 'ownership value'. That is, New Zealanders derive a welfare benefit from knowing that particular pieces of land are owned by New Zealanders. Thus, where the land is owned by an overseas investor, this lack of ownership value is compensated by the imposition of conditions;

    - ensure appropriate governance arrangements around the overseas investment regime.

14. Many of the concerns around overseas owners of land in New Zealand are to do with access, and land use. These arise in the context of changing communities (increasingly urbanised population; migrants) as well as overseas owners. For all landowners, these should already be addressed by other regulatory mechanisms, including the Historic Places Act and Resource Management Act. Other mechanisms include the Reserves Act, Crown Pastoral Land Act, Conservation Act, QE II covenants and Nga Whenua Rahui Kawenata. Current government initiatives include the Ministerial Reference Group work on walking access in New Zealand and the New Zealand Biodiversity Strategy.

15. However, there is an opportunity to reinforce those mechanisms where land is purchased by overseas investors. As noted above, many New Zealanders have a degree of unease about some land being in overseas ownership, and derive value or welfare from knowing that particular land is in New Zealand ownership even if they derive no other benefits from the land.

16. The Overseas Investment Act does not prohibit overseas persons from owning land in New Zealand. This is for several reasons: first, the parcels of land in respect of which there is an ownership value are difficult to identify specifically; and secondly this would impose a significant restriction on the private property rights of New Zealanders, which would (reasonably) require compensation from government. Further, a large proportion of New Zealand land is in New Zealand ownership through the Conservation estate. Instead, the Act acknowledges the importance of land, and other significant assets, to New Zealanders, by requiring overseas persons to show specific benefits.

17. In the international context, this regime should not inhibit the global connection objectives of our Growth and Innovation Framework. These include our policies of greater trans-Tasman harmonisation, and international agreements New Zealand has entered into. While the proposed changes relating to foreshore and seabed parcels may attract some comment and possible criticism, I have been advised that there are reasonable grounds for defending the adjustments, given the nature and history of the parcels concerned, as well as the nature and intent of our present reservations to the various relevant international instruments.

18. The Annex contains a diagram that outlines the proposed approach to processing applications for overseas investment into New Zealand and compares the current and proposed criteria. I have attached a background paper containing some relevant data and a summary of the current regime, which I propose to release publicly following the Cabinet decision.

LIKELY EFFECTS OF THE PROPOSED CHANGES

19. The changes may not make a large difference to the number of sales to overseas investors of sensitive land. The OIC estimates that the biggest impact on application numbers from these changes will be 13 fewer non-land applications a year. It is not clear what, if any, change in application numbers will come from the foreshore and seabed changes.

Approvals by category

	1998 - 2003	% of total (land) transactions	Average / year	Avg under proposed changes [b]
Non - land applications	**82** [a]		**20**	**7**
Fishing quota	**2**		**<1**	**<1**
Land	**1341**		**220**	**unknown**
Caught by one category only				
> $10 m	14	1	2	-
> 5ha	578	43	96	96
Lakes (adj)	2	-	<1	<1
Conservation Land (incl / adj)	2	-	<1	<1
Reserve, Public park etc (incl)	4	-	<1	<1
Reserve, Public park etc (adj)	55	4	9	<9
Heritage Order/Historic Place (incl)	14	1	2	2
Heritage Order/Historic Place (adj)	5	-	<1	<1
Foreshore	12	1	2	unknown
Islands	8	1	1	1
Associated Land	122	9	20	20
Caught by more than one category				
> 5 ha + other	466	35	78	78
Other combination	59	4	10	10
Total			**240**	

Note:

(a) Historical numbers are 2000 - 2003 only, the period over which the $50 million threshhold applied. Prior to this the threshold for business applications was $10 million.

(b) The expected approval numbers are based only on the changes in coverage. No effect on application numbers or approval rates from the changes in criteria, monitoring and enforcement are factored in.

20. There may be some changes in overseas investor behaviour. The improved monitoring and enforcement regime is likely to increase compliance with submitted land use plans, and, the broadened criteria could remove an incentive to develop land inappropriately in order to obtain consent under the Act.

21. Benefits of the changes include some reduced compliance costs for business investors consistent with building our global connections. In respect of land, benefits will be improved natural and historic heritage management or increased walking access. The financial costs of the proposed changes are discussed at paragraph 100 below. If the regime is perceived internationally as more restrictive, there could be a loss of overseas investment, however in my judgement, given the nature of the changes, this is unlikely to be the case.

COVERAGE

22. Coverage describes those assets in which an investment by an overseas person is subject to the Overseas Investment Act.

Land that will be screened

23. I propose that the screening regime continue to cover the land listed below. This will continue to include associated land, so that the intent of the Act cannot be

avoided by purchasing land in small parcels. Land continued to be covered by the regime will be:

- land over 0.2 hectares which adjoins the foreshore;
- land over 0.4 hectares that includes or adjoins any lake (the bed of which exceeds 8ha);
- land over 0.4 hectares on specified islands[1];
- any land on other islands[2];
- land over 0.4 hectares which includes or adjoins Conservation Act land which is over 0.4 hectares;
- land over 0.4 hectares which is provided as a reserve, a public park, for recreation purposes, or as a private open space, or is proposed for any such purpose;
- land over 0.4 hectares that is subject to any heritage order, or with Historic Places Act registration, or in respect of which a proposal for registration has been made; and
- any rural land over 5 hectares.
- land over 0.4 hectares adjoining coastal and lake front reserves and other margins that make up the Queen's Chain, where the reserves are over 0.4 hectares;[3]
- land over 0.4 hectares adjoining land which is over 0.4 hectares and which is subject to any heritage order, or with Historic Places Act registration, or in respect of which a proposal for registration has been made.
- land over 0.4 hectares adjoining scientific, scenic, historic and nature reserves over 0.4 hectares that are classified under the Reserves Act 1977 and that are administered by the Department of Conservation.

24. I consider that continuing to subject these land types to screening will ensure that land with significant 'ownership value' to New Zealanders is less likely to pass out of New Zealand hands unconditionally. The coast, lake-front and islands are all important to New Zealanders, and as such I consider it important that this land remain subject to screening.

25. In addition I propose that the regime encompass all foreshore and seabed land, irrespective of the size of the parcel. As noted above, I propose that the Crown have the right of first refusal over foreshore and seabed land that would otherwise be sold to an overseas person (see paragraphs 60 to 64 below). Because I propose that the Overseas Investment Act be used as the trigger for the right of first refusal process, it is important that all foreshore and seabed land be subject to the Act.

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1 Specified islands are: Arapawa; Best; Great Barrier; Great Mercury; Jackett; Kawau; Matakana; Mayor; Motiti; Motuhoa; Rakino; Rangiwaea; Slipper; Stewart; Waiheke and Whanganui Islands.

2 Other than the North and South Islands

3 This includes esplanade strips; esplanade reserves; marginal strips and other similar reserves (see paragraph 30)

26. I have been advised that application of the Act to all foreshore and seabed parcels, irrespective of size, is defensible under our international treaty obligations.

27. I propose to clarify that the Act applies to any land in respect of which the transfer would be governed by the Land Transfer Act 1952 or Te Ture Whenua Maori 1993. While this is not explicitly mentioned in the Act, I consider that its inclusion is within the spirit and intent of the existing legislation. This clarifies that all foreshore and seabed parcels are land and therefore subject to the Act.

28. The requirement for rural land over 5 hectares (12.5 acres) to be screened ensures that larger tracts of land, be it in the South Island High Country or other rural areas, need approval prior to purchase by an overseas person.

Land that will no longer be screened

29. The following categories of land are not necessarily sensitive, and in the absence of other sensitive features, will no longer be screened:

- Land with an unimproved land value over $10 million;
- Land adjoining reserves other than coastal and lake front reserves or margins; and scientific, scenic, historic and nature reserves classified under the Reserves Act 1977 and administered by DOC;

30. *Unimproved land value over $10 million*: Purchases caught under this category tend to be commercial buildings, shopping malls or industrial parks. These are not sensitive in themselves. For example the unimproved land value for 1 the Terrace, Wellington is only $6.3 million, but 1 Queen St, Auckland is $11.5 million. Under the proposal neither building would be subject to screening, whereas the Auckland building would currently be. On average two transactions a year are screened solely because their unimproved land value exceeds $10 million, and all are in urban areas.

31. *Adjoining reserves*: Screening for overseas purchasers will not continue for land adjoining some reserves. This is mainly for compliance cost reasons. There are many types of reserves, including recreation, drainage and hospital reserves. Land adjoining these reserves is not always sensitive and does not need to be screened.

32. I propose that screening be retained over land adjoining reserves that are particularly sensitive, or where access to sensitive land is an issue. Particularly sensitive reserves are scenic, scientific, historic and nature reserves that are so classified under the Reserves Act 1977 and are administered by the Department of Conservation. For access, screening should be retained on land that adjoins the foreshore and lake front, and land adjoining land that is held for conservation purposes under the Conservation Act. The foreshore and lakefront reserves broadly comprise what is referred to as the Queen's Chain, and will be either roads, road reserves, marginal strips, ambulatory marginal strips, public reserves or margins regained on subdivision.

33. An example of the effect of this change is that the Otari Native Botanic Garden in Wellington would be subject to the regime, but land adjoining it would no longer be. On average nine transactions a year have been screened solely because they involve land that adjoins a reserve.

Fishing quota

34. I propose that the current requirement for Ministerial permission of all fishing quota purchases by overseas persons be maintained. To improve transparency the Overseas Investment Act will refer to the provisions relating to fishing quota that are in the Fisheries Act, 1996. At present fishing quota is not mentioned in the Overseas Investment Act, although the relevant provisions in the Fisheries Act are required to be read as if they were part of the Overseas Investment Act.

Business investment

35. I propose that business investment be screened only where the business is likely to be of strategic interest. I consider that increasing the business threshold from the current level of $50 million to $250 million achieves this. The effect of this is that a purchase of 25% of a business with assets of $250 million will be subject to the Act. The higher threshold will mean that New Zealand will still be able to test whether overseas purchasers of our significant enterprises are of good character, while reducing the compliance costs on smaller businesses seeking foreign capital. For example, the recent purchase by ANZ of the National Bank would still require consent. Any purchase of 25% or more of companies such as Fonterra, Telecom, Ports of Auckland, and Fulton Hogan would also still require approval.

36. By increasing the threshold we are removing a small disincentive effect for overseas investment into our small and growing companies.

37. A further effect is that the higher threshold will become an expected starting point in negotiating future trade agreements. I note that under the recently agreed USA/Australia free trade Agreement, the threshold for US investment into Australia has been raised to A$800 million, except in certain sensitive sectors where it will remain at $50 million.

38. While this removes a number of transactions from the scope of the Act, it is important to remember that overseas owned companies operating in New Zealand are required to comply with the same regulatory laws as domestically owned or controlled companies. This includes the Consumer Guarantees Act, the Fair Trading Act, and the Health and Safety in Employment Act. Further, this proposal does not affect land that is transferred as part of a business, which will be screened in the same way as it would if it were transferred separately.

Aquaculture

39. The present regime covers fishing quota, but not the right to use coastal space for aquaculture. Aquaculture can be distinguished from both fishing quota and land. This is largely because the nature of the activity is, by the nature of the right, tightly controlled. An aquaculture right is a consent under the Resource Management Act to undertake a specified activity (and no other) within a defined coastal space for a defined period of time. The consent does not provide for

ownership of the coastal space. The local authority has the ability to ensure that appropriate conditions are attached to the consent to ensure the coastal resource is appropriately managed. Changing to any other activity would require a new consent application, as would expiry of the existing consent.

40. While aquaculture management in New Zealand is currently being reviewed, unless the nature of the rights changes significantly as a result of that review, I do not propose to cover aquaculture rights in the Overseas Investment Act.

Cutting rights

41. I propose that no change be made to the sale of forestry cutting rights. The sale of cutting rights to an overseas person does not currently require approval except as a non-land business transaction if the consideration is greater than $50 million (which will become $250 million under these proposals). I consider this is appropriate as cutting rights do not encompass ownership of the underlying land.

Maori Land

42. The sale of Maori freehold land is currently exempt from the provisions of the Overseas Investment Act if it has been confirmed by the Maori Land Court under section 152 of the Te Ture Whenua Maori Act 1993. In confirming a sale to an overseas person, the Maori Land Court is required, as far as possible, to act in conformity with the relevant provisions of the Overseas Investment Act and regulations; and must have regard to the matters required to be taken into account by that Act or those regulations. Thus both processes are currently required to be undertaken, but with the Overseas Investment Act process carried out by the Maori Land Court.

43. However the focus of the two Acts is different. The focus of Te Ture Whenua Maori is on promoting the retention of Maori land. In the sale context, it is designed to consider the actions of the vendor(s) of Maori land, and ensure that proper processes have been followed with respect to sale – for example that there is sufficient consensus for the sale and that the price is fair. In contrast the Overseas Investment Act considers the proposed actions of potential purchaser(s).

44. There are four main options, and the advantages and disadvantages of each are as set out below. All of the options assume the current processes of each Act will be retained, but allow for different decision makers in respect of each process. I recommend that we ask officials from Treasury and Te Puni Kokiri to discuss these options and the implications of them for the Court with the Maori Land Court, with a report back to POL from the Minister of Finance by 28 July 2004.

	Option	Advantages	Disadvantages
Option 1	Maori Land Court only (status quo)	To date we are not aware of any problems related to the jurisdiction of the Maori Land Court over sales of Maori land to overseas persons.	The regulator's role is likely to become more difficult, with a wider range of factors (environmental, heritage and walking access being explicitly added to the criteria) being taken into account in deciding

			applications.
Option 2	Overseas Investment Act only – i.e. remove jurisdiction of Maori Land Court from sales of Maori land to overseas persons.		The Maori Land Court fulfils a statutory function in confirming Maori land sales, and it has the requisite expertise in taking the prescribed factors into account in its decision making. If sales to overseas persons were removed from the jurisdiction of the court those matters would have to be taken into account by ministers.
Option 3	Maori Land Court approval process, but with the regulator under the Overseas Investment Act monitoring and enforcing any conditions of consent (this may also require a change to Te Ture Whenua Maori confirming that the Maori Land Court has power to impose conditions).	Maintaining the current jurisdiction of the Maori Land Court, without losing the potential for monitoring and enforcement of conditions.	Slightly different processes for dealing with sales to overseas persons of Maori land and general land. The Maori Land Court would be required to take account of a wide range of factors including natural and historic heritage and walking access, and to consult with a range of agencies in setting conditions.
Option 4	Both processes required. Processes could be parallel, but Overseas Investment Act decision should precede Maori land Court decision.	Each body deals with the issues in its field of expertise.	Potentially a more time consuming process for sales of Maori land than present The change may be seen as diminishing the jurisdiction of the Maori Land Court.

CRITERIA

45. The criteria are the factors that may be taken into account in deciding whether to approve an application. They will also form the basis of the conditions of consent.

46. I propose that:

- all overseas investment subject to the screening regime will continue to be required to meet the investor test (see paragraph 47);
- fishing quota purchasers will be required to meet the same economic development test as at present;
- land purchasers will be required to submit a management plan taking account of any of economic development, natural or historic heritage features or walking access, as appropriate. The weighting given to each of

these features will be property specific, and be determined by Ministers and the regulator;

- investors who demonstrate that they intend to reside here permanently will be able to purchase land subject only to showing that they have been granted an appropriate visa or permit;
- advertising requirements in respect of farmland be maintained;
- a category of "other matters as may be prescribed" be retained.

All investments - investor test

47. The investor test requires the applicant to show business acumen; financial commitment; and good character. Further, it requires that they do not contravene section 7(1) of the Immigration Act (section 7(1) deals with criminal records; deportees; and terrorist activities). The reference to the Immigration Act reflects the approach that overseas persons who are barred from visiting or living here should not be entitled to own significant New Zealand business assets, fishing quota or sensitive land.

Immigration interface

48. It is important that overseas investment policy is consistent with and reinforces New Zealand's immigration policy, which aims to attract skilled migrants. For this reason I consider it appropriate that potential migrants continue to be offered concessional treatment over other overseas persons for purchases of land, on the basis that ownership of land will assist new migrants to settle here.

49. I propose to ensure immigration and overseas investment policy remains well aligned over time. This is to be done by continuing the legislative ability for approval to be able to take account of applicants who show intention to reside in New Zealand. The guidelines issued by the Minister would then outline how this should be interpreted given current immigration policy. For example, at present I would expect this to state that applicants would be required to have been granted a visa or permit under a work to residence policy (such as the Talent Visa or Priority Occupations List), or a Long Term Business Visa, and show other actions consistent with an intention to reside here.

50. While for some categories of immigrant there is currently a policy that an applicant approved on a 'proposed resident' basis must become resident within 12 months, I propose that going forward there will be no specific time limit to become a resident, provided in the opinion of the New Zealand Immigration Service (NZIS) the applicant is on a path to residency. Applicants will be required to sell the land in the event that the applicant decides not to apply for residence or is denied it by the NZIS for any reason.

51. The detail of this policy should be prescribed by overseas investment regulation so that the policy can be easily aligned with any immigration policy changes.

Land

52. I propose that in addition to the investor test, overseas purchasers must present a brief land management plan that takes account of economic development,

natural or historic heritage, or walking access, as appropriate. The relative balance between these factors will depend on the nature of the property itself, and for each parcel of land the relevance of the criteria will be determined by the Ministers and the regulator. For example economic development may be more important for a farm with no heritage sites, walking access may be more important for land which borders onto Conservation land; walking access and site preservation may be relevant for land that contains registered wahi tapu sites. Whether the overseas person intends to reside permanently in New Zealand is also relevant (see above).

53. The widened criteria give the applicant, and Ministers and the regulator more choice in agreeing the basis on which an application can be approved. There are two criteria that should apply to all land approvals: the investor test, and access to the land for the regulator and agents of the regulator, for the purposes of monitoring compliance with the conditions of consent. Other criteria for land can be any one or more of:

Economic development (as at present)

- The creation of new job opportunities in New Zealand or the retention of existing jobs in New Zealand that would or might otherwise be lost;
- The introduction into New Zealand of new technology or business skills;
- The development of new export markets or increased export market access for New Zealand exporters;
- Added market competition, greater efficiency or productivity, or enhanced domestic services, in New Zealand;
- The introduction into New Zealand of additional investment for development purposes; or
- Increased processing in New Zealand of New Zealand's primary products.

Natural heritage (new). This involves protecting or enhancing existing areas of significant indigenous vegetation and significant habitats of indigenous fauna. Tools for achieving this are:

- Active management: pest control; fencing; fire control; erosion control; riparian planting; or
- Legal mechanisms: agree to new covenants over the land and comply with any existing covenants (such as QE II covenants).

Historic heritage (new)

- Active management: improved conservation (including maintenance) of historic heritage sites, areas or buildings;
- Legal mechanisms: register under the Historic Places Act; place heritage covenants on the property title (the covenant could include features such as maintenance or access); and comply with any existing covenants; or
- Access: agree access to heritage sites with relevant community groups as appropriate.

Walking access (new). Any policy here should be aligned with the New Zealand Land Access Strategy being developed in conjunction with the Ministry of Agriculture and Forestry, and in particular with the principles agreed by Cabinet on 10 May.

- Agree to walking access, for example to waterways, heritage sites, or Conservation land; or
- Negotiate in good faith with other interested parties, including any agency established to administer the New Zealand Land Access Strategy ("land access agency") for walking access.

Intention to reside in New Zealand
This can be shown by being granted certain categories of visa or permit; and living in New Zealand for a specified period of time.

Other matters

I propose that the category of "other matters as may be prescribed" be retained. These could include policy matters that are relevant from time to time, such as participating in the tenure review process.

Farm land

54. I propose that the current advertising requirements for farmland be maintained in regulation. That is, the land must have been offered for sale or acquisition on the open market to persons who are not overseas persons.

55. I propose that the requirement that purchasers of farmland show 'substantial and identifiable' benefit resulting from the purchase not be explicitly maintained[4]. The revised criteria will mean that the benefits from all land purchases will implicitly meet this standard. Again, any detailed policy about the level of benefit to be shown could be set out in guidelines or a ministerial directive letter.

Fishing quota

56. I propose that the current economic development criteria for fishing quota purchases be maintained. For fishing quota it is appropriate that this benefit be economic, to ensure that New Zealand benefits from its fishing resources either through employment, processing or export opportunities. This will reduce the risk of foreign operated and crewed vessels from fishing New Zealand waters, and processing the catch offshore, without benefit to New Zealand.

57. The criteria for fishing quota are:

- The creation of new job opportunities in New Zealand or the retention of existing jobs in New Zealand that would or might otherwise be lost;
- The introduction into New Zealand of new technology or business skills;

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4 This involves assessing the impact of the proposal having regard to the showing the proposed use of the land and whether experimental or research work will be carried out on the land, in addition to the other factors taken account of in assessing land applications.

- The development of new export markets or increased export market access for New Zealand exporters;
- Added market competition, greater efficiency or productivity, or enhanced domestic services, in New Zealand;
- The introduction into New Zealand of additional investment for purposes of significant development;
- Increased processing in New Zealand of fish, aquatic life, or seaweed.

CONDITIONS OF CONSENT

58. The purpose of the regime (as proposed) is to acknowledge the standards required of overseas persons buying certain New Zealand assets and to ensure compliance with those standards. To this end I propose that reasonable compliance with representations made and plans submitted by an applicant as to the use and management of New Zealand assets be made conditions of consent. This will require careful wording of the conditions by the regulator and Ministers. In the event of non-compliance for reasons beyond the control of the applicant, Ministers and the regulator should have the ability to vary the conditions of consent, as well as some discretion in their approach to enforcement.

59. Conditions imposed on the sale are specific to the owner, except to the extent they are permanent legal obligations. If the property is sold prior to the completion of the imposed conditions, the new owner (domestic or overseas) is not necessarily required to fulfil those conditions. If the sale is to an overseas person, the conditions will be re-negotiated with the regulator, but could be carried over if considered appropriate.

CROWN PURCHASE OF FORESHORE AND SEABED

60. Given the sensitivity of the foreshore and seabed, I propose that rather than have this pass out of New Zealand hands into overseas ownership, the Crown should have the right to purchase any foreshore or seabed land at the time it is offered for sale to an overseas person. I propose to effect this by providing that any agreement for the sale and purchase of land that comprises or includes any foreshore or seabed will not be enforceable unless the process for giving the Crown right of first refusal under the Act has been complied with. A slightly different process may be used for some parcels that are predominantly dry land but which are surveyed to below the mean high water spring mark, with a small foreshore strip.

61. For parcels where the Crown may wish to acquire the entire parcel, I propose that the process should broadly replicate that provided to Te Runanga o Ngai Tahu in the Ngai Tahu Claims Settlement Act 1998. While I propose that officials do further work on this, reporting back to me by the end of July, the process would broadly be:

    - the owner notifies the Crown, by way of lodging its application under the Overseas Investment Act, of any agreement to sell to an overseas person, including the terms and conditions of the agreement;

- on receipt of the relevant notice, the Crown has a certain period of time in which to offer to purchase on equivalent terms and conditions;
- if the Crown chooses not to do so, the owner would have the right to proceed to sell on those terms and conditions but only within a limited period of time;
- any agreement entered into subsequent to that time period, or within that time period but on more favourable terms and conditions, would trigger the notification and negotiation process again.

62. Further work would involve considering appropriate time limits and arbitration and mediation processes for determining what constitutes more or less favourable terms and conditions.

63. In some cases, foreshore strips may be able to be compulsorily acquired on sale to an overseas person. A condition of consent relating to the purchase could be the transfer of the foreshore strip title to the Crown, as an alternative to providing benefits under the economic development, natural or historic heritage or walking access criteria. As noted above, the distance between the mean high water spring and mean high water marks can vary enormously depending on the gradient of the land and the tidal flows. Acquisition as a condition of consent may be possible where the strip is narrow. However in some cases a substantial part of the value of the land could lie in the foreshore strip, and in those cases compulsory acquisition of the strip may not be appropriate.

64. Further work will need to be undertaken, and I have asked officials to report back by the end of July. This report back will consider parallel processes in existing legislation such as the right for esplanade reserves to be set aside on a subdivision, and how best to achieve these outcomes while remaining consistent with our international obligations.

MONITORING

65. I propose that in order to keep the costs to the Crown of the regime to a minimum most of the onus of compliance should be on the overseas investor. Thus applications are to be signed personally by the applicant, or in the case of a corporate entity, an officer of the entity. Overseas investors should, on an ongoing basis, be required to provide a statutory declaration to the regulator certifying compliance with the conditions of their consent. That statutory declaration should outline the reasons for any non-compliance and plans to ensure future compliance.

66. The statutory declaration would be required on a regular basis, say, every one or two years, as considered appropriate by the regulator. If a possible breach comes to the attention of the regulator, ongoing compliance can be assessed against the conditions of consent and the representations that have been certified on an on-going basis.

67. Monitoring should not continue indefinitely. Monitoring is only required up to the point of the applicant discharging their obligations. In most cases, I would expect monitoring to have ceased within 10 years (although the conditions would continue to apply, as appropriate). This will allow enough time for any serious non-compliance to have been realised. For example, where the applicant has

agreed to legal protection, such as covenants, no further monitoring would be required by the regulator. Compliance with such legal protections would be carried out in the normal course by the holder of the legal right (for example, the Department of Conservation on behalf of the Minister of Conservation in the case of a conservation covenant). Where cases of non-compliance are bought to the attention of the regulator outside of the monitoring period, the regulator would retain the right to bring the necessary enforcement action.

68. Monitoring and enforcement of any conditions of consent to acquire fishing quota should be aligned with the revised monitoring and enforcement provisions under the Overseas Investment Act.

69. Guidelines may be developed on the monitoring and enforcement proposals, such as the level and frequency of monitoring.

ENFORCEMENT

70. At present the Crown appears to have very wide powers in relation to consents. These powers are very general. Current regulations give Ministers the power to add conditions, or revoke consent, for any reason. Penalties for breach of conditions of consent include imprisonment for up to 12 months, fines of up to $30,000 for individuals or $100,000 for companies. Further, there is power for the High Court to order a sale of the property but only within two years of the breach occurring.

71. The courts are rightly reluctant to order a sale of property, and while I consider this power ought to remain, there may be a need for more flexibility around the court's powers. This includes giving the court power to control the sale process, flexibility around the timing of when orders can be sought, and around fines, so that these can recognise any gain made by the person in breach, or the cost of remedying the breach.

72. Further, the existing powers of Ministers and the regulator to add conditions or revoke existing consents are in most cases hard to justify (and probably difficult to implement). These powers should be better specified and relate only to circumstances such as non-compliance for reasons beyond the control of the applicant.

73. The regulator should have the power to impose administrative penalties for failure to supply information reasonably requested including for failure to supply the required statutory declaration (see paragraph 65) within agreed timeframes.

74. Other enforcement mechanisms will also be considered and provided for in legislation if appropriate. These could include civil penalties; charging orders; caveats, power for the courts to order that certain action be taken such as performance of the conditions or remedying a breach; and requiring consent holders to maintain an address for service in New Zealand. There may also need to be mechanisms to deal with enforcing the regime against non-residents. There is likely to be further work required in finalising these proposals and I have asked officials to include this in the report back to the Ministers of Finance and Land Information by the end of July.

MINISTERIAL INVOLVEMENT

75. I recommend that the current level of Ministerial involvement be maintained. That is, all decision making power rests with the Minister of Finance for business decisions, the Minsters of Finance and Land Information for all land decisions, and the Ministers of Finance and Fisheries for fishing quota decisions.

76. The Act will contain provision for relevant Ministers to delegate this decision-making power to the regulator. For example at present, Ministers have retained the right to make decisions relating to "sensitive" land – that is, islands, and foreshore, lakes and reserves and land over 0.4 hectares on certain islands.

ORGANISATIONAL DESIGN AND GOVERNANCE

77. The changes proposed to the screening regime have implications for the structure of the agency responsible for the Overseas Investment Act. The OIC was originally sited with the Reserve Bank given the parallels between its work and the capital controls administered by the Bank. These considerations are no longer relevant. Its current arrangements are out of date and suboptimal:
    - The OIC is a statutory board which receives administrative support from the Reserve Bank, and its staff are employees of the Bank. However, the relationship between the OIC and the Bank and lines of responsibility for the staff are not clear.
    - Accountability to Parliament is inconsistent with current best practice.
    - The role played by the Commission itself – that is the Board - is unclear. It does not make decisions, it is not a governing board, and it does not act as an advisory body.

78. I have considered a number of options in terms of currently available models to carry out the functions of the regulator, including maintaining the current OIC structure but supported by a government department, establishing a new Crown entity and locating the functions within an existing Crown entity.

79. My view is that having the functions performed by an existing government department is the best option. This option provides:
    - A well understood set of governance arrangements and accountabilities;
    - Clear accountability to Parliament, both through the Estimates and Statement of Intent, and through the relevant department's annual report;
    - The support of a larger organisation in terms of corporate overheads, career structure for staff, and access to other resources;
    - It avoids any need to establish a new organisation.

80. I consider LINZ to be the appropriate government department to be the regulator, as the bulk of the applications have traditionally been, and are expected to continue to be, land related. While I see this as a long term arrangement, I also think that the legislation should leave open the possibility that the government could transfer the function to another department if that was more appropriate at some point in the future.

81. Given that I propose that ultimate decision making authority rest with Ministers, the legislation would not vest the regulatory decision making powers in the Chief Executive of LINZ, or another statutory officer in their own right. Instead Ministers would delegate to the chief executive, who would in turn sub-delegate in the normal way. Some tailoring of the delegation regime may be required, however, reflecting the fact that several Ministers will be delegating the decision making power.

82. Ministers would continue to have the power under statute to issue a statement setting out government policy in respect of overseas investment, consistent with the Act. Consistent with the need for transparency, this statement would be published. Ministers could also choose to reserve decision making to themselves in some cases.

83. Guidelines would be issued explaining operational policy on issues such as: advertising requirements for farm land; levels of monitoring; consultation; and provision of information to both potential investors and the general public. These could also cover any property searches that applicants might be required to do as part of their application; such as district plans, land titles, or historic heritage registers.

84. This regulatory function is likely to require specialist skills and a culture consistent with the policy intent of the overseas investment regime. Accordingly, the chief executive of LINZ would be expected to maintain a dedicated unit to manage the overseas investment responsibilities. The expectation of a dedicated expertise and an appropriate culture could be reinforced in a range of ways, including by:

- Explicit Government decisions to that effect;
- The statement of government policy and the criteria in the legislation itself;
- The way that the delegations themselves are expressed;
- Ongoing engagement by Ministers, and by Treasury as the organisation with primary responsibility for policy advice.

85. The Minister of Finance would remain responsible for the overall regime, and Treasury for policy advice. I would expect Treasury to undertake regular liaison with other relevant government agencies and to report to the Minister of Finance on a regular basis on the operation of the regime.

Functions of the regulator

86. The regulator will be charged with implementing the regime, under a delegation from Ministers. As part of this the regulator will be expected to consult with relevant agencies in making its recommendations or decisions: for example the Ministry of Fisheries in respect of applications for fishing quota; the Department of Conservation, Ministry of Agriculture and Forestry or Historic Places Trust, as appropriate, in respect of land applications. The views of these agencies are to be informative but not binding on the regulator. Similarly, views of other agencies or local interest groups may be sought but will not be binding. The regulator will

be expected to manage this consultation process in a way that does not unduly delay the decision making process.

87. It will also be required to fulfil an information function to provide general information to overseas buyers about relevant heritage and environment laws, and the requirement for public access, for example in and over the public foreshore. The regulator will work with the relevant agencies to provide information to overseas purchasers about the importance of sites contained on their land, and what the owners' obligations are under general legislation for their care and protection. This information function would not extend to property specific information.

88. Currently, the Overseas Investment Commission has certain reporting requirements, including six-monthly reporting to Parliament, and providing information to the public and potential overseas investors about levels of foreign investment in New Zealand and about New Zealand's regulatory regime. Because these functions will now be carried out by a government department, there is no need for separate reporting to Parliament. Information about applications and their outcomes can be provided as part of the department's annual reporting obligations. The current practice of the OIC to publish information on its website reinforces the expected transparency of the regime and should be continued.

FLEXIBILITY IN THE REGIME

89. I have also looked at whether or not any flexibility should be built into the regime. The Act has changed over time to reflect society's changing concerns and preferences around overseas ownership, and these will continue to evolve. However, for certainty and transparency, I do not recommend that flexibility be explicitly built in to the regime. Changes to coverage and criteria should only be able to be changed by Parliament.

90. The regulations currently allow exemptions from the Act to be granted, but the grounds on which this may be done are not specified. I propose that there be a power (by regulation) to exempt certain persons or transactions only where the person or transaction would be technically subject to the Act but in practice the transaction(s) would not result in increased levels of overseas investment. This should also apply to classes of persons or transactions.

TRANSITIONAL ISSUES

91. There are a number of transitional issues around the transfer of the function to a government department. These include the manner in which the functions are performed within LINZ; the transfer of staff, the nature of the delegation from Ministers and the cost recovery framework for application fees charged (see paragraph 102 below). On the basis that you agree that LINZ is the appropriate department to carry out the functions under the Overseas Investment Act, I recommend that LINZ, in conjunction with Treasury and the Reserve Bank, develop an implementation plan for the transition covering those issues, and report back to the Ministers of Finance and Land Information with that plan by the end of July.

Personnel

92. The staff of the Overseas Investment Commission will be offered employment by the regulator. This will ensure as little disruption as possible. Because the provisions of the State Sector Act 1988 do not apply to the Reserve Bank, it may be necessary to include technical redundancy provisions in the legislation.

93. There are no transitional issues relating to the Overseas Investment Commission Board. Of the four board members two are ex-officio appointments, from the Ministry of Economic Development and the Reserve Bank. The two external commissioners are on fixed term contracts, both of which expire in mid-2005.

Policy

94. Given that the regime will be strengthened as a result of the changes proposed, there may an incentive on some investors to make applications before the changes come into effect.

95. There are currently wide powers in the Overseas Investment Act, both for Ministers and for the Commission. In particular the Act requires the Commission to comply with government policy as transmitted in writing to the Commission and gazetted. The current directive letter sets out the assets that the government regards as sensitive and in respect of which decisions are to be referred to Ministers.

96. For the transition period, I propose that a new directive letter be issued, and changes to existing regulations be made requiring the Commission to deal with applications as if the changes had come in to force. The directive letter would be issued once the proposed changes are announced. The main changes can be dealt with thus:

    - Conditions of consent: The Commission currently has power to impose conditions and to monitor and enforce those conditions. Ministers could require that reasonable compliance with representations and plans be made conditions of consent;

    - Increased threshold for business: This should be done by way of change to the regulations;

    - Expanded criteria: This could be done either by regulation, or by the Ministers' directive letter requiring the Commission to take natural and historic heritage features, and walking access into account in particular defined circumstances.

97. Changes to coverage should best be effected by legislation, and accordingly will not be able to be dealt with during the transition period.

INTERNATIONAL OBLIGATIONS

98. I have been advised that these proposals are defensible under our international treaty obligations.

99. One of our obligations under the OECD Code of Liberalisation of Capital Movements is to update, in a timely fashion, the reservations we have made under that agreement to reflect changes to our overseas investment regime. I recommend that MFAT be directed to review our OECD reservation and to report to Cabinet External Relations and Defence Committee following implementation of the changes arising from this review.

FINANCIAL IMPLICATIONS

100. There will be some transitional costs associated with the Overseas Investment Commission becoming part of an existing government department. I estimate that these will not exceed $1 million. These, and ongoing costs, will be met by way of an appropriation through Vote: Land Information. The ongoing costs will be largely fiscally neutral for the Crown as most of the costs of the regime are currently, and will continue to be, recovered through application fees. The operating budget for 2004/05 of the OIC is $1.1 million, with 8 full time equivalent employees.

101. A broader range of criteria to be applied, broader consultation requirements, the requirement to ensure appropriate legally binding commitments and increased monitoring and enforcement is likely to raise costs. Whether additional employees are needed will depend on whether all applications are monitored or a more risk based approach is taken. As noted above, the degree of monitoring and enforcement will be set by Ministers. In light of the revisions to the regime officials will work further on ensuring an appropriate cost recovery framework.

LEGISLATIVE IMPLICATIONS

102. Many of the changes outlined above will require legislative change. Further, there are substantive regulations issued pursuant to the Act, and much of the policy set out in those regulations should preferably be in the primary legislation. Legislation to effect these changes is currently on the legislative programme for 2004 with a priority 4.

103. I expect a revised Bill to be ready for introduction to Parliament in September 2004. While a new Overseas Investment Act will be drafted, provisions of the 1973 and amending Acts, unless specifically amended by these proposals, will be carried over into the new Act. If issues of substance arise in the course of drafting I will refer these back to Cabinet, but propose that decisions about technical issues be delegated to me.

REGULATORY IMPACT STATEMENT

104. A regulatory impact statement is attached.

TREATY IMPLICATIONS

105. The underlying principles that allow foreign investment in private property have not been altered under these proposals, thereby not creating new Treaty risks. This is expected to be the case even if responsibility for applying Overseas Investment Act criteria to Maori freehold land is transferred to the overseas

investment regulator. Further work on the proposed right of first refusal will include Treaty implications.

HUMAN RIGHTS

106. The Ministry of Justice has confirmed that the proposals do not appear to give rise to inconsistencies with the Bill of Rights Act or Human Rights Act but a final view will depend on the manner in which the legislation is drafted.

PUBLICITY

107. There is likely to be a degree of public interest in these proposals. I recommend that I announce the proposed changes following final Cabinet decisions. At that time, this paper and the attached background paper should be released publicly. This will help inform the public in making submissions on the legislation.

CONSULTATION

108. Land Information New Zealand, Ministry of Fisheries, Ministry for Culture and Heritage, Te Puni Kokiri, Ministry of Agriculture and Forestry, Department of Prime Minister and Cabinet, Department of Labour (New Zealand Immigration Service), Department of Conservation, Ministry for the Environment, State Services Commission, Ministry of Justice, Ministry of Foreign Affairs and Trade, Reserve Bank, Ministry of Economic Development and the Overseas Investment Commission have been consulted in the preparation of this report. Relevant aspects of the proposals have also been discussed with the Historic Places Trust. Departments have limited time to comment on the proposed Crown right of first refusal in respect of the foreshore and seabed. However there will be an opportunity for departmental input during the next phase of work on this issue.

109. Prior to the proposal being developed submissions were received from or discussions were held with a number of interest groups on issues and concerns related to foreign investment. This included; Forest and Bird, the New Zealand/American Chamber of Commerce, EMA Northern, Bayleys, Wrightson, Wellington Chamber of Commerce, Council of Trade Unions, Canterbury Employers Chamber of Commerce, Federation of Maori Authorities, Business New Zealand, Environment & Conservation Organisation, Federated Mountain Clubs of New Zealand, NZ Historic Places Trust, New Zealand Archaeological Association, Local Government New Zealand, High Country Accord and Trustees, Public Access New Zealand, CAFCA - Coalition Against Foreign Control of Aotearoa, International Council on Monuments and Sites (NZ Committee), Federated Farmers, Fish and Game New Zealand, New Zealand Business Roundtable, Environmental Defence Society, the Seafood Industry Council, Talleys, Sanford, Maruha, Chapman Tripp, Russell McVeagh and Bell Gully.

RECOMMENDATIONS

It is recommended that the Committee:

Purpose of the Act

a. Agree that the purpose of the Act is to acknowledge that it is a privilege for overseas persons to own sensitive New Zealand assets, and to impose conditions on them in respect of those assets;

Coverage

b. Agree that:

   1. the threshold for business assets be increased from $50 million to $250 million,

   2. the present coverage be retained on fishing quota;

   3. the present coverage be retained on the following land:

      a. land over 0.2 hectares which includes or adjoins the foreshore or seabed;

      b. land over 0.4 hectares that includes or adjoins any lake (the bed of which exceeds 8ha);

      c. land over 0.4 hectares on specified islands;

      d. any land on other islands;

      e. land over 0.4 hectares which includes or adjoins land over 0.4 hectares which is held for conservation purposes under the Conservation Act 1987;

      f. land over 0.4 hectares which is provided as a reserve, a public park, for recreation purposes, or as a private open space, or is proposed for any such purpose;

      g. land over 0.4 hectares adjoining coastal and lake front reserves and other margins that make up the Queen's Chain, where the reserves are over 0.4 hectares;

      h. land over 0.4 hectares adjoining scientific, scenic, historic and nature reserves over 0.4 hectares that are classified under the Reserves Act 1977 and that are administered by the Department of Conservation.

      i. land over 0.4 hectares that is subject to any heritage order, or with Historic Places Act registration, or in respect of which a proposal for registration has been made; and

      j. any rural land over 5 hectares.

   4. the regime encompass all foreshore and seabed land irrespective of the size of the parcel;

   5. coverage over land adjoining the following land be removed:

a. land over 0.4 hectares which is provided as a reserve, a public park, for recreation purposes, or as a private open space, or is proposed for any such purpose; other than coastal or lake front reserves and scientific, scenic, historic and nature reserves that are classified under the Reserves Act 1977 and are administered by the Department of Conservation;

6. the Act not apply to land that is covered only because its unimproved land value is over $10 million;

7. the legislation confirm that 'land' refers to land the transfer of which would be governed by the Land Transfer Act 1952 or Te Ture Whenua Maori Act 1993 or any preceding or subsequent legislation.

c. Direct officials from Treasury and Te Puni Kokiri to discuss the options for dealing with Maori land, and the implications of those options for the Court with the Maori Land Court, with a report back by to POL from the Minister of Finance by 28 July 2004;

Criteria

d. Agree that the criteria for non-land business assets and fishing quota remain the same;

e. Agree that other matters as may be prescribed in regulation be able to be taken into account;

f. Agree the criteria for land be expanded to take account of:

   i. natural heritage; or

   ii. historic heritage; or

   iii. negotiated walking access (to be consistent with the New Zealand Land Access Strategy being developed); or

   iv. economic development; and

   v. proposed residency of the applicant.

g. Agree that the relevant Minister(s) be able to decide which of the criteria in recommendation (f) are appropriate for the land in question;

h. Agree that applications for consent contain statements supporting compliance with relevant criteria and be signed by the applicant or in the case of a corporate entity, by an officer of the entity;

Crown purchase of foreshore and seabed

i. Agree that the Overseas Investment Act provide for a right of first refusal in favour of the Crown in respect of any foreshore or seabed land subject to the Act;

j. Direct officials to report back to the Minister of Finance by the end of July on proposals for a right of first refusal in respect of foreshore and seabed land, and the possibility of compulsory acquisition of foreshore strips;

Monitoring and enforcement

k. Agree that for all assets, reasonable compliance with representations made and plans submitted in support of an application be made conditions of consent;

l. Agree that in the event of non-compliance for reasons beyond the control of the applicant, Ministers and the regulator should have the ability to vary the conditions of consent, as well as some discretion in their approach to enforcement;

m. Agree that investors be required to confirm their compliance with conditions of consent on a regular basis at the discretion of Ministers and the regulator;

n. Agree that the regulator have power to impose administrative penalties for failure to supply the required confirmation referred to in recommendation (m);

o. Agree that the courts be given power to impose fines commensurate with any gain made in relation to the land by the person in breach or with the cost of remedying any breach, as appropriate;

p. Agree that other enforcement mechanisms including civil penalties; charging orders; power for the court to order that certain action be taken; and requiring consent holders to maintain an address for service in New Zealand be implemented by legislation where appropriate;

q. Agree that the monitoring and enforcement provisions in respect of fishing quota contained in the Fisheries Act 1996 be aligned with the revised provisions of the Overseas Investment Act;

Organisational design

r. Agree that Ministers, being the Minister of Finance in respect of business applications, the Ministers of Finance and Land Information in respect of land applications and the Ministers of Finance and Fisheries in respect of fishing quota applications, retain all decision making rights in relation to applications under the Act, but that Ministers have the power to delegate the power to make decisions to the regulator;

s. Agree that the Overseas Investment Commission be disestablished and the functions of the regulator required by the Act be performed by a government department;

t. Agree that the functions be performed within Land Information New Zealand;

u. Agree that the Minister of Finance be the Minister responsible for the Act, and the Treasury be responsible for policy advice relating to the Act;

v. Agree that the regulator be expected to consult with the Department of Conservation, the Historic Places Trust, the Ministry of Agriculture and Forestry, the Ministry of Fisheries and any land access agency, as appropriate, in making its recommendations;

w. Agree that the regulator will have the function of providing information to overseas persons about overseas investment, natural and historic heritage and access laws; and to the public about the operation of the regime;

Transitional

x. Agree that at the time the proposed changes are announced, the Overseas investment Regulations 1995 be amended, and a new directive letter be issued, that conform to the proposals set out in the Bill;

y. Agree that the current OIC staff will be offered employment by Land Information New Zealand and that technical redundancy provisions be included in the legislation;

z. Direct LINZ to work with Treasury and the Reserve Bank on an implementation plan for the transitional period;

aa. Direct officials to report to the Ministers of Finance and Land Information by the end of July 2004 on transitional issues including on organisational design and personnel issues;

Financial

bb. Note that there are likely to be transitional costs of approximately $1 million for the 2004/05 fiscal year and that these will be appropriated through Vote: Land Information, as will ongoing costs of the regime;

cc. Direct officials to work on an appropriate cost recovery framework for the revised regime;

Legislation, regulations and guidelines

dd. Agree that the Act provide power for regulations to be made by Order-in-Council exempting certain transactions or classes of transaction, or persons or classes of persons from the application of the Act;

ee. Agree that the regulator be required, in consultation with relevant ministers, to issue guidelines describing for example, operational policy on the advertising requirements for farmland; monitoring; consultation; and levels of information to be provided;

International obligations

ff. Note that the changes proposed are considered defensible under our international treaty obligations;

gg. Direct the Minister of Foreign Affairs and Trade to consider reviewing New Zealand's reservations to the OECD Code of Liberalisation of Capital Movements, and to report to Cabinet External Relations and Defence Committee once the legislation resulting from this review has been passed;

Next steps

hh. Agree that the Minister of Finance issue drafting instructions to Parliamentary Counsel on the basis that a new Overseas Investment Act be drafted, but with provisions of the 1973 and amending Acts, unless specifically amended by these proposals, being carried over into the new Act;

ii. Agree that decisions on technical issues that might arise in the course of drafting be delegated to the Minister of Finance;

jj. Note that if issues of substance arise in the course of drafting, including on organisational design, these will be referred back to Cabinet by the Minister of Finance, following consultation with other relevant Ministers;

kk. Note that an amending Act is on the 2004 legislative programme with a priority 4 classification, to be referred to select committee within calendar year 2004;

ll. Agree that the Minister of Finance announce these proposed changes following final Cabinet approval.

Hon Dr Michael Cullen
Minister of Finance

Annex: PROPOSED Operation of the overseas investment screening regime

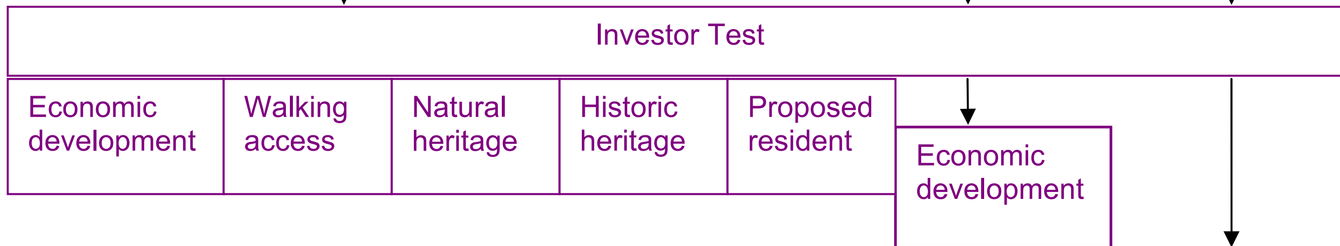
Coverage

Land
- over 5 hectares
- coastal, lake front, foreshore and seabed, most islands
- Conservation Act land
- subject to, or adjoining, heritage orders, HPA registered,
- Reserves, or adjoining reserves along coastal lake front and some DOC reserves

Fishing quota

25% or more of **business** over $250 million

Criteria



Crown right of first refusal for foreshore and seabed land

Decision
Approved / Declined

Plans / undertakings and compliance with other laws made conditions of consent

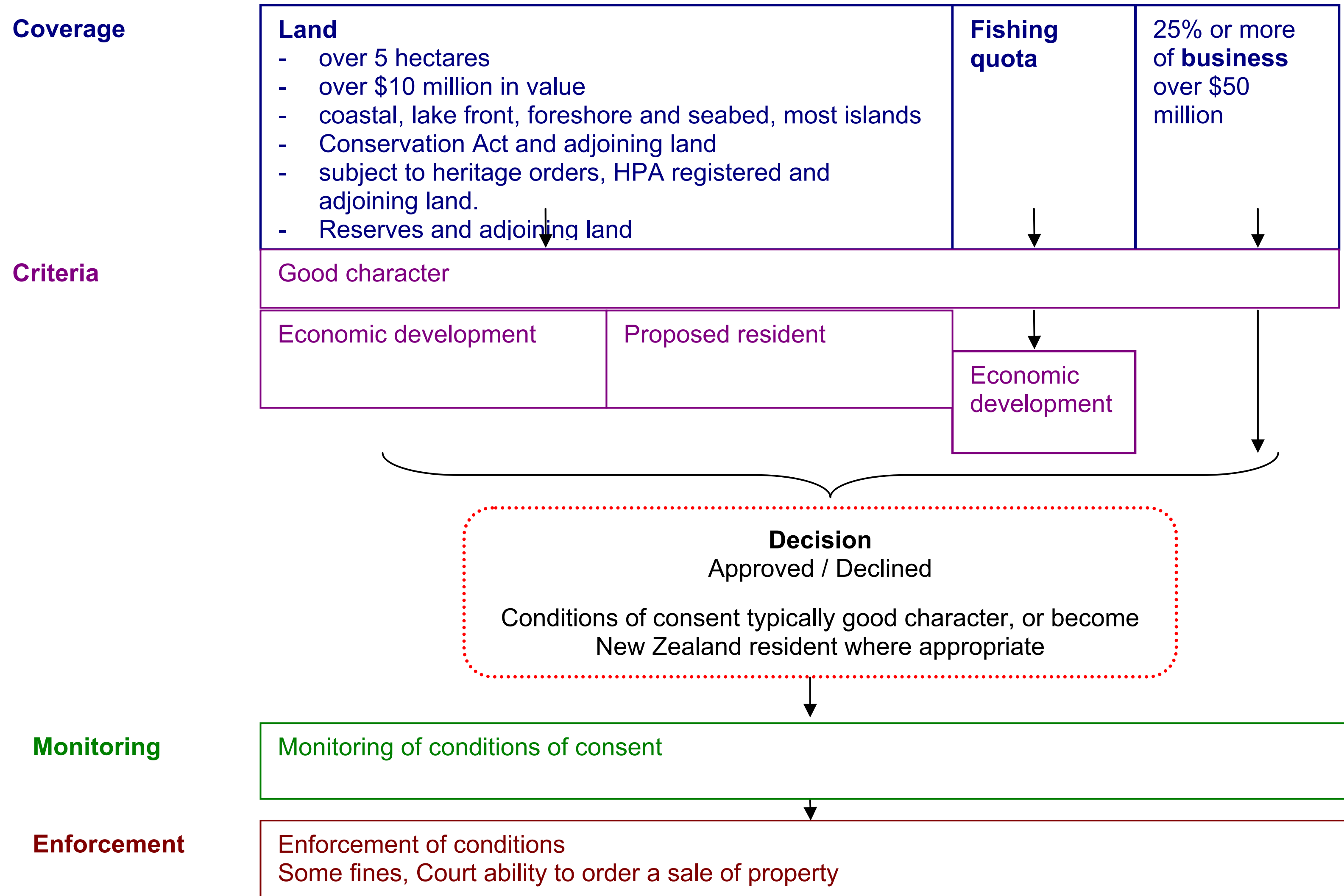
Monitoring

Monitoring of conditions of consent,
Periodic statutory declarations filed by approved purchasers regarding their compliance

Enforcement

Enforcement of conditions and compliance with other laws if required
Increased use of fines commensurate with actions taken, court ability to order a sale remains

CURRENT Operation of the overseas investment screening regime



COMPARISON OF CURRENT AND PROPOSED CRITERIA

	CURRENT	PROPOSED
Business	***Investor test*** - financially committed - business acumen - good character and not the type of person mentioned in s 7(1) of the Immigration Act.[5]	***Same***
Land	***Investor test*** AND ***Economic development*** - creation of job opportunities; - introduction new technology or business skills; - development of new export markets; - added market competition; greater efficiency, productivity, enhanced domestic services; - additional investment for development purposes; or - increased processing in NZ of NZs primary products - for farm land, substantial and identifiable benefits (including proposed land use; experimental and research work) - other matters ***Proposed resident*** - intends to reside permanently in New Zealand.	***Investor test*** AND access for the regulator for monitoring purposes AND some combination of ***Economic development*** Same (apart from substantial and identifiable benefits for farm land) ***Natural heritage*** - *Active management*, for example: pest control; fencing; fire control; erosion control; riparian planting; - Legal mechanisms, agree to new covenants over the land. ***Historic heritage*** - *Active management:* improved conservation (including maintenance) of historic heritage sites, areas or buildings - *Legal mechanisms:* register under the Historic Places Act; place heritage covenants on the property title. - *Access:* agree access to heritage sites with relevant community groups ***Walking access*** - Covenant walking access on the

5 s 7 (1) refers to the type of people who are unable to enter New Zealand for either tourist, business or residence purposes.

		title to rivers, streams, heritage sites, or Conservation land. - Negotiate in good faith with other interested parties in conjunction with any land access agency for access to heritage sites, rivers, streams, or public land ***Proposed resident*** - Demonstrates intention and is granted appropriate visa or permit and subsequently becomes resident
Fishing Quota	***Investor test*** AND ***Economic Development*** - creation of job opportunities; - introduction of new technology, business skills; - development of new export markets; - added market competition; greater efficiency, productivity, enhanced domestic services; - additional investment for development purposes; or - increased processing in NZ of NZ's fish, aquatic life or seaweed.	Same

REGULATORY IMPACT STATEMENT FOR THE REVIEW OF THE OVERSEAS INVESTMENT REGIME

Problem

1 The current overseas investment regime raises the following problems:

- overseas business investors are subject to some unnecessary compliance costs;
- the legislation focuses on economic development stemming from the land purchase, and other important factors, such as its heritage value and public access are not explicitly mentioned;
- the monitoring and enforcement provisions do not require proposed land management plans of the Applicant on which consent is given by the Overseas Investment Commission to be undertaken and completed to a reasonable standard,
- the Courts lack the ability to impose penalties commensurate with any breach by the applicant;
- Ill defined accountability and governance structures.

2 Overall, the overseas investment regime may provide a small disincentive for foreign investment into small and growing companies, may promote non-optimal foreign investment outcomes and lacks transparency in governance.

Objectives

3 The public policy objectives behind the changes to the Overseas Investment Act are to:

a. encourage foreign investment into New Zealand recognising the growth benefits that foreign investment brings.

b. ensure that the value of sensitive New Zealand property is recognised and enhanced by any overseas owners.

c. Ensure appropriate governance arrangements around the overseas investment regime.

Options

	Status Quo	Proposed change
Coverage	*Business:* 25% of more ownership of assets over $50 million. *Fish:* any fishing quota *Land:* Land over 5 hectares and/or worth more than $10 million;	*Business:* 25% of more ownership of assets over $50 million. *Fish:* any fishing quota *Land:* Land over 5 hectares

	Any land on most off-shore islands;	Any land on most off-shore islands;
	Certain sensitive land over 0.4 hectares (e.g. on specified islands, including reserves, Conservation Act land, historic or heritage areas, or lakes and adjoining these types of land);	Certain sensitive land over 0.4 hectares (on specified islands, including reserves, lakes, Conservation Act land, historic or heritage areas); Land over 0.2 hectares adjoining the foreshore; Land over 0.4 hectares adjoining coastal and lake front reserves and other margins that make up the Queen's Chain, where the reserves are over 0.4 hectares Land over 0.4 hectares adjoining scientific, scenic, historic and nature reserves over 0.4 hectares that are classified under the Reserves Act 1977 and that are administered by the Department of Conservation; land over 0.4 hectares adjoining heritage sites;
	Land over 0.2 hectares including or adjoining the foreshore.	All foreshore and seabed land
Criteria:	All applications: investor test Land: Economic development and other matters Fish: Economic development and other matters	All applications: investor test Land: Economic development, natural and historic heritage, walking access and other matters Fish: Economic development and other matters
Monitoring and enforcement:	Very wide powers under legislation for monitoring and enforcement, including: -Ministers have the power to add conditions or revoke consent for any reason. - Court can order the sale of a property within two years of any breach occurring.	Clarification of powers under legislation. Expectation that land management plans submitted by applicants will become conditions of consent. Overseas investor required to provide a statutory declaration to the regulator certifying compliance with the conditions of consent. Court power to control the sale process, flexibility around the timing

		of when orders can be sought and around fines. The regulator to have power to impose administrative penalties for failure to supply information reasonably requested.
Governance structures:	Situated in the Reserve Bank with a four person Board including 2 ex-officio members from the Reserve Bank and MED.	Separate unit within LINZ. Delegation from the Minister to the Chief Executive.

4 In addition, it is proposed that the Crown would have the right of first refusal over the purchase of foreshore and seabed land that would otherwise be sold to an overseas person. The method of implementation of this right is yet to be finalised.

5 There is no proposal to limit the ownership of certain parcels of land to New Zealand nationals. This is for two reasons: first, the parcels of land in respect of which there is an ownership value are difficult to identify specifically; and secondly this would impose a significant restriction on the private property rights of New Zealanders, which would (reasonably) require compensation from government.

Impact assessment (net benefit)

6 The proposed changes recognise that for some land in New Zealand there is an 'ownership value'. That is, New Zealanders derive a welfare benefit from knowing that particular pieces of land are owned by New Zealanders. Thus, where the land is owned by an overseas investor, this lack of ownership value is compensated by the imposition of conditions.

	Costs	**Benefits**
Govt	As the regime is self funded there are no fiscal benefits or costs from the changes. To the extent that any additional monitoring and enforcement costs are not able to be charged back to the applicants by way of fees, increased costs will fall on government. There may also be costs for other agencies required to contribute to the approval and monitoring process.	*Organisational design:* The benefits of performing the functions within an existing government department are: - A well understood set of governance arrangements and accountabilities; - Clear accountability to Parliament; - The support of a larger organisation in terms of corporate overheads, career structure for staff, and access to other resources; - Efficiency by avoiding the need to establish a new organisation. *Right of first purchase* provides an opportunity for the Crown to purchase foreshore and seabed land.

	Right of first purchase likely to be some fiscal costs associated.	
Overseas investors	*Expanded criteria* may increase costs if the purchaser needs to spend additional time to develop an appropriate land management plan that they would not have otherwise prepared. *Monitoring and enforcement* will increase the costs on the applicants to the extent that land management plans were not previously complied with, and may increase the level of application fees. *Right of first purchase* may prolong the application process.	*Coverage:* lower compliance costs related to a potentially smaller number of properties being subject to the regime. *Expanded criteria* provides a wider choice of actions, while also ensuring land management plans are appropriate for the particular property.
Society	*Right of first purchase* may prolong the application process if a vendor of foreshore and seabed land.	*Coverage:* The higher business threshold may encourage more foreign investment in New Zealand companies. *Expanded criteria* improve the protection provided to land in overseas ownership, particularly with regard to natural heritage and historic heritage. *Increased monitoring & enforcement* will provide surety that applicants will undertake the land management plans that they put forward. This will reduce the incentive for applicants to submit plans with little intention of carrying them out. *Right of first purchase* is likely to result in more foreshore and seabed land vested in the Crown

7 The average number of applications expected under the proposed changes in contained in the table below.

Approvals by category

	1998 - 2003	% of total (land) transactions	Average / year	Avg under proposed changes [b]
Non - land applications	**82 [a]**		**20**	**7**
Fishing quota	**2**		**<1**	**<1**
Land	**1341**		**220**	**unknown**
Caught by one category only				
> $10 m	14	1	2	-
> 5ha	578	43	96	96
Lakes (adj)	2	-	<1	<1
Conservation Land (incl / adj)	2	-	<1	<1
Reserve, Public park etc (incl)	4	-	<1	<1
Reserve, Public park etc (adj)	55	4	9	<9
Heritage Order/Historic Place (incl)	14	1	2	2
Heritage Order/Historic Place (adj)	5	-	<1	<1
Foreshore	12	1	2	unknown
Islands	8	1	1	1
Associated Land	122	9	20	20
Caught by more than one category				
> 5 ha + other	466	35	78	78
Other combination	59	4	10	10
Total			**240**	

Note:

(a) Historical numbers are 2000 - 2003 only, the period over which the $50 million threshhold applied. Prior to this the threshold for business applications was $10 million.

(b) The expected approval numbers are based only on the changes in coverage. No effect on application numbers or approval rates from the changes in criteria, monitoring and enforcement are factored in.

Consultation undertaken

8 Prior to the proposal being developed submissions were received from or discussions were held with a number of interest groups on issues and concerns related to foreign investment. This included; Forest and Bird, American Chamber of Commerce in NZ, EMA Northern, Bayleys, Wrightson, Wellington Chamber of Commerce, Council of Trade Unions, Canterbury Employers Chamber of Commerce, Federation of Maori Authorities, Business New Zealand, Federated Mountain Clubs of New Zealand, NZ Historic Places Trust, New Zealand Archaeological Association, Local Government New Zealand, High Country Accord and Trustees, Public Access New Zealand, CAFCA - Coalition Against Foreign Control of Aotearoa, International Council on Monuments and Sites (NZ Committee), Federated Farmers, Fish and Game New Zealand, New Zealand Business Roundtable, Environmental Defence Society, Seafood Industry Council, Talleys, Sanford, Maruha, Chapman Tripp, Russell McVeagh and Bell Gully. Relevant aspects of the proposals have also been discussed with the Historic Places Trust.

9 Since the proposal has been developed, discussions have been held with the following government departments: Land Information New Zealand, Ministry of Fisheries, Ministry for Culture and Heritage, Te Puni Kokiri, Ministry of Agriculture and Forestry, Department of Prime Minister and Cabinet, Department of Labour

(New Zealand Immigration Service), Department of Conservation, Ministry for the Environment, State Services Commission, Ministry of Justice, Ministry of Foreign Affairs and Trade, Reserve Bank, Ministry of Economic Development and the Overseas Investment Commission.