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Cabinet Legislation Committee

LEG (04) 197

2 November 2004

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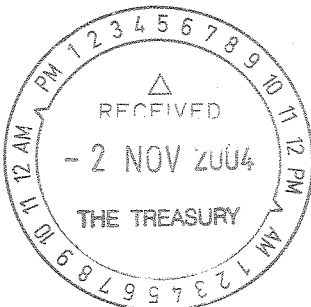
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Title **Overseas Investment Bill: Approval for Introduction**

Legislative Purpose This paper seeks approval for the introduction of the Overseas Investment Bill.

Previous Consideration The policy relating to the content of the Bill was agreed between July and October 2004 [CAB Min (04) 22/6; POL Min (04) 19/5; CBC Min (04) 9/5; POL Min (04) 23/8].

Summary The purpose of the Bill is to introduce changes to the way that overseas investment is regulated in New Zealand, recognising that it is a privilege for overseas persons to own sensitive assets in New Zealand. The Bill modifies aspects of the existing overseas investment regime established by the Overseas Investment Act 1973 and the Overseas Investment Regulations 1995. The Bill also modifies the provisions in the Fisheries Act 1996 relating to overseas investment in fishing quota.



Local Government New Zealand is compiling a list of reserves for inclusion in a schedule to the Bill, but this is unlikely to be completed before the Bill is introduced. It is proposed that the Minister of Finance be authorised to determine whether the final list should be included in the Bill or published by the Regulator.

It is also proposed that overseas investment transactions that require consent but are given effect without consent can be cancelled by the vendor or the Court on application of the Regulator.

Compliance The Bill complies with the relevant legal principles and obligations.

Timing Issues Introduced: 15 November 2004;

Referred: to the Finance and Expenditure Committee;

Passed: by 1 July 2005.

Announcement None indicated.

Consultation Mfish, MFE, DPMC, Cabinet Office, LINZ, Labour, Justice, MAF, MFAT and TPK were consulted. SSC, MED, DOC and Culture and Heritage were informed. PCO, the Overseas Investment Commission and the Reserve Bank were also consulted.

The Minister indicates that the government caucuses and other parties represented in Parliament will be consulted.

The Minister of Finance recommends that the Committee:

- 1 note that the Overseas Investment Bill holds priority 4 (to be referred to a select committee in 2004) on the 2004 legislation programme;
- 2 note that the purpose of the Bill is to acknowledge that it is a privilege for overseas persons to own or control sensitive New Zealand assets;
- 3 approve for introduction the Overseas Investment Bill [PCO 6016/12], subject to the final approval of government caucuses;
- 4 agree that the Bill be introduced on 15 November 2004;
- 5 agree that the government propose that the Bill be:
 - 5.1 referred to the Finance and Expenditure Committee for consideration;
 - 5.2 enacted by a date to be appointed by Order in Council on or before 1 July 2005;
- 6 agree to recommend that Cabinet:
 - 6.1 authorise the Minister of Finance to complete the list of parks and reserves for inclusion in the Schedule to the Bill and to determine whether the list should continue to be included in the Bill or instead be maintained and published by the Regulator;
 - 6.2 agree that overseas investment transactions that require consent but are given effect to without consent can be cancelled by the vendor or the Court on application of the regulator;
 - 6.3 agree that the Act be binding on the Crown;
- 7 authorise the Minister of Finance to make any further necessary technical amendments to the Bill prior to its introduction;

- 8 note that the Minister of Finance indicates that the government caucuses and other parties represented in Parliament will be consulted.

Fleur Gaston
for Secretary of the Cabinet

Copies to:

Cabinet Legislation Committee
Chief Executive, DPMC
 Chief Executive, Ministry for Culture and Heritage
Secretary to the Treasury
Chief Executive, Ministry of Economic Development
Secretary for Justice
 Secretary of Foreign Affairs and Trade
Minister of Agriculture
 Director-General, Ministry of Agriculture and Forestry (Agriculture)
Minister of State Services
 State Services Commissioner
Minister of Maori Affairs
 Chief Executive, Te Puni Kokiri
Acting Minister for Land Information
 Secretary of Labour
Minister for the Environment
 Secretary for the Environment
Minister for Land Information
 Chief Executive, Land Information New Zealand (LINZ)
Minister of Conservation
 Director-General of Conservation
Chief Executive, Ministry of Fisheries
Chief Parliamentary Counsel
Clerk of the House of Representatives

IN CONFIDENCE

Chair
Cabinet Legislation Committee

OVERSEAS INVESTMENT BILL: APPROVAL FOR INTRODUCTION

Proposal

1. This paper proposes the introduction of the Overseas Investment Bill on 15 November 2004.

Policy

2. The Bill's purpose is to acknowledge that it is a privilege for overseas persons to own or control sensitive New Zealand assets. The Bill modifies aspects of the existing overseas investment regime established in the Overseas Investment Act 1973 and the Overseas Investment Regulations. The Bill also modifies the provisions in the Fisheries Acts 1996 relating to overseas investment in fishing quota.

Coverage

3. The threshold for screening non-land business assets where the proposed acquisition includes a 25 per cent or more shareholding by an overseas person will be increased from \$50 million to \$100 million.
4. The regime will screen purchases of all foreshore and seabed land, regardless of the size of the land parcel. The present coverage of the regime will be retained on purchases by overseas persons of all land of the following types:
 - land over 0.2 hectares which adjoins the foreshore or seabed;
 - 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;
 - any land on other islands;
 - 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;
 - land over 0.4 hectares that a district plan or proposed district plan under the Resource Management Act 1991 provides is to be used as a reserve, a public park, for recreation purposes, or as open space;

- 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 that is subject to any heritage order, or is with Historic Places Act registration, or in respect of which a proposal for registration has been made, or land over 0.4 hectares adjoining these categories of land;
 - historic places, historic areas, wahi tapu, or wahi tapu areas that are registered or for which there is an application or proposal for registration under the Historic Places Act 1993 or land over 0.4 hectares adjoining these categories of land;
 - land over 0.4 hectares adjoining any regional park under the Local Government Act 1974, or over 0.4 hectares adjoining any of the parks or reserves listed in a Schedule to the Bill; and
 - any rural land over 5 hectares.
5. As requested by Cabinet, (CAB Min (04) 22/6) Local Government New Zealand (LGNZ) is compiling a list of reserves for listing in a schedule to the Bill. LGNZ have identified a number of parks for inclusion in the schedule but the list is unlikely to be completed before the Bill is introduced to the House because of uneven capability across Councils to identify qualifying land. I propose that the Committee authorises me to finalise the list and gives me the discretion to determine whether the list is too long for inclusion in the Bill and should instead be maintained and published by the Regulator.
6. Purchase of land by overseas persons with an unimproved value of more than \$10 million will no longer require consent where the land is not screened for other reasons. The removal of this requirement is only expected to affect purchases of land in the main centre central business districts.
7. Land adjoining some non-sensitive reserves, for example drainage and hospital reserves, will be removed from coverage. The current Act also includes "private open spaces" as sensitive land but there is no legal definition of this category of land and so in the revised Bill the word "private" has been dropped.
8. The Bill makes no changes to the existing policy that investments in fishing quota by overseas persons (OP) are not allowed unless consent is granted. There are some changes to which party needs to apply for consent due to a policy decision to more closely align the overseas investment provisions in the Fisheries Act 1996 with the Overseas Investment Act.

Criteria for Approval

9. All overseas investment subject to the screening regime will continue to be required to meet the *investor test*. 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).

10. Where an owner plans to sell a foreshore and seabed land parcel to an OP, that person will need to notify the Crown, which will have a limited period of time to exercise its right to purchase the land on equivalent terms and conditions.
11. Fishing quota purchasers will be required to meet the same *economic development test* as at present.
12. Land purchasers who do not intend to reside in New Zealand will be required to submit a management plan taking account of any of economic development, natural heritage, historic heritage features, or walking access, as appropriate. Currently only the economic development criterion is applied to land purchasers. The weighting given to each of these features will be property specific, and be determined by Ministers and the regulator.
13. The current advertising requirements for farmland will be maintained. That is, the land must have been offered for sale or acquisition on the open market to persons who are not OP.
14. The Bill provides that reasonable compliance with plans submitted by an overseas investor in support of their purchase will be made conditions of consent.

Previous Policy papers considered by Cabinet

15. Cabinet has considered four policy papers relating to this Bill and the relevant decisions are set out in:

Title	Committee Minute	Cabinet Minute
Review of the Overseas Investment Act	Amended	CAB Min (04) 22/6, 5 July 2004
Review of the Overseas Investment Act: Supplementary Issues	POL Min (04)19/5 25 August 2004	Confirmed
Review of the Overseas Investment Act: Inclusion of Aquaculture in the Overseas investment Regime	CBC Min (04) 9/5, 20 September 2004	Confirmed
Review of the Overseas Investment Act: Enforcement Issues and Foreign Investment in Fishing Quota	POL Min (04) 23/8, 6 October 2004	Confirmed

16. Much of the Bill could be contentious because foreign investment is an issue on which people hold strong and divergent views.
17. There are no outstanding policy issues. There are two issues though that I would like to draw to the attention of the Committee. These relate to the fact that the "triggering action" under the Overseas Investment regime is the *acquisition* of sensitive assets by OP rather than the *holding* of those assets by overseas persons. The first issue exists under the current regime and the second has arisen as a result of a Cabinet decision to align the "triggering action" under the Fisheries Act with the Overseas Investment Act:

Effect of a Change in Residency Status

- i. People ordinarily resident in New Zealand are not required to apply for permission to purchase sensitive assets such as land or fishing quota. Due to the lengthy "probation period" which is part of current immigration policy it is possible that a person could subsequently lose their residency status (for example due to committing a crime) but still be allowed to hold New Zealand land or other assets because they did not need permission when they acquired the asset. This risk exists under the current overseas investment regime and I do not recommend making any changes to address the situation. Extending the regime to all New Zealand residents and requiring ongoing residency as a condition of consent would represent a major increase in the restriction on foreign investment in New Zealand and would be inconsistent with existing international commitments.

Forfeiture of Fishing Quota

- ii. Cabinet's agreement to align the provisions of the Fisheries Act covering who needs to apply for consent to acquire fishing quota with the Overseas Investment Act has resulted in a minor change to the application of forfeiture provisions in the Fisheries Act. Companies who acquire quota without consent will still be subject to the forfeiture of quota under section 58 of the Act but the forfeiture provisions will not now apply to a situation where an OP buys shares in a company without permission. Under the current regime, if an OP bought 25% of the shares of a quota owning company without permission, the company's quota could be forfeit even though it held a current consent. Under the new regime, since the offence is acquiring shares without consent, the OP could be required to dispose of their shares and could be fined but the quota held by the company would not be subject to forfeiture. I believe this to be a minor change because the general enforcement powers under the Overseas Investment Act are sufficient to deal with the offence and note that the forfeiture provisions in the Fisheries Act relating to overseas ownership have never been used.

The Ability to Cancel a Transaction

18. The Bill seeks to clarify the legal status of a transaction that is entered into without consent. The current situation is that such a transaction would be likely to be deemed an illegal contract for the purposes of the Illegal Contracts Act. This would be undesirable from a policy perspective because the ownership of an illegally acquired asset would revert to the original owner and the enforcement provisions in the Bill would not apply. For example the Courts could not order the disposal of the assets of an overseas person who did not have consent if the ownership had reverted to the original owner. For this reason the Bill states that transactions entered into without consent are not illegal contracts. There may be situations, however, where it would be preferable to cancel a transaction that was obtained without consent. The Bill allows for transactions entered into without consent to be cancelled by the vendor or the Court on application of the regulator.

Compliance

19. Bill complies with the:
1. principles of the Treaty of Waitangi;
 2. rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
 3. principles and guidelines set out in the Privacy Act 1993;
 4. relevant international standards and obligations; and
 5. LAC Guidelines: Guidelines on Process and Content of Legislation, a publication by the Legislation Advisory Committee.

Consultation

20. The following Government Departments have been consulted on the draft Bill and were consulted during the policy development stage: Land Information New Zealand (LINZ), 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, 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. Relevant aspects of the proposals have also been discussed with the Historic Places Trust.
21. 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.
22. The Government caucus and coalition partners have been consulted.

Binding on the Crown

23. Due to an omission during the policy development stage, a decision has not been made by a Cabinet committee on whether the Bill should be binding on the Crown. Provisions in this Bill relevant to the Crown include the criteria that Ministers will take into account when considering applications from overseas persons to buy sensitive New Zealand assets and enforcement powers and penalties for overseas persons in breach of the Act. Failure to bind the Crown by this Act would introduce considerable uncertainty on the part of foreign investors and undermine the Government's policy of maintaining an open and transparent foreign investment regime.

24. I propose that the Bill be binding on the Crown in keeping with the general principle that the Crown should be bound by Acts unless the application of a particular Act to the Crown would impair the efficient functioning of Government.

Creating new agencies or amending law relating to existing agencies

25. Cabinet has agreed that the current Overseas Investment Commission (OIC) will be disestablished, and the functions of the regulator carried out within a government department [Cab Min (04) 22/6 refers]. At this stage Cabinet has decided 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.
26. The Bill will continue to set out the functions of the regulator and the arrangements for delegating the Minister's decision making powers to the regulator as the existing Act does. This is in order to provide transparency for overseas investors and provides clarity in the situation where I will be delegating some decision making powers to a Department which I do not have primary responsibility for.

Allocation of decision making powers

27. Not applicable.

Associated regulations

28. As a result of reviewing the current Overseas Investment Act and Overseas Investment Regulations 1995, the revised Overseas Investment Bill will have far fewer regulations because a number of substantive regulations (for example covering what sensitive New Zealand assets are covered by the regime) have been moved into the primary Act. Cabinet has agreed that the thresholds for land and business assets be retained in regulation to allow for future flexibility but changes to coverage and criteria should only be able to be changed by Parliament.
29. Regulations will also be needed to:
- prescribe procedures for offering the farm land or the securities to which the overseas investment relates for acquisition on the open market to persons who are not overseas persons;
 - provide what is required to satisfy the criteria for foreshore or seabed to be offered to the Crown;
 - prescribe other criteria that the relevant Ministers may apply to applications for purchase of sensitive land or fishing quota;
 - prescribe fees and charges to be paid, or the amounts to be charged, a means by which they may be calculated and ascertained, or a rate at which

they may be calculated or ascertained, including for applications for consent and monitoring compliance with the conditions of consents;

- prescribe maximum administrative penalties to be charged by the regulator;
 - provide for and regulating the giving or service of notices for the purposes of this Act;
 - provide exemptions from the requirement for consent under this Act or the Fisheries Act 1996; or from the definition of overseas person; or from fees, charges and administrative penalties.
30. Drafting these regulations will not be a major task but some work will be required to review all existing exemptions and determine whether they should be continued in the new regulations.
31. The draft Bill continues to allow for approval to be granted to persons who wish to buy sensitive assets and can show "intention to reside in New Zealand". The first submission to Cabinet on the revised regime in July stated that guidelines would be issued by the Minister outlining how this should be interpreted given current immigration policy. The paper further suggested that the detail of this policy should be prescribed by regulation "so that the policy can be easily aligned with any immigration policy changes." However, many immigration policy changes are made at an operational policy level and not through regulation. For this reason, I have been advised that the definition of what it means to 'intend to reside' should not be set out in regulation, and will be available to overseas investors as guidelines on the website of the overseas investment regulator.

Deemed regulations

32. Not applicable.

Definition of Minister/department

33. The Cabinet Office has been consulted on the Bill's definition of Minister, Department and chief executive.

Commencement of legislation

34. The Bill provides for a commencement date to be appointed by Order in Council in order to allow time for the drafting of the necessary regulations. It is anticipated that this will be on or before 1 July 2005.

Parliamentary stages

35. I propose that the Bill be introduced on 15 November 2004 and should be passed by 1 July 2005.
36. I propose that the Bill be referred to the Finance and Expenditure Select Committee.

Recommendations

37. I recommend that the Committee:

- a **note** that the Overseas Investment Bill holds priority 4 on the legislation programme;
- b **note** that the purpose of the Bill is to acknowledge that it is a privilege for overseas persons to own or control sensitive New Zealand assets;
- c **approve** for introduction the Overseas Investment Bill, subject to the final approval of government caucuses;
- d **agree** that the Bill be introduced on 15 November 2004;
- e **agree** that the government propose that the Bill be:
 - i referred to the Finance and Expenditure Select Committee for consideration; and be
 - ii enacted by a date to be appointed by Order in Council on or before 1 July 2005; and
- f **agree** that the Act should be binding on the Government;
- g **agree** that overseas investment transactions that require consent but are given effect to without consent can be cancelled by the vendor or the Court on application of the regulator;
- h **authorise** the Minister of Finance to make any further necessary technical amendments to the Bill prior to its introduction; and
- i **authorise** the Minister of Finance to complete the list of parks and reserves for inclusion in the Schedule to the Bill and to determine whether the list should continue to be included in the Bill or instead be maintained and published by the Regulator.



Hon Dr Michael Cullen
Minister of Finance

Consultation on Cabinet and Cabinet Committee Submissions

Certification by Department

Departments consulted: The attached submission has implications for the following departments whose views have been sought and are accurately reflected in the submission:

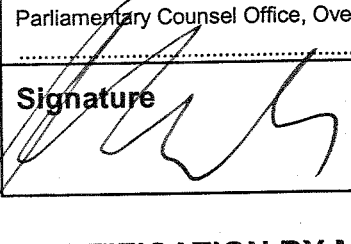
Ministry of Fisheries, Ministry for the Environment, Department of Prime Minister and Cabinet, Cabinet Office, Land Information New Zealand, Department of Labour, Ministry of Justice, Ministry of Agriculture and Fisheries, Ministry of Foreign Affairs and Trade, Te Puni Kokiri,

Departments informed: In addition, the following departments have an interest in the submission and have been informed:

State Services Commission, Ministry of Economic Development, Department of Conservation; Ministry of Culture and Heritage

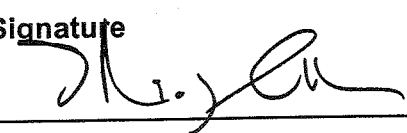
Others consulted: Other interested groups have been consulted as follows:

Parliamentary Counsel Office, Overseas Investment Commission, Reserve Bank

Signature 	Name, Title, Department <i>Treasury</i> <i>Steve Rylands, Principal Advisor</i>	Date <i>29, 10, 04</i>
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CERTIFICATION BY MINISTER

Ministers should be prepared to update and amplify the advice below when the submission is discussed at Cabinet/Cabinet committee. The attached submission:

Consultation at Ministerial level	<input checked="" type="checkbox"/> did not need consultation with other Ministers <input type="checkbox"/> has been the subject of consultation with the Minister of Finance <i>[required for all submissions seeking new funding]</i> <input type="checkbox"/> has been the subject of consultation with the following Minister(s)	
Consultation with Government MPs	<input type="checkbox"/> does not need consultation with the government caucuses <input checked="" type="checkbox"/> has been or will be <i>[specify which]</i> the subject of consultation with the following government caucuses: <input checked="" type="checkbox"/> Labour caucus <input checked="" type="checkbox"/> Progressive Coalition caucus	
Consultation at Parliamentary level	<input type="checkbox"/> does not need consultation at parliamentary level <input checked="" type="checkbox"/> has been or will be <i>[specify which]</i> the subject of consultation with the following other parties represented in Parliament: <div style="text-align: center;"><i>U.F., others as required</i></div>	
Signature	Portfolio	Date
	<i>Finance</i>	<i>30, 04</i>