Office of the Minister of Finance

Chair
CABINET POLICY COMMITTEE

SUPPLEMENTARY ISSUES ARISING FROM THE REVIEW OF THE OVERSEAS INVESTMENT ACT

PROPOSAL

1. Cabinet requested in CAB Min (04) 22/6, that officials report back on a number of issues arising from the review of the Overseas Investment Act.

2. Arising from these reports backs I propose that:

   a. Right of first refusal on foreshore and seabed: the time periods within which the right of first refusal must be exercised should be similar to those used by the Crown in the Ngai Tahu Settlement Claims Act, but slightly extended to allow time for the Cabinet process. I further propose that the Minister of Conservation, as Minister responsible for the Crown's ownership functions under the Foreshore and Seabed Bill, be responsible for administering the right of first refusal.

   b. Aquaculture: the overseas investment regime not be extended to cover aquaculture as the benefits from doing so are limited, but the costs potentially high. ***[Withheld under sections 6(a) and 9(2)(h) of the Official Information Act]***

   c. Drafting issues: coverage under the Overseas Investment Act be contained in the Act itself, but the thresholds for the asset categories (e.g. $100 million for non-land assets, and land areas) be contained in regulation;

   d. Maori Land: Maori land be brought within the Overseas Investment Act. The Maori Land Court would still be required to confirm sales of Maori land, but consent under the Overseas Investment Act would be a pre-requisite for confirmation where an overseas purchaser is involved.

3. Further, officials have processes in train for dealing with the issues related to parks and reserves, organisational transition and fishing quota. I will report back to Cabinet Policy Committee in late September on these issues, on monitoring

and enforcement, and on any further matters arising out of the legislation drafting process.

CONTEXT

4. On 28 June 2004 Cabinet agreed to certain reforms of the Overseas Investment Act (CAB Min (04) 22/6 refers). Several outstanding issues were identified. Cabinet:

- Directed officials from Treasury, in consultation with relevant regional and territorial authorities, Local Government New Zealand, the Department of Internal Affairs and the Department of Conservation, to develop options for identifying those parks and reserves (to be listed in a schedule to the Overseas Investment Act) in respect of which land adjoining should be screened, as well as options for revising that list in the future;
- Directed officials from Treasury and Te Puni Kokiri to discuss with the Maori Land Court the options for dealing with Maori land and the implications of those options for the Court, and invited the Minister of Finance to report to POL by 28 July 2004;
- Directed officials from Treasury, Te Puni Kokiri and the Ministry of Fisheries to develop details of how aquaculture can be covered in the regime, and report back to POL at the conclusion of current consultation with the aquaculture industry on the Crown's proposals;
- Directed officials to report to the Minister of Finance by the end of July 2004 on proposals for a right of first refusal in respect of foreshore and seabed land and the possibility of compulsory acquisition of foreshore strips;
- Directed officials to work on an appropriate cost recovery framework for the revised regime;
- Invited the Minister of Finance to issue drafting instructions to Parliamentary Counsel on the basis for drafting of a new Overseas Investment Act, but with provisions of the 1973 and amending Acts, unless specifically amended by these proposals, being carried over into the new Act;
- Directed 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.

RIGHT OF FIRST REFUSAL OVER FORESHORE AND SEABED

5. Cabinet previously discussed a process for the Crown's right of first refusal over foreshore and seabed that was based on the right granted to Te Runanga o Ngai Tahu by the Crown under the Ngai Tahu Claims Settlement Act 1998. There were four issues outstanding:

- the time limits within which offers must be made and agreements entered into;
- whether an arbitration or mediation process is needed to deal with potential disagreements about whether land has been offered on more favourable terms and conditions;

- the level of compensation to be paid by the Crown when it wishes to purchase only part of the land that is subject to the Overseas Investment Act process;
- exemptions from the subdivision provisions under the Resource Management Act;
- administration of the right of first refusal process.

6. As outlined in the previous Cabinet paper, the process for the right of first refusal is that when an application is lodged with the overseas investment regulator, the Crown is offered the opportunity to purchase any foreshore and seabed land within the parcel on the same terms and conditions prior to the application being approved.

Time limits

7. I originally proposed that the time periods used in the Ngai Tahu legislation should be used as a guide. Generally, the Crown should not take for itself a longer time period than it has agreed to give Ngai Tahu under their right of first refusal. However, a longer time period is required because these decisions have to go through the Cabinet process. I therefore propose that the Crown would have thirty working days from being notified of a proposed sale to decide whether it wishes to acquire the land. This is slightly longer than the 20 working days under the Ngai Tahu legislation.

8. As we have previously discussed, the vendor should then not be able to sell on terms and conditions more favourable than those on which the Crown could have purchased. The Crown's right of first refusal will therefore arise again in two circumstances: if the terms and conditions agreed between vendor and the overseas purchaser change; and if a new application is lodged in respect of the land.

Arbitration or mediation process

9. If conditions placed on the sale by the overseas investment regulator are considered to be onerous, the prospective purchaser may only be prepared to pay a lower price than originally negotiated. Where the price is reduced to reasonably account for conditions of consent, the terms and conditions should not, for these purposes, be treated as having been changed. I do not recommend legislation to address this, but the regulator may wish to cover this issue in guidelines to be issued to overseas investors.

Compensation for foreshore strips

10. Where the land is predominantly dry land, but is surveyed to below the mean high water spring mark, the Crown right to purchase extends only to the foreshore and seabed component. The Crown could ask to take the strip without compensation, as one of the conditions of consent under the Overseas Investment Act, where the value of the strip is insignificant compared to the value of the land.

11. In cases where the strip represents a significant part of the value of the land it may be appropriate for the Crown to pay compensation for the strip. If the Crown and the vendor cannot agree on the value of the strip, I propose that compensation will be determined by a registered valuer agreed on by the parties.

This is similar to the process as outlined in section 237H of the Resource Management Act 1991.

12. I propose that survey costs be borne by the Crown. These costs will arise where the Crown acquires the foreshore strip only, as the remaining parcel of land will have to resurveyed for the revised title.

13. Funding for any purchase of foreshore and seabed land will likely be appropriated through a multi year appropriation for Vote Conservation through the 2005 Budget. The appropriation type is expected to be a non-departmental capital appropriation (Purchase or development of Capital Assets by the Crown).

Exemption from RMA subdivision provisions

14. I propose that the taking of a foreshore strip by the Crown should be exempt from the subdivision provisions under the RMA. This means that size restrictions, consultation requirements and other such provisions will not apply.

15. Such an exemption is not inconsistent with the policy intention of the RMA relating to subdivisions. The policy intent behind these RMA provisions relate to regulating the effects of land use intensification, which will be unaffected by this proposal.

AQUACULTURE

16. In CAB Min (04) 22/6 Cabinet directed officials from Treasury, Te Puni Kokiri and the Ministry of Fisheries to develop details of how aquaculture can be covered in the regime. I have previously proposed that aquaculture remain outside the regime.

17. Coastal aquaculture activities may be seen as a sensitive industry, and screening of overseas investment considered appropriate. This sensitivity may reflect that coastal aquaculture activities take place in coastal areas, and exclude other coastal activities from the farming areas. Further, it may be seen as similar to fishing quota, which is subject to the Overseas Investment Act.

18. Set against this sensitivity however, the benefits of screening aquaculture activities are likely to be limited. Significant limitations will already be placed on the coastal permit by the local authority. The permit will outline specifically the nature of the activity to be undertaken; limiting the discretion of permit holders in their use of the space. This is likely to also limit the ability of the overseas investment regulator to require 'extra' benefits from overseas permit holders.

19. Benefits of overseas screening are likely to be mainly around ensuring that overseas persons owning aquaculture businesses are of good character. There may be some additional benefits from ensuring that processing was carried out onshore and with New Zealand staff, as is the case with fishing quota. However, aquaculture can be differentiated from fishing quota in this context, as the nature of the aquaculture industry suggests that the risk of all related economic activity being undertaken offshore is lower.

20. In addition, the potential costs of screening overseas investment in aquaculture could be high. Significant consultation is likely to be required between local authorities and the overseas investment regulator to avoid conflict or overlap between the conditions imposed by the local authority and the overseas investment regulator. This will be exacerbated if the consent holder owns or operates aquaculture activities in a number of local jurisdictions.

21. ***[Withheld under sections 6(a) and 9(2)(h) of the Official Information Act]***

22. I therefore recommend that aquaculture remain outside the overseas investment regime.

Possible mechanism for incorporating aquaculture into the Act

23. If Cabinet decides to incorporate aquaculture under the Overseas Investment Act I would propose the mechanism set out below, subject to consultation with the aquaculture industry on implementation.

24. The Overseas Investment Act could provide that an estate or interest in land includes an interest in a coastal permit to undertake aquaculture activities as defined in the proposed Aquaculture Reform Bill. For clarity and transparency, these permits should also specifically be included under the coverage section of the Overseas Investment Act. It is not clear at this stage whether this would require amendment to the Aquaculture Reform Bill.

25. The relevant Ministers would be the Minister of Finance and the Minister of Conservation, as Minister responsible for the regulation of activities in the coastal marine area.

26. The criteria that Ministers would be required to have regard to could be the same criteria as for non-land assets (i.e. the investor test), or the same criteria as for fishing quota (i.e. the investor test and economic development criteria). It may be difficult for applicants to show economic development benefits. Limiting the relevant criteria under the Overseas Investment Act to the investor test would minimise the opportunity for conflict between the local council conditions and those imposed under the Overseas Investment Act.

27. The proposed monitoring and enforcement provisions in the revised Act would be sufficient to cover consents for coastal aquaculture activities.

DRAFTING ISSUES

28. Parliamentary Counsel Office has raised some issues in the course of drafting. Of those issues, the only one that requires Cabinet consideration at this point relates to flexibility around thresholds.

29. Assets that are subject to the Act (coverage) are at present set out in regulation, while the criteria are in legislation. To improve transparency the previous Cabinet paper discussed that both coverage and criteria be contained in legislation rather than regulation.

30. If the government wishes to maintain some ability to change the coverage of the Act there are three alternatives. Overall I propose that the asset categories be moved to the legislation; however thresholds (land areas, and value of business assets) could be treated differently. The options are:
    - the thresholds would be set out in regulation;
    - the thresholds would be set out in the Act, but with a the power to change the thresholds by regulation;
    - the thresholds would be set out in the Act, but with a power to modify both the asset categories and the thresholds by regulation.

31. I consider that the first option is preferable. Moving asset categories into the Act would increase the transparency of the regime, and address any concern about government's ability to significantly alter the impact of the regime by regulation – such as through changing the asset categories that are subject to the regime. However retaining the thresholds in regulation retains the present level of flexibility for the government to adjust thresholds by Order-in-Council.

32. While the other options would be more transparent by having all aspects of coverage in the Act, and would provide greater flexibility to the government, the Regulations Review Committee generally considers the power to change legislation by regulation should only be used rarely and with strict controls.

MAORI LAND

33. The paper on the review of the Overseas Investment Act discussed at Cabinet on 5 July 2004 (Cab Min (04) 22/6 refers) described four options for addressing the application of the act to Maori land.

34. The options entailed either the Maori Land Court having sole responsibility for requirements under Te Ture Whenua Maori Act 1993 and the Overseas Investment Act; the overseas investment regulator having this same sole responsibility, or not requiring Maori Land Court approval for sales of Maori land to overseas persons. The fourth option was to bring Maori land within the Overseas Investment Act and amend Te Ture Whenua Maori accordingly.

35. I propose that option 4 be adopted. This would ensure that the Maori Land Court and the overseas investment regulator each deal with issues in their field of expertise. The risk around this option is that it involves amending Te Ture Whenua Maori Act 1993 in order to alter one of the criteria for the exercise of jurisdiction of the Maori Land Court.

36. Officials from Te Puni Kokiri and Treasury have discussed these options with the Maori Land Court unit of the Ministry of Justice, including the Chief Registrar of the Court, in order to discuss any implications for the Court. They have not identified any concerns with the proposal. I note also that the Ministry of Justice has advised that they are not aware of any recent application being made to sell Maori land to overseas persons. This suggests that the impact of these changes will not be large.

TRANSITIONAL ISSUES

37. Discussions have been held between the Reserve Bank and LINZ on the issue of transitional arrangements for the staff and functions of the Overseas Investment Commission. I understand the Reserve Bank is preparing a report on separation of the information technology and document management systems used by the OIC, and that LINZ is working on an implementation plan for the transition, which is expected to be available by the end of September.

38. LINZ has confirmed that offers of employment will be made to all OIC staff. Some conditions will not be able to be replicated; however, offers will be made on terms and conditions as similar as possible to the existing terms and conditions of OIC staff.

39. LINZ has confirmed that the functions of the regulator will be performed by a dedicated team within LINZ, reporting to the General Manager, Regulatory Group.

PARKS AND RESERVES

40. Treasury was directed by Cabinet to develop options for identifying those parks and reserves for which land adjoining will be subject to screening under the overseas investment regime, and options for revising that list (CAB Min (04) 22/6).

41. Treasury have asked Local Government New Zealand to liaise with all councils, and ask for information about parks or reserves that are used for recreation purposes, and that are over 10 hectares in size. They have also asked for information about any smaller parks or reserves that the relevant council considers to be particularly sensitive, and for detail on that sensitivity. On the basis of that information, they will work with the Department of Conservation and the Department of Internal Affairs to develop a list of relevant parks and reserves for which overseas ownership of land adjoining should be screened. The list is likely to be finalised in the first quarter of 2005.

FINANCIAL IMPLICATIONS

42. The financial implications arising from these proposals include the cost of purchasing foreshore and seabed land, and transitional costs which have been raised previously (Cab Min (04) 22/6 refers). Funding will be sought for a multi-year appropriation for the foreshore and seabed land as part of Budget 2005. As previously noted, transitional costs are not likely to exceed $1 million. Funding will be sought for this once costs are better quantified.

TREATY IMPLICATIONS

43. There are no Treaty implications arising from these proposals.

CONSULTATION

44. Land Information New Zealand, Ministry of Fisheries, Te Puni Kokiri, Department of Conservation, Ministry for the Environment, Ministry of Justice (Maori Land

Court Unit), Ministry of Foreign Affairs and Trade, Department of Prime Minister and Cabinet, Department of Internal Affairs and the Overseas Investment Commission have been consulted in the preparation of this paper.

RECOMMENDATIONS

It is recommended that the Committee:

Right of first refusal over foreshore and seabed

1. Agree that the right of first refusal over any foreshore or seabed land within a parcel be one of the criteria to be taken into account in assessing applications under the Overseas Investment Act;

2. Agree that the right of first refusal extends only to the foreshore and seabed land, and not any dry land, contained within a parcel.

3. Agree that the Minister of Conservation, as Minister responsible for the Crown's ownership functions under the Foreshore and Seabed Bill, be responsible for implementing the Crown's right of first refusal over foreshore and seabed land under the Overseas Investment Act;

4. Agree that the Crown be required to notify its intention to purchase any foreshore and seabed land within thirty (30) working days of an application being lodged under the Overseas Investment Act;

5. Agree that following that thirty day period the Crown's right of first refusal will arise again in two circumstances: if the terms and conditions agreed between vendor and the overseas purchaser change; and if a new application is lodged in respect of the land;

6. Agree that where a foreshore strip is taken by the Crown as a condition of consent under the Overseas Investment Act and the Crown and the vendor cannot agree on the value of the strip, compensation will be determined by a registered valuer agreed on by the parties;

7. Agree that where a foreshore strip is taken by the Crown as a condition of consent under the Overseas Investment Act, the taking be exempt from the subdivision provisions of the Resource Management Act;

8. Note that funding for the purchase of foreshore and seabed land will likely be appropriated through a multi-year appropriate for Vote Conservation (non-departmental capital appropriation), with funding to be sought in Budget 2005;

Aquaculture

9. Agree that the overseas investment regime not be extended to include aquaculture;

Drafting issue raised by PCO - thresholds

10. Agree that the thresholds for coverage be retained in regulation, but that the asset categories be in legislation;

Maori Land

11. Agree that the Overseas Investment Act continue to apply to Maori land, but that this be governed by the Overseas Investment Act rather than by Te Ture Whenua Maori Act 1993;

12. Agree that Te Ture Whenua Maori Act 1993 be amended so that consent under the Overseas Investment Act is a pre-requisite for confirmation by the Maori Land Court in any case where Maori land is sold to an overseas person;

13. Note that there are likely to have been very few, if any, applications to the Maori Land Court for consent to sell Maori land to an overseas person;

Transitional issues

14. Note that LINZ staff have met with Reserve Bank staff and have commenced developing an implementation plan for the transition of the functions and staff from the Bank to LINZ;

15. Note that LINZ propose to offer employment to all staff of the Overseas Investment Commission, and to keep the staff together in a dedicated team reporting to the General Manager, Regulatory Group;

Parks and reserves

16. Note that Local Government New Zealand is liaising with all councils to identify parks or reserves over 10 hectares, or of particular sensitivity, in order to develop a list of recreational parks or reserves in respect of which land adjoining should be screened;

Next steps

17. Invite the Minister of Finance to report to POL by the end of September 2004 on issues related to monitoring and enforcement of the regime, fishing quota issues and any further policy issues that are raised during the legislation drafting process.

Hon Dr Michael Cullen
Minister of Finance