

Treasury Report: Overseas Investment Act Review - Additional Issues

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|------------------------|--------------------------|---------------------------|------------|
| Date: | 11 June 2004 | Treasury Priority: | Medium |
| Security Level: | COMMERCIAL-IN-CONFIDENCE | Report No: | T2004/1006 |

Action Sought

| | Action Sought | Deadline |
|---|---|-------------------|
| Minister of Finance | Agree that draft POL paper on the review of the Overseas Investment Act be amended as proposed | Wednesday 16 June |
| Associate Minister of Finance (Hon Trevor Mallard) | None | None |
| Associate Minister of Finance (Hon David Cunliffe) | None | None |

Contact for Telephone Discussion (if required)

| Name | Position | Telephone | 1st Contact |
|-----------------|-------------------|------------------|--|
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11 June 2004

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Executive Summary

Following our report of 4 June 2003 (T2004/954 refers) you requested further work on:

- coverage of land adjoining reserves administered by the Department of Conservation (DOC);
- coverage of foreshore and seabed land; and
- Crown right of first purchase of foreshore and seabed land.

Coverage of land adjoining reserves

DOC considers there are four types of reserves in respect of which it is appropriate that land adjoining them be screened; namely scenic, nature, scientific and historic.

We recommended that coverage only be extended to land adjoining scenic, scientific and nature reserves. The treatment of land adjoining historic reserves should be the same as the treatment of land adjoining heritage sites, which is not proposed to be screened. The ability for an adjoining land owner to improve the care or maintenance of a historic reserve or heritage site may be relatively limited except in a small number of cases. The compliance costs involved in checking surrounding properties for heritage sites are borne by all land applicants. The Ministry for Culture and Heritage (MCH) have expressed some reservations about land adjoining heritage sites not being screened.

Coverage of foreshore and seabed land

The regime could encompass all foreshore and seabed land. There are a relatively small number of parcels that are likely to be caught as a result of this extension. MFAT have advised that this change is defensible under our international treaty obligations.

Crown purchase of foreshore and seabed land

There are three options that provide the Crown with an option to purchase foreshore and seabed land that may otherwise be sold to overseas persons; right to be notified and make an offer, right of first refusal and compulsory acquisition. For parcels that are entirely foreshore and seabed we consider that the right of first refusal is likely to best meet the Crown's needs. The process would be broadly similar to that under the Ngai Tahu Settlement Claims Act, 1998 which gives Te Runanga o Ngai Tahu a right of first refusal in respect of certain Crown land. For parcels that only include a foreshore strip as part of a larger dry land title, depending on the size of the foreshore strip it may be appropriate that either the above right of first refusal process be triggered, or that a condition of sale be imposed affecting the transfer of the foreshore strip only into Crown ownership.

Given the complexity of the issues involved we suggest that officials do further work on this and report back by the end of July.

Recommended Action

We **recommend** that you:

- a **agree** that coverage be retained over land adjoining scientific, scenic and nature reserves that are both classified as such under the Reserves Act 1977 and administered by the Department of Conservation;
- Agree/disagree.*
- b **agree** that land adjoining heritage sites, and land adjoining historic reserves that are classified as such under the Reserves Act 1977 and administered by the Department of Conservation, coverage not be maintained;
- Agree/disagree.*
- c **agree** that to the regime encompass all foreshore and seabed land irrespective of size;
- Agree/disagree.*
- d **agree** that in respect of foreshore and seabed land either:
- i The Overseas Investment Act require the owner to notify the Crown with a view to the Crown making an offer to buy the land; or
- Agree/disagree.*
- ii The Overseas Investment Act provide for a right of first refusal in favour of the Crown in respect of any land covered by the Act; or
- Agree/disagree.*
- iii Direct officials to extend the work already underway on vesting in the Crown foreshore and seabed that was previously in public hands, to include private foreshore and seabed land;
- Agree/disagree.*
- e **direct** officials to investigate the right of first refusal and compulsory acquisition of foreshore strips and report back by the end of July.
- Agree/disagree.*

Rosemary Cook
for Secretary to the Treasury

Hon Dr Michael Cullen
Minister of Finance

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Purpose of Report

1. This report advises on options for dealing with coverage of land adjoining that administered by the Department of Conservation, and coverage of foreshore and seabed titles. These issues were raised in our report of 4 June 2003 on the review of the Overseas Investment Act (T2004/ 954 refers). It also discusses options for giving the Crown a right of first refusal over foreshore and seabed land that would otherwise be sold to overseas persons.

Department of Conservation – land adjoining reserves

2. In our report of 4 June 2003 we noted the Department of Conservation (“DOC”) comment that they would like to see coverage retained on land adjoining more reserves than is recommended in the draft cabinet paper. We have spoken further to DOC officials, and they asked that land adjoining certain reserves administered by DOC be retained within the coverage of the Overseas Investment Act (“the Act”).
3. We note that all reserves will continue to be screened – the change proposed in the draft cabinet paper only deals with land adjoining reserves.
4. As noted in the draft cabinet paper, land adjoining many reserves, including local purpose reserves such as drainage reserves, is not sensitive. The recommendation to screen only land adjoining foreshore and lake front reserves was based on the difficulty of identifying by category, reserves that are sufficiently sensitive that land adjoining them might need to be screened. DOC has now suggested continuing to screen land adjoining some reserves that are both classified under Reserves Act and administered by DOC.
5. Categories of reserve under the Reserves Act are: recreation; historic; scenic; scientific; nature, local purpose; and government purpose. DOC considers that of these, it is only historic, scenic, scientific and nature reserves which are administered by DOC, in respect of which land adjoining should be screened. There are 1,756 scientific, scenic, historic and nature reserves, covering approximately 520,000 hectares that are administered by DOC.

| Categories of reserve | Conservation units | Area (in hectares) |
|-----------------------|--------------------|--------------------|
| Historic | 140 | 5,006 |
| Scenic | 1,481 | 384,077 |
| Nature | 53 | 115,430 |
| Scientific | 82 | 15,775 |
| Total | 1,765 | 520,288 |

6. Compliance costs will be higher than proposed as all (land) applicants will have to search the Conservation Management Strategy, or DOC geographic information system website for the relevant region, in order to ascertain whether the land is subject to the Act.
7. If land adjoining historic reserves is screened, this raises the question of land adjoining sites registered (or proposed to be registered) under the Historic Places Act, which the paper recommends not remain subject to the regime. DOC considers that historic reserves could be differentiated from Historic Places Act registered sites. This is on the basis that land for heritage reserves is acquired only as it becomes available and therefore an historic reserve may not encompass all of the historic area. In contrast, registration under the Historic Places Act, because it does not require purchase of the land, is more likely to encompass all of the relevant area.
8. As noted in our 4 June report, the Ministry for Culture and Heritage has expressed some reservations about land adjoining heritage sites no longer being screened. On some occasions historic heritage may be affected by developments on adjoining land. This may occur where a development on an adjoining site has an adverse visual impact on historic heritage, or the Trust's registration does not cover the land or setting associated with historic heritage. A case by a case assessment of applications would be required to determine whether there are adverse heritage effects. In some instances, historic heritage may be located so far from site boundaries that developments on adjoining land would not have an impact on them. Where historic heritage is located near the boundary of a site, however, developments on adjoining land could potentially have adverse effects. The Ministry considers that the compliance costs are not significant relative to the potential benefit of ensuring greater protection in some circumstances.
9. We acknowledge the concerns of both DOC and the Ministry, but note that issues do not clearly arise in respect of land adjoining all heritage sites or historic reserves. Conditions of consent will only be relevant in a limited number of cases for land adjoining sensitive reserves or sites, and therefore the benefit of screening all adjoining sites is limited. Further, we note that one of the terms of reference for the review of the Overseas Investment Act is to reduce compliance costs for businesses. If land adjoining heritage sites (registered and proposed) and historic reserves are to be screened this would mean that in respect of each parcel of land subject to the Act, prospective purchasers would have to search the Historic Places Act register as well as the DOC conservancies' Conservation Management Strategies for all surrounding land.
10. The attached draft cabinet paper has been amended to reflect that coverage will remain over land adjoining land that is classified as a scientific, scenic or nature reserve under the Reserves Act 1977 and which is administered by DOC. The Cabinet paper still reflects that land adjoining historic reserves or heritage sites will not be screened.

Foreshore and seabed

11. In our report of 4 June, we noted that not all seabed parcels would be covered by the proposed regime. You have indicated that you are interested in the regime possibly encompassing all foreshore and seabed parcels and allowing the Crown a first right of purchase of these.

Data on existing foreshore and seabed parcels

12. The foreshore is the area between the mean high water spring and mean low water spring marks. There are approximately 12,000 parcels of land that are surveyed to below mean high water spring, and which therefore include some foreshore. Depending on the tidal flows and the gradient of the land, the amount of foreshore coverage can vary enormously.
13. There are 32 seabed parcels and 208 eroded parcels. In our report of 4 June we noted that there are some seabed parcels that will not be covered by the Act. Three of these are non-eroded seabed titles. LINZ is compiling information about the amount of affected seabed, and the owners of it. To give you an indication of the size of the 208 parcels, most look to be around 1,000 square metres (a quarter acre). Eleven of the 208 are over 5 hectares in size and are therefore large enough to be covered by the Overseas Investment Act. Of the 11 large parcels, 4 are Maori land and 7 general land.

Extending the scope of the Act

14. You have indicated that you would like to see the regime encompass all foreshore and seabed parcels, irrespective of size. This would apply to the 208 eroded and 32 other seabed titles in private ownership, and to any of the 12,000 titles that were surveyed to below the mean high water spring mark which are less than 0.2 hectares and are therefore not otherwise covered. These numbers describe privately held land. There are a number of foreshore and seabed titles that are held by territorial authorities but the intention is that these will vest in the Crown under the Foreshore and Seabed Bill.

International obligations

15. **Withheld under section 6(a) To avoid prejudice to the security or defence of New Zealand or the international relations of the Government of New Zealand;**
16. **Withheld under section 6(a) To avoid prejudice to the security or defence of New Zealand or the international relations of the Government of New Zealand;**

Crown purchase of foreshore and seabed

17. You have asked for advice on the possibility of using the Overseas Investment Act to obtain a right of first refusal in favour of the Crown on foreshore and seabed land. Any mechanisms under the Overseas Investment Act would only address land offered for sale to overseas persons. If you wish to extend this to other foreshore and seabed land, this should be effected through a different legislative vehicle.
18. We assume you wish the Crown to acquire only that portion of any land that is surveyed below the mean high water spring mark, rather than to acquire all of any parcel that includes some foreshore. We understand there are 240 privately owned parcels that the Crown might want to acquire outright – 208 eroded and 32 other seabed parcels. There are approximately 12,000 parcels that are predominantly dry land but which are surveyed to below the mean high water spring mark.

Overseas Investment Act

19. Where land is subject to the Overseas Investment Act, an agreement to sell that land is not effective unless consent has been obtained under the Act. Applying this same mechanism to give the Crown rights in respect of the foreshore and seabed is relatively straightforward. An agreement to sell would not be effective unless the relevant land had first been offered for sale to the Crown in the prescribed manner. However we

note that this mechanism is limited by the doctrine of indefeasibility of title, which means that once a transfer is registered, a court order would be required to cancel the registration of the transfer.

20. There are three options for using the Overseas Investment Act to give the Crown opportunities to purchase. For the land in respect of which the Crown might wish to acquire the entire parcel, the Act could provide either a right to make an offer, or a right of first refusal. Where the Crown wishes to acquire only a portion, such as a foreshore strip, compulsory acquisition may be an alternative.

Right to be notified and make an offer

21. At its simplest, the owner would notify the Crown, by lodging an application under the Overseas Investment Act, that the land was subject to an agreement for sale to an overseas person, so that the Crown had an opportunity to make an offer. It would be clear in the Act that the proposed sale to the overseas person could not proceed until the Crown had either made an offer, which may or may not be accepted, or had notified the owner that it did not wish to make an offer.
22. The advantage of this approach is its simplicity. However any delays arising from the process over and above the OIC consent process could raise costs and jeopardise the transaction. The disadvantage from the Crown's point of view is that the owner could refuse an offer from the Crown and subsequently sell, maybe at a lower price to another person.

Right of first refusal

23. If the Crown wished to have a more defined right to purchase, the policy issues become more complex. It would involve restricting the ability of the owner to sell to others in certain circumstances. In this case, the legislation would need to set out a well defined process such as:
- the owner notifies the Crown (by making an application for consent 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; and
 - 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.
24. This is, broadly, the approach that was used in the Ngai Tahu Settlement Claims Act 1998. That Act gives Te Runanga o Ngai Tahu a right of first refusal in respect of certain Crown land.
25. In the Overseas Investment Act context, the right of first refusal would impose a degree of compliance costs. The imposition of time limits could impact on negotiations and impose costs on sellers. There are also likely to be significant costs to the Crown in managing the process.

26. A further alternative is for the Crown to have the right to purchase at a fair market value once the intention to sell was signalled. This is likely to be problematic and we would not recommend pursuing this option further. Such a change could raise Bill of Rights issues. It would involve establishing mechanisms for agreeing a 'fair' market value, something that is likely to be difficult given the small number of sales. It will affect property rights in that it limits the owner's choice to sell at a price above the deemed market value. This alternative is more akin to a compulsory purchase.

Acquisition of foreshore strip

27. There are many parcels that are predominantly dry land but have been surveyed to mean high water mark, which is below the mean high water spring mark, and which therefore include a strip of foreshore. There may be another mechanism for acquiring these strips.
28. In some cases, foreshore strips may be able to be compulsorily acquired on sale to an overseas person. If the process is to be limited to proposed sales to overseas persons, 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.

Other mechanisms

29. In December Cabinet recommended that DOC report back on steps that might be taken to vest in the Crown foreshore and seabed land that was transferred to publicly owned entities that are now private companies (for example port companies and airport companies). The report back is expected in March 2005. One option for addressing private foreshore and seabed titles would be to include this work in that report back.

Report back

There is a reasonable amount of further work required in finalising details of any of these options, and we would recommend that you ask officials to do further work and report back to you. Given the proposed legislative timetable, this is likely to be required by the end of July. Depending on your preferred option, this work may involve considering appropriate time limits; arbitration and mediation processes for determining what constitutes more or less favourable terms and conditions; the relationship between the Crown's right and other conditions of consent imposed under the Overseas Investment Act; parallel processes in existing legislation such as the right for esplanade reserves to be set aside on a subdivision; the issue of compensation; and **[Withheld under section 6(a) To avoid prejudice to the security or defence of New Zealand or the international relations of the Government of New Zealand;]**

Consultation

30. We have consulted LINZ, the Department of Prime Minister and Cabinet, the Ministry for Culture and Heritage, the Department of Conservation, Ministry for the Environment; and the Ministry of Foreign Affairs and Trade in preparing this report.

While we have provided only a short time for those agencies to comment, further opportunity will be provided through the required reports back.

Other Relevant Information

31. LINZ is preparing a schedule of information relating to the 208 seabed parcels in private ownership, including the size of, and owners of each parcel. We expect this to be available shortly and will forward it to your office by early next week.