

Reference: 20170114

20 April 2017



Thank you for your Official Information Act request, received on 22 March 2017.

You requested the following:

“Can you please provide a full copy of the November 10, 2016 Treasury document entitled, Overseas Investment Act Exemptions: Further Decisions Following Consultation.”

Information Being Released

Please find enclosed the following documents:

Item	Date	Document Description	Decision
1.	10 November 2017	Treasury Report: Overseas Investment Act Exemptions: Further decisions following consultation	Release in part

I have decided to release the document listed above, subject to information being withheld under one or more of the following sections of the Official Information Act, as applicable:

- personal contact details of officials, under section 9(2)(a) – to protect the privacy of natural persons, including deceased people, and
- under section 9(2)(k) – to prevent the disclosure of official information for improper gain or improper advantage, and
- under section 9(2)(h) – to maintain legal professional privilege.

We have redacted the direct dial phone numbers of staff members in order to reduce the possibility of staff being exposed to phishing and other scams. This is because information released under the OIA may end up in the public domain, for example, on websites including Treasury's own website.

In making my decision, I have considered the public interest considerations in section 9(1) of the Official Information Act.

Please note that this letter (with your personal details removed) and enclosed documents may be published on the Treasury website.

This fully covers the information you requested.

You have the right to ask the Ombudsman to investigate and review my decision.

Yours sincerely

Chris Nees
Team Leader, International

Treasury Report: Overseas Investment Act Exemptions: Further Decisions Following Consultation

Date:	10 November 2017	Report No:	T2016/2088
		File Number:	IM-5-3

Action Sought

	Action Sought	Deadline
Minister of Finance (Hon Bill English)	Agree to the recommendations in this report. Refer a copy of this report to the Minister for Land Information.	Wednesday 16 November 2016

Contact for Telephone Discussion (if required)

Name	Position	Telephone		1st Contact
Mark Holden	Senior Analyst	s9(2)(k)	s9(2)(a)	✓
Chris Nees	Team Leader, International			

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

<p>Return the signed report to Treasury.</p> <p>Refer a copy of this report to the Minister for Land Information.</p>

Note any feedback on the quality of the report

Enclosure: No

Treasury Report: Overseas Investment Act Exemptions: Further Decisions Following Consultation

Executive Summary

This report seeks agreement to minor changes to the Overseas Investment Amendment Regulations 2016 No. 2 following consultation. These Regulations implement the targeted exemptions to the investment screening regime agreed by Cabinet [CAB-16-MIN-0164 refers]. We propose the following changes to the exemptions:

- **Provide greater flexibility in exemption two (leasehold land transactions where consent has previously been obtained) to allow minor changes to the terms and conditions of the lease** that do not affect the substantive conditions (e.g. the size of the land being leased). This will address a concern from submitters that the proposed terms and conditions of the exemption were too strict to be practical, but will ensure that there cannot be changes to the substantive terms of the lease.
- **Allow exemption three (certain transactions between overseas persons) to be used in conjunction with existing exemptions 33(1)(a) (relating to corporate restructures) and 33(1)(e) (relating to transfers between trustees of the same trust on appointment, retirement or resettlement).** This will ensure that an investor is not restricted from claiming this exemption due to technical changes in their ownership.
- **Remove the five hectare size limit on exemption four (transactions involving public works actions).** This will address feedback that this limit on the exemption is too restrictive to be practical for many projects (such as roading). We consider this change to be appropriate as the investor is being compelled to make the transaction (so the need for a protection of a size limit may not be necessary) and decisions under the Public Works Act will generally have government oversight.
- **Provide that exemption five (custodians) applies to both custodians holding shares on behalf of a New Zealander and from the definition of an overseas person** for the purposes of establishing whether a company is an overseas person. This addresses an oversight in the drafting of the Regulations and maintains the principle in both examples that beneficial ownership is where screening should occur.
- Address the following issues with the drafting of exemption five to ensure that is practicable for investors:
 - the custodian may be allowed interests in the securities for the purpose of a security arrangement to secure payments of fees for the custodial services; and
 - the exemption is applicable where an intermediate custodial relationship may apply.

Submitters also provided a number of proposals to expand the scope of exemption one, two and three. We propose no change to the scope of these exemptions other than those outlined above. We consider the current drafting strikes the right balance between providing exemptions while maintaining the substantive protections of the Act. s9(2)(h)

s9(2)(h)

We will provide you with the final Regulations, and paper for the Cabinet Legislation Committee, for approval at the meeting of Wednesday 30 November 2016. s9(2)(h)

s9(2)(h)

Recommended Action

We recommend that you:

- a **agree** that exemption two be amended to provide greater flexibility to allow minor changes to the terms and conditions of the lease that do not affect the substantive conditions (e.g. the size of the land being leased);

Agree/disagree

- b **agree** that exemption three be amended so that it can still be used if existing exemptions under regulation 33(1)(a) or 33(1)(e);

Agree/disagree

- c **agree** that exemption four be amended to remove the five hectare size limit on the exemption;

Agree/disagree

- d **agree** that exemption five be amended for the following changes:

- the exemption applies to both custodians holding shares on behalf of a New Zealander and from the definition of overseas person for the purposes of establishing whether a company is an overseas person;
- the custodian may be allowed interests in the securities for the purpose of a security arrangement to secure payments of fees for the custodial services;
- the exemption is also applicable where an intermediate custodial relationship may apply;

Agree/disagree

- e **refer** a copy of this report to the Minister for Land Information.

Referred/not referred

Chris Nees
Team Leader, International

Hon Bill English
Minister of Finance

Treasury Report: Overseas Investment Act Exemptions: Further Decisions Following Consultation

Purpose of Report

1. This report seeks your agreement to minor amendments to proposed exemptions to the Overseas Investment Act 2005 following consultation.

Background

2. In April 2016 Cabinet agreed to targeted exemptions to the screening requirements of the Overseas Investment Act 2005. Cabinet authorised you to make any minor policy decisions that may be required to give effect to the exemptions. (CAB-16-MIN-0164 refers).
3. You authorised the release of a consultation paper proposing draft Overseas Investment Amendment Regulations 2016 implementing these exemptions in August [T2016/1378]. Submissions were sought on the clarity of the scope of the Regulations and whether the proposed conditions were practicable to comply with.

Analysis

4. We received nineteen submissions on the proposed Overseas Investment Amendment Regulations 2016 (the Regulations). Submissions covered both the technical drafting of the Regulations as well as more substantive policy issues. Substantive submissions on each exemption, and our proposed changes, are discussed in turn below.

Exempting certain leasehold land transactions from the farmland advertising requirements (exemption one)

5. Two submissions commented on this exemption. One suggested extending the duration of leases that are entitled to the exemption from twenty to thirty years. The second proposed reducing the term to ten years.
6. We propose no change to length of duration of leases entitled to this exemption. The Overseas Investment Act 2005 (the Act) specifically requires leases over three years to be screened to protect against using leases to avoid the screening requirements of the Act. This exemption is designed to reduce compliance costs where repeat applications may be required over a short period of time (e.g. three to five years) due industry preference for short-term leases without renewal rights in the agricultural sector.
7. We consider the proposed exemption to strike the right balance between reducing compliance costs for situations referred to above, while still maintaining the protections required by the Act. The twenty year timeframe provides sufficient scope for multiple re-grants in the situations originally described to us. If investors are particularly concerned about the length of time, they may still seek longer term leases through the negotiation of their leases and/or build rights of renewal into the terms of the lease which would then be considered in the originally screening application (no further screening would be required).

Exempting certain leasehold land transactions where consent has previously been obtained (exemption two)

8. Nine submissions commented on this exemption. The following substantive issues were raised:
- 8.1. *Duration of leases entitled to the exemption:* submitters proposed increases to the twenty year limit proposed, ranging from thirty to fifty years. One advocated for no change to the proposed limit.
- We propose no change to the length of leases entitled to the exemption for the same reasons outlined in paragraph seven above.
- 8.2. *Greater flexibility for minor changes to the lease to be allowed:* submitters were concerned that more flexibility was required to allow small changes to the terms of the lease that did not substantively affect the lease. For example, amendments required as a result of legislative changes.
- We propose to amend the conditions of the exemption so that the terms and conditions may vary as long as the substantive terms of the lease do not (e.g. the area of land may not increase or the use of the land may not change).
- 8.3. *Period for completing negotiations on new leases:* one submitter considered the three month window to allow negotiations on a new lease to be completed should be extended to six months.
- We propose no change. The current allowance strikes a balance between providing an allowance for contractual negotiations to be completed and maintaining the continuity of the original lease. We note that investors will have forewarning of an impending end to a lease and this should incentivise them to complete negotiations if they wish to take advantage of the lease.
9. We also received submissions on technical issues to improve drafting. We have amended the Regulations to address these issues.

Exempting certain transactions between overseas persons (exemption three)

10. Six submissions commented on this exemption. The following substantive issues were raised:
- 10.1. *Expanding the scope of the exemption:* the following expansions were proposed by submitters:
- non-urban land where the adjoining sensitive land is next to a road or privately owned should be covered;
 - where an investor would be entitled to the exemption, but for also requiring consent to invest in significant business assets, they should still be able to use the exemption for that part of their transaction;
 - the land in question should also be exempted from the first transaction to an overseas person.
- We propose no change to the scope of the exemption. s9(2)(h)
s9(2)(h)
s9(2)(h)
s9(2)(h)

10.2. *Relationship with other exemptions*: the exemption is currently drafted so that it cannot be claimed if another exemption has previously been used. One submitter suggested that the exemption should be able to be claimed if other exemptions had also been used, in particular the existing exemption relating to corporate restructuring.

- We agree that the drafting could be amended to allow the exemption to be utilised with other exemptions where applicable for the relevant land. Technical exemptions utilised by the existing owner should not prevent a new investor from claiming the exemption. We propose to amend the exemption so that it can be claimed if the investor has previously utilised regulations 33(1)(a) (relating to corporate restructures) and 33(1)(e) (relating to transfers between trustees of the same trust on appointment, retirement or resettlement).

Exempting certain transactions involving public works actions (exemption four)

11. Three submissions commented on this exemption. Two submissions suggested that the five hectare limit on land for claiming the exemption should be removed. Submitters considered that the limit would limit the effectiveness of the exemption and that as the consent would only be required as a result of Government action there are sufficient safeguards when that action is taken (for example, a swap relating road stop under section 117 must first have been gazetted by the Minister for Land Information).
12. The five hectare limit was included in the terms of the exemption as a safeguard against potentially large transactions from being not screened. However, we agree with submitters that there are other safeguards in place through the Public Works Act 1981 requirements that mean there will be government oversight of any action taken. Combined with the fact that investors will be required to comply with the transaction, we propose that the terms of the exemption be amended to remove the land size limit.

Exempting certain transactions involving custodians who are overseas persons (exemption five)

13. Seven submissions commented on this exemption. There was broad concern that the proposed drafting only addressed one aspect of the concerns raised earlier this year. That is, it exempts situations where a custodian held shares on behalf of a New Zealand investor, but it does not exempt situations where, in assessing overseas ownership of a company, a custodian should not be counted as the beneficial owner of the shares. This reflects an error in the drafting process.
14. We propose to amend the regulations so that both situations are covered. This will mean that:
 - custodians that are overseas persons, and are holding shares on behalf of a New Zealander, will be exempt from screening;
 - custodians that are overseas persons, and are holding shares on behalf of a New Zealander, will not be counted as overseas persons when assessing whether another company is an overseas person.
15. In both of these situations this will mean that the screening focuses on who holds the ultimate beneficial interest.

16. In addition to this substantive interest we propose the following additional changes to address more technical issues with the drafting:

16.1. *Security interests in securities*: the exemption is currently drafted so that a custodian may not have any beneficial interest in shares held for a client. However, submitters have raised the issue that a custodian can have a beneficial interest in shares if their client/the beneficial owner does not pay their fees (i.e. a lien on the shares). Submitters consider such interests should be allowed.

- We agree that such interests should be allowed as they are limited and do not provide the custodian with any control rights. The Office has previously permitted such an arrangement in exemptions granted in the past.

16.2. *Intermediate custodians*: the exemption is currently drafted assuming that a custodian is holding shares on trust directly for the beneficial owner. Submitters have indicated that there can be arrangements where a custodian can hold share on behalf of another custodian, who in turn holds shares on trust for the beneficial owner. They consider such arrangements should also be captured by the exemption.

- We agree that this scenario should also be captured by the exemption. It aligns with the principle of looking through to the beneficial owner.

s9(2)(h)

Next Steps

Cabinet decisions

18. We are currently finalising Regulations for you to take to Cabinet and the Executive Council for approval. We intend to provide you with a paper for the Cabinet Legislation Committee to submit for the meeting on Wednesday 30 November 2016.

Further exemptions

19. We also received further exemption ideas through the consultation process. An initial assessment suggests that there are perhaps up to six new exemptions that may be feasible along with a similar number of changes to existing exemptions. We will provide advice on potential further exemptions in early 2017.