The Treasury

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Office of the Associate Minister of Finance

Chair
Cabinet Committee of Economic Development

Overseas Investment Amendment Bill – Residential Land

Proposal

1. This paper seeks Cabinet's agreement to a number of changes to the Overseas Investment Amendment Bill (the Bill), which implements the Government's 100 day commitment to "ban overseas speculators from buying existing homes". This follows consideration by Select Committee, public consultation on the draft Bill and further reflection by officials.

Executive Summary

2. The Overseas Investment Amendment Bill, implementing our 100 day commitment to "ban overseas speculators from buying existing homes", is now before the Finance and Expenditure Committee (the Committee). As anticipated, the Bill has received a large amount of public interest and many recommendations on ways the Bill could be improved. The purpose of this paper is to seek Cabinet's agreement to make a number of changes to the Bill that are not covered by previous Cabinet decisions.

3. There are two key issues that require careful consideration by Cabinet. The first issue is who requires consent to buy residential land under the Bill. We previously decided that New Zealand citizens, and permanent resident visa holders that have been residing in New Zealand for the past 12 months and present for at least 183 days, would not require consent to buy residential land [CBC-17-MIN-0083].

4. There have been a large number of submissions that have suggested expanding this to include resident visa holders that meet this 12 months/183 days test. The main arguments made in favour of this are that permanent resident visas and resident visas both entitle the holder to reside in New Zealand indefinitely and there are very few distinctions between the entitlements under New Zealand law for these types of visa holders. Both permanent resident visa and resident visa holders will be tax resident in New Zealand if they meet the 12 months/183 days test. However, under the Bill as introduced resident visa holders would still be able to apply for consent to purchase a home to live in, they would just not be exempt. I recommend these visa holders are treated the same way.

5. The second issue concerns possible impacts of the Bill on two types of large developments:

    a. Large apartment developments:

        i. Some submitters have argued that the requirement in the Bill to on-sell apartments pre-purchased by overseas buyers would make it more difficult to achieve sufficient pre-sales to make large developments viable. Information provided by developers indicates that presales to overseas buyers can range from between 5 and 50 percent of units in new developments.

ii. I consider it likely that overseas presales at the upper end of the range indicated by developers are likely to have taken place before the 6(a) Further, we don't have clear data on how important overseas presales are to the viability of new developments.

iii. There are broadly two options: leave the Bill as drafted or provide flexibility to allow some share of an apartment development to be sold and continue to be owned by an overseas persons (but not occupied by them or their associates). I recommend providing flexibility. We could do this through the Bill or in the future through a new exemption power in regulations. This would allow us to mitigate against potential impacts of the Bill on our housing supply objectives.

b. Rental and shared equity developments:

i. Submitters have argued that the Bill would prevent build-to-rent, rent-to-buy and share equity developments (a description of these arrangements is set out in Annex One) by overseas corporate developers. These development models may be important to deliver our Government's housing supply objectives. The OIA definition of an overseas person includes New Zealand companies that are 25% or more overseas owned or controlled, including major developers like Fletchers.

ii. There are broadly two options: leave the Bill as drafted or allow large developers and property managers to develop large developments that they could rent out or maintain a shared equity interest in. I recommend allowing lard developers and property managers to develop large developments they could rent out or maintain a shared equity interest in.

6. There are also a number of areas where I recommend further changes to the Bill:

a. Introduce the 183 day rule for tax residency as an additional element to be satisfied in order for a non-NZ citizen to be "ordinarily resident in New Zealand" and excluded from the requirement to obtain consent to purchase residential land.

b. Clarify that a residential tenancy of three years or more (including rights of renewal) is covered by the OIA but that a periodic lease (including a residential tenancy) with an initial term of less than three years (regardless of actual duration) is not covered by the OIA.

c. Allow overseas persons to apply for consent to buy residential land for non-residential purposes (e.g. hotels and supermarkets) and residential uses incidental to core business purposes (e.g. staff accommodation and buffer land), through a simplified pathway. This would be similar to the approach already taken for rest homes and retirement villages.

d. Provide an exemption that allows hotel developers of 50 or more units to enter into lease-back arrangements with overseas investors without requiring OIO consent for that arrangement. This would allow investors to purchase units in hotel developments and lease them back to the hotel operator, while retaining the right to use the unit for up to 30 days per year. Overseas developers would still require consent to purchase residential land for development into hotels.

e. Exempt telecommunications network operators, electricity distribution businesses, and gas distribution and transmission businesses from the requirement to obtain consent to purchase residential land used for the purpose of their business.

f. Amend the commencement date in the Bill from 10 days after Royal Assent, as currently specified, to provide that provisions necessary to prepare for full commencement of the regime (e.g. new regulation-making powers) come into force immediately after Royal Assent, and the commencement date for other provisions be set at no later than 60 days after Royal Assent, with the actual commencement date set by Order in Council (so, if necessary, that date can be brought forward).

g. Replace the requirement that conveyancers certify compliance with the Act "to the best of their knowledge" with a requirement that purchasers of residential land provide a simple declaration that they comply with the Act, which the conveyancer must obtain before completing the conveyance.

h. Provide new exemptions in the Bill:

   i. A transitional exemption for the purchase of residential land necessary to comply with pre-existing Resource Management Act requirements;

   ii. An exemption to allow overseas persons that are descendants of owners of parcels of Māori freehold land to have their interest in those particular parcels of land recognised; and

   iii. A specific transitional exemption from the requirements in the Bill for the Te Arai property development that is limited to a period of 15 years.

i. Clarify exemption-making powers in the Act to reduce risks that exemptions could be struck down by the Courts and to clarify how consent conditions apply when an overseas person acquires land or other sensitive assets using an exemption.

j. Clarify how the Commitment to Reside in New Zealand pathway [CAB-18-MIN-0004] applies, including coverage of Australian permanent residents and people that have foreign partners, and when it is permissible to be outside of New Zealand without being required to sell a home purchased with consent.

k. Broaden the coverage of Wahi Tapu by the definition of 'sensitive land' to include: land over 0.4 ha that adjoins land over 0.4 ha set apart as Māori reservation under section 338 of Te Ture Whenua Maori Act because it is a Wahi Tapu (within the meaning of that Act).

7. There are likely to be a number of further minor policy matters requiring decisions in order for Treasury to finalise its advice to the Committee. I propose that I be delegated with Power to Act by Cabinet to make decisions on minor policy changes to the Bill to be made through the Treasury's Department Report.

Background

8. On 14 December 2017, we introduced legislation to deliver on our 100 day commitment to ban overseas speculators from buying existing homes, following agreement from the Cabinet Business Committee (with Power to Act) [CBC-17-MIN-0083]. The Bill passed its first reading and was referred to the Committee. Written submissions on the Bill closed on 16 February 2018. The deadline for the Committee to report back to the House on the Bill is 31 May 2018.

9. Since the Bill was referred to the Committee, Cabinet has agreed to other changes to the Overseas Investment Act:

    a. On 23 January 2018, Cabinet made decisions on further detail on the circumstances in which *permanent resident* and *resident visa* holders who are not "ordinarily resident in New Zealand" can obtain consent to purchase a single home to live by demonstrating a "commitment to reside in New Zealand" [CAB-18-MIN-0004]. I have advised the Committee of Cabinet's decisions on these matters and our intention that these changes are incorporated into the Bill through the Treasury's Departmental Report.

    b. On 5 March 2018 Cabinet decided to incorporate amendments to the Act to incorporate forestry cutting rights and other profits à prendre in to the regime through a Supplementary Order Paper [CAB-18-MIN-0071.01] (the SOP). The SOP was lodged and refereed to the Committee for its consideration on 20 March 2018, following Cabinet's approval of a Cabinet Legislation Committee Paper on the SOP [CAB-18-Min-0094]. The Committee Chair has since called for public submissions on the SOP, which will be considered by the Committee and any issues addressed through a supplementary report by the Treasury to the Committee. The need to provide time for the Committee to consider the SOP before its 31 May 2018 report back deadline is driving the timeframes for Cabinet's consideration of this paper.

Issues raised in Select Committee submissions

10. In total 213 individuals and organisations provided submissions on the Bill. These covered a variety of different themes, in particular:

    a. *Who should have to apply for consent to purchase a home to live in* (including distinctions between *permanent resident visas* and *resident visas*, and treatment of investor migrants).

    b. The impact of requiring individual overseas persons to sell property purchased "off the plans" on the *viability of new developments,* and the impact of requiring developers to sell newly developed property on build-to-rent, rent-to-buy, and shared equity models.

    c. The impacts of the rules on *commercial developments and related core businesses*, including supermarkets, retailers, hotels, utilities operators, staff accommodation and buffer land.

    d. *Exemptions* for: retirement village operators, "luxury homes", compliance with resource consent conditions and a variety of other purposes.

    e. *Compliance and enforcement issues*, including the requirement that conveyancers give certificates, information-gathering powers and third party accessory liability.

    f. *Transitional issues and commencement dates*, including concerns about the need for the Overseas Investment Office to be resourced, have adequate time to prepare and be able to implement the Bill in a way that minimises disruptions to property transactions.

Criteria for assessing proposed changes to the Bill

11. I have asked officials to assess changes to the Bill against the three criteria used to assess the effectiveness of options in my 31 October 2017 *"100 Day Commitment: Banning Overseas Buyers from Buying Existing Homes*" Cabinet Paper [CAB-17-MIN-0489]:

a. *Policy effectiveness:* That the policy is effective, has the coverage we want, minimises any unintended consequences, and provides a mechanism for overseas investors to build new houses for sale where this supports housing supply without adding to demand.

b. *Compliance with New Zealand's international obligations:* 9(2)(h)

c. *Minimising compliance and administration costs:* Supported by clear and simple rules that fit in with existing regulatory frameworks and land sale processes.

12. I consider that some of the proposals by submitters have merit when considered against these criteria and I recommend changes to the Bill to reflect these. I also recommend making a number of changes resulting from further consideration of the Bill by officials.

13. My preferred options are outlined below. Detailed analysis and alternative options considered are set out in the Treasury's Regulatory Impact Statement appended to this paper as Annex Four.

Options for Cabinet's consideration

14. There are a number of issues that have been raised in submissions that I consider require Cabinet's consideration before a preferred option can be determined. These issues relate to the questions of:

a. Who requires consent to purchase a home to live in.

b. The operation of the New Builds test for large apartment and rental developments.

Who requires consent to purchase a home to live?

Background

15. In December 2017, Cabinet agreed in principle to the following approach to consent for purchasing a house to live in:

a. New Zealand citizens will not require consent;

b. People with *permanent resident visas* will not require consent if they are "ordinarily resident in New Zealand", i.e. they have been residing in New Zealand for 12 months and present in New Zealand for 183 days or more in that time (the 12 months/183 days test) – like citizens, there are no restrictions on their ability to buy dwellings and continue to own them;

c. *Permanent resident visa* holders who do not meet the 12 months/183 days test and all *resident visa* holders can only purchase a single dwelling to live in if they obtain consent through the Commitment to Reside in NZ test – they must sell the dwelling if their visa is cancelled or they leave New Zealand (as detailed further in [CAB-18-MIN-004]);

d. All other persons (including temporary visa holders) cannot purchase a dwelling to live in.

16. Cabinet noted that this approach differs from the existing approach in the OIA, which treats permanent resident visa holders and resident visa holders the same way, and that it remained interested in submissions made on the "ordinarily resident in New Zealand" definition.

Submissions

17. A number of submitters raised issues with the way the Bill distinguishes between *permanent resident visa* and *resident visa* holders, on the basis that there is little difference in the entitlements between the *permanent resident visas* and *resident visas* and therefore they should be treated the same.

18. The point made by submitters is generally correct. Both *permanent resident visas* and *resident visas* provide the holder with the right to:

    a. live, work and study in New Zealand indefinitely;

    b. access to free healthcare, vote in elections (if the visa holder has lived in New Zealand for more than one year);

    c. access to benefits such as the Jobseekers Allowance and New Zealand Superannuation (subject to other criteria).

19. *Permanent resident visa* and *resident visa* holders are treated the same way under the OIA as it currently stands. People with either class of visa would also be tax resident in New Zealand if they meet the 12 months/183 days test. I consider this to be an important indication of their commitment to New Zealand.

20. The main difference in entitlements is that *resident visas* have travel conditions that could result in the visa expiring if the visa holder spends more than a prescribed length of time out of New Zealand. In contrast, a *permanent resident visa* cannot expire if a person spends time outside New Zealand.

Options

21. I propose that Cabinet considers whether a change should be made to the Bill to address concerns of submitters on this area. I propose two options for Cabinet's consideration:

    a. Option 1: Modify the Bill so that *permanent resident visa* holders and *resident visa* holders that meet the 12 months/183 days test do not require consent to purchase residential land [recommended].

    b. Option 2: Continue with the existing approach to consent in the Bill, which provides that *permanent resident visa* (but not *resident visa*) holders that meet the 12 months/183 days test do not require consent to purchase residential land.

22. Visa holders that do require consent to purchase residential land would need to apply through one of the pathways in the Bill. Under option 1, *permanent resident visa* and *resident visa* holders that do not meet the 12 months/183 days test could apply for consent to purchase one home to live in. Under option 2, *permanent resident visa* holders that do not meet the 12 months/183 days test and all *resident visa* holders could apply for consent to purchase one home to live in. Under either option, other visa holders (including temporary visa holders) could not purchase a home to live in. The key consequences of needing to

apply for consent are additional costs to apply (including lawyers and application fees), uncertainty of outcome and conditions which require properties to be on-sold.

23. A table showing the impacts of Options 1 and 2 on different visa categories is set out in Annex Two.

Option 1 analysis

24. This option treats *permanent resident visa* holders and *resident visa* holders in the same way, consistent with the way these visa holders are treated pursuant to the OIA currently and most other legislative regimes. This test is also more similar to the IRD bright-line withholding test.[1]

25. Option 1 would exempt a larger number of persons from the requirement to obtain consent than Option 2. 6(a), 9(2)(h)

Option 1 is also less likely than Option 2 to compromise New Zealand's ability to attract migrants who strongly contribute to New Zealand, as it allows those with a right to reside in New Zealand indefinitely and who have demonstrated they are residing here for at least 12 months to purchase homes without consent.

26. Officials estimate 2500 applications per annum for consent to purchase residential land to live in under Option 1. This will result in a higher application fee than option 2 as fixed costs are spread across fewer applicants. However, it would also result in reduced administration costs and may lead to higher levels of compliance (because fewer people require consent).

27. One risk of this approach is that a resident visa holder could purchase residential land without restriction after meeting the 12 months/183 days test and then subsequently lose their visa (e.g. because they exceed the permitted time outside of the country), while continuing to own multiple dwellings in New Zealand. Mitigating against this concern is that resident visa holders have to go through a robust process in order to be granted residence and are assessed on how they will benefit New Zealand either through their skills, their family connections or through our international commitments. Further, the number of cases in which resident visa holders lose their visa following the purchase of residential land is likely to be relatively low.[2]

28. This option would address concerns raised by the majority of submitters on this issue.

Option 2 analysis

29. Option 2 treats *permanent resident visa* holders differently to *resident visa* holders. Under this option resident visa holders will always require consent to purchase residential land, with consent available in limited circumstances.

30. The key benefit of this approach is that the people that do not require consent to purchase residential land in New Zealand will be those that have the strongest commitment to New Zealand and are most likely to consider New Zealand their home. Option 2 is therefore more closely aligned with our objective that the New Zealand housing market is a market with prices shaped by New Zealand-based buyers than Option 1.

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[1] The IRD bright-line test applies to sellers rather than buyers.

[2] MBIE data relating to resident visas issued in the 2013-2014 financial year shows that of 44,000 resident visas approved during that year, 95% remained in New Zealand after two years. Officials estimate that of the remaining 5%, only a small proportion are a risk of purchasing residential land without consent and leaving the country indefinitely while retaining that land.

31. Option 2 would restrict the number of people that can buy residential land without consent. Officials estimate 5300 applications per annum for consent to purchase residential land under Option 2. This will result in a lower application fee than Option 1 because the OIO's fixed costs will be spread across more applicants. However, the total cost of administering this option and compliance costs associated with it will be higher. Non-compliance levels may also be higher than Option 1 because more people would be required to apply for consent to purchase residential land.

32. Option 2 may impact on people that have lived in New Zealand a long time (but have only recently obtained a *residence visa*), and are active contributors to their communities and the economy. Some submitters say that this could undermine New Zealand's ability to attract migrants who strongly contribute to New Zealand. However, both *permanent resident visa* and *resident visa* holders could still apply for consent to buy a home to live in under the "Commitment to reside in New Zealand" pathway, which would mitigate against these impacts.

The operation of the New Builds test for large apartments, rental and shared equity developments

Background

33. Cabinet previously agreed to provide a mechanism for overseas investors to build new dwellings where this supports housing supply without adding to demand [CAB-17-MIN-0489]. To achieve this objective, the Bill allows overseas investors to buy residential land to develop new dwellings under the "New Builds test" provided they on-sell the dwellings within a specified period (to be set on a case-by-case basis by the OIO when granting consent).

34. The New Builds test recognises that foreign-owned developers play an important role in developing new housing in New Zealand. In fact, some large "New Zealand" developers are "overseas persons" (and require consent under the Act to acquire "sensitive land") because they are 25% or more overseas owned or controlled. This would include some New Zealand-based but publicly listed companies, such as Fletcher Building.

35. The New Builds test would also allow an individual overseas investor to buy a unit in a development "off-the-plans", provided they sold it following completion of construction. This allows individual foreign investors to support financing for new housing developments, without adding to end-user demand.

36. Approximately thirty submissions to the Select Committee took some issue with the requirement in the Bill that overseas investors sell newly built dwellings under the New Builds test.

37. There were two themes in the submissions that I believe require further consideration: impacts on large apartment developments, and impacts on rental housing developments.

Impacts on large apartment developments

Submissions

38. Some submitters noted that the requirement that units purchased through "pre-sales" or "off-the-plan" must be on-sold after construction was completed would reduce the attractiveness of this type of investment. Submitters noted that a level of pre-sales is required in order to bridge gaps between the amount banks are prepared to finance and the total cost of developments. Consequently, submitters argue that a decline in pre-sales volumes to overseas persons, especially for larger apartment projects, would reduce or delay developers' access to funding. This would go on to restrict or delay the ultimate availability of

housing for New Zealanders. Developers have indicated that pre-sales to overseas buyers typically range between 5 and 50 percent of total units.

39. Officials do not have any clear data to support claims made by developers that the Bill would result in fewer new large apartment developments taking place. However, I consider it likely that overseas presales at the upper end of the 5-50 percent range provided to officials by developers are likely to have been more common when house price inflation was at its highest 2-3 years ago, 6(a)

40. Requiring overseas persons to on-sell units purchased "off-the-plans" is likely to reduce the attractiveness of these investments to overseas persons. It is unclear how the market will respond. Apartment developments may be delayed or cancelled if fewer overseas pre-sales are made. However, it is possible that the effect will be mitigated by New Zealand buyers substituting for the loss in overseas buyers, or developers modifying their developments to appeal more to New Zealand based end-user buyers.

Options

41. There is no data or information publicly available to support claims by developers on the impacts of the on-sell requirement in the Bill on new developments. However, given the important goals of our Government in relation to increasing the availability of affordable housing for New Zealanders, I propose that Cabinet considers whether a change should be made to the Bill to provide flexibility around on-sell requirements. I propose two options for Cabinet's consideration:

    a. Option 1: Modify the Bill to allow developers of large apartment buildings to sell a proportion of units to overseas buyers with no-on sell requirement. A regulation-making power would be added to allow us to adjust the proportion of units in each development that could be sold to overseas buyers to between zero and 100 percent, with the level initially set at 60 percent [recommended]

    b. Option 2: Modify the Bill to introduce a regulation-making power, allowing the flexibility described in Option 1 to be introduced in future. The on-sell requirement for units purchased by overseas buyers "off-the-plans" would be retained until the regulation-making power was exercised.

    c. Option 3: Continue with the existing approach in the Bill, which requires all overseas buyers to on-sell units purchased "off-the-plans".

Option 1 analysis

42. Option 1 would allow developers to apply for consent to pre-sell a proportion of units in large multi-storied apartment developments to overseas buyers without the requirement that they on-sell when construction is completed. These overseas buyers and their associates could not live in the units they purchase, with units generally rented out and adding to the New Zealand housing supply. Overseas buyers would need to obtain consent, including being subject to the "investor test".[3]

43. This approach would apply to developers of new multi-storied apartment developments of 50 units or more. Based on data from the RCG Development Tracker[4] for units to be completed

[3] The "Investor Test" is set out in section 16(1) of the Act. It requires an assessment of the prospective overseas investor's business experience and acumen, financial commitment to the investment, good character and eligibility for visas and entry permission under the Immigration Act.

[4] An architecture and design firm that gathers data on apartment developments in Auckland.

between 2015 and 2021, this proposed threshold of 50 new units would mean this pathway is available to 47% of anticipated projects (covering 76% of new units).

44. A regulation-making power would be introduced to allow the Government to set the proportion of these developments that could be sold to overseas buyers between zero and 100 percent. The initial proportion would be set at 60 percent. This would allow us to respond according to housing market and financial sector conditions, and the impacts of these on the viability of new developments.

45. Australia has a similar model under its "New Dwelling Exemption Certificate" regime, which allows developments of 50 units or over to be able to sell 50 percent of units to overseas persons. This proposal is more restrictive than the Australian regime, which does not require individual overseas buyers to obtain consent and allows overseas buyers to occupy units.

46. The key benefit of this approach is that it will mitigate possible impacts of the Bill on the viability of large new developments and provide us flexibility to adjust our approach in future. Failure to provide some flexibility could undermine our ability to deliver against our ambitious housing supply objectives. This option would be preferable to the status quo in the Bill if we placed greater emphasis on mitigating risks to new housing supply.

47. There is a risk that the exemption could be used to undermine the Bill's effectiveness against our objective (i.e. that the New Zealand housing market is a market with prices shaped by New Zealand-based buyers). However, this is mitigated as the pathway would only be available to multi-storied developments of 20 new units or more. This would target the flexibility on areas where there is greatest risk. That is, the on-sale exception would only apply to large apartment developments that require the greatest level of financing to take place and which cannot easily be developed/funded on a staged basis.

48. Another risk of this approach is that it would widen the circumstances in which some overseas buyers of residential property could retain that property for their own use (or their associates). This is mitigated by the requirement that units are not occupied by overseas owners or their associates. There is also a risk that by removing the on-sell requirement for apartments in large developments, demand for property investment from overseas persons will be channelled into this area. However, this would be mitigated by specifying the maximum level of units that could be sold to overseas buyers.

49. It is likely that this approach would involve some additional compliance and enforcement costs. However, the extent of these will depend on the final design of the on-sell exceptions pathway.

Option 2 analysis

50. Option 2 would be to provide the Government with the ability to introduce the flexibility described in Option 1 in the future through regulations.

51. This approach would allow us to gather information on the impacts of the Bill and introduce flexibility to allow us to take action if we consider that the Bill is impacting on the viability of large apartment developments.

52. The benefits of this approach are largely as for Option 1. However, it would do less to accommodate concerns of developers and delay action which could mitigate against impacts of the Bill on delivery of our ambitious housing supply objectives.

Option 3 analysis

53. Option 3 would be to leave the Bill as is and not make any changes to address potential impacts on the viability of new large apartment developments.

54. As noted above, officials do not have any data to verify the assertions made in submissions on the impacts on the viability of some new developments. However, officials understand that people do purchase units in new developments "off-the-plans" and sell them when the development is completed as an investment (something permitted by the Bill as currently drafted), which suggests that overseas investors will continue to do this but perhaps at reduced levels.

55. If, after the Bill is enacted, it becomes clear that it is impacting on the viability of new developments, we could amend the legislation to address this, including through a regime along the lines described in Option 1 and 2. However, this process would be slower and more complex process than exercising a regulation-making power, delaying and putting at risk our ability to effectively deal with any housing supply issues created by the Bill.

Impacts on rental and shared equity housing developments

Submissions

56. Some submitters noted that the requirement to on-sell units after a development has been completed would prevent overseas firms from developing new, large-scale developments under a build-to-rent, rent-to-own, shared equity or other innovative development model (a description of these arrangements is set out in Annex One). These models are already being used in some parts of New Zealand (e.g. Hobsonville, Whenuapai, and Queenstown) and are popular in other parts of the world.

57. The key benefit of the existing approach in the Bill is that any new developments would need to be sold to New Zealand-based buyers (i.e. as allowed by the Bill), prioritising home ownership by New Zealanders and New Zealand companies over other models for provision of long-term residential accommodation. However, the on-sell requirement in the Bill as drafted would make it more difficult for overseas firms to provide rental and shared equity housing. The impact of this is exacerbated by the way the OIA captures some New Zealand-based companies that are more than 25% overseas owned or controlled are "overseas persons" under the Act. This would prevent companies such as Fletchers from developing new housing (on land it owns) to rent out.

58. I am aware of one proposed development in the Queenstown Lakes area that has been put on hold as a result of this Bill. This project was intended to be developed using a shared equity model, and rented out through a Community Housing Trust, developed in part with international investors. Investors involved with this development are waiting to see the final form of this Bill before proceeding with the project.

Options

59. I propose two options for Cabinet's consideration on this matter:

    a. Option 1: Provide flexibility to allow large-scale investors and property management firms to provide rental housing and housing through shared equity arrangements to be able to develop rental land to rent out, or maintain a shared equity interest in [recommended].

    b. Option 2: Continue with the existing approach in the Bill, which requires overseas developers to on-sell completed dwellings.

Option 1 analysis

60. Under Option 1, large-scale investors and property management firms that are in the business of providing rental housing or housing through shared equity arrangements would be able to buy residential land for development into additional dwellings under the New Builds test. They could retain units after the development is complete to rent out or maintain an equity interest pending complete buy-out by a New Zealand-based buyer.

61. If adopted, I would recommend that safeguards are built into any mechanism to ensure that this option is only available following screening through the New Builds test where Ministers (or OIO, under delegation) are satisfied that:

    a. the developer is in the business of providing rental accommodation or housing through shared equity arrangements and is seeking consent to develop at least 50 new residential rental units;

    b. the developer would use the land for rental accommodation or shared equity housing as evidenced by:

        i. demonstrated or demonstrable ability to provide rental accommodation or shared equity housing (including based on track record and experience); and

        ii. plans to actively market and ensure units are occupied; and

    c. the developer is committed to maintaining the properties as rental properties or under a shared equity model.

62. As is already the case for the New Builds test, the "investor test" would apply but there would not be any "counter-factual" analysis required.[5] For developers providing rental accommodation, they would be required to sell units if they cease to maintain them as rental properties.

63. This approach would limit who can make use of this pathway to large developers that have fewer incentives to game the system (i.e. to occupy units themselves or allow family members or associates to do so). This reduces the likelihood that this flexibility would be used in ways that undermine the policy effectiveness of the Bill.

64. This approach would allow foreign capital to be leveraged to increase the availability of professionally-provided rental properties and affordable shared-equity housing. It would support the provision of new units into the rental sector which has worse housing quality than the owner-occupied sector (eg, more likely to be damp, mouldy, or poorly maintained[6]).

65. This approach may increase screening volumes for the OIO, and thereby add to administration costs. There would also be additional enforcement and monitoring costs compared to Option 2 but these will be limited because enforcement efforts would be focused on a limited range of professional large developers.

Option 2 analysis

[5] The counterfactual analysis used to assess applications: a number of the benefit factors require an assessment of what would likely happen with and without the overseas investment (e.g. new jobs, increased exports, new technology, increased local processing).

[6] BRANZ 2015 Housing Condition Survey: Comparison of house condition by tenure, https://www.branz.co.nz/cms_show_download.php?id=a1efff0a2fd9885ecf878ce475631df7025cf3b8

66. Option 2 would be to leave the Bill as is and require developers of new housing to sell all developments once completed.

67. As noted above, the key benefit of this approach is that it aligns more closely with our objective that the New Zealand housing market is a market with prices shaped by New Zealand-based buyers than Option 1.

68. However, the key risk of this approach is that it could dissuade developers that prefer a build-to-rent model from undertaking new development projects in New Zealand, which could impact on our housing supply objective. It would also constrain us in our ability to look at new innovative affordable housing models, including rent-to-buy and shared equity models.

Other proposed amendments to the Bill

69. There are a number of other issues that have been identified with the Bill that I consider to be reasonable cases where changes to the Bill are justified. My recommended changes to address these issues are set out in this section.

Tax residency

Background

70. In December, Cabinet agreed that non-New Zealand citizens would be required to obtain consent to purchase residential land, unless they held a permanent resident visa and the person had resided in New Zealand for the preceding 12 months and been present for at least 183 days in that period. I explained that this test, incorporated into the Bill through a new definition of "ordinarily resident in New Zealand", broadly reflected the 183 days rule for tax residency.

71. The 183 day rule for tax residency is similar to the 12 months/183 days test we have used in the Bill. Under that rule, a person will be tax resident if they are *personally present* in New Zealand for more than 183 days in total in a 12 month period. The test in the Bill requires a person to *have resided* for the preceding 12 months and *been present* for at least 183 days in that time.

Submissions

72. Some submitters noted that it would be desirable to align the definition of "ordinarily resident in New Zealand" more closely with the definition used in the Income Tax Act for tax residency.

Recommendation

73. I recommend introducing the 183 day rule for tax residency as an additional element to be satisfied in order for a non-NZ citizen to be "ordinarily resident in New Zealand" and excluded from the requirement to obtain consent to purchase residential land.

74. This will create greater alignment between this definition and the principle that those that are committed to New Zealand and willing to contribute to it can purchase residential land. Adding the 183 day rule for tax residency is not intended to alter the existing 12 months/183 days test in substance.

Residential tenancies and leases

Background

75. The OIA requires consent for an overseas person acquiring an "interest in land". This captures leases for a term of three years or more (including rights of renewal). The OIA does not specifically state whether this would include a residential tenancy. Officials consider that it would. In any event, it is desirable to clarify the position of residential tenancies under the OIA as, with the expansion of the regime to include residential land, residential tenancies will remain one of few long-term accommodation options available to temporary migrants, including international students.

76. There are currently two types of residential tenancy arrangements available in New Zealand:

    a. A periodic tenancy is one that continues until either the tenant or the landlord gives written notice to end it.

    b. A fixed-term tenancy last for the set amount of time specified in the tenancy agreements. If the fixed-term is for longer than 90 days, the tenancy automatically becomes a periodic tenancy when the fixed-term expires (unless the landlord or the tenant gives notice to say they don't want the tenancy to continue or they agree on something else).

Recommendations

77. I recommend that the Bill clarify that a residential tenancy is covered by the OIA and that the existing rules in the OIA for leases would apply. That is, a lease (including a residential tenancy) is subject to the OIA if, when the lease is agreed, it would:

    a. be for a fixed term of five years or more, or

    b. be for a shorter term with rights of renewal that would allow for the term of the tenancy to be for more than three years if any rights of renewal were exercised.

78. I also recommend clarifying that a periodic lease (including a residential tenancy) is not covered by the OIA.

79. This proposal would allow non-residents (including international students) to enter into fixed-term tenancies for periods of less than three years and to enter into a periodic tenancy agreement. Consent would be required for leases (including residential tenancies) of longer terms.

80. The median length of a tenancy in 2017 was two years and three months, and anecdotally, we understand that most fixed-term tenancies are set for a period of one year (however, we note that many of these will roll over onto a periodic agreement). It is therefore likely that the vast majority of tenancies would not be captured by the proposed OIA requirements.

81. I understand that MBIE is currently carrying out a review of the Residential Tenancies Act 1986 (RTA), including 9(2)(f)(iv) . We may need to reconsider the treatment of residential tenancies under the OIA alongside any recommended changes to residential tenancy laws that results from that review.

<u>Treatment of commercial uses of residential land</u>

Background

82. In December, Cabinet endorsed decisions by Ministers that overseas persons that wanted to purchase residential land to convert to another use (e.g. to build a motel or retail operation) would need to apply for consent through the current "benefits test" in the OIA.

83. The benefits test involves an assessment of the proposed investment by the OIO against 21 factors (these are set out in Annex Three) and a counter-factual analysis.[7] This is a higher test than Cabinet endorsed for new builds, which is a simpler test that looks at whether the number of dwellings on the land will increase.

Submissions

84. Submitters argue there are two problems with applying the benefits test for purchases of residential land to convert to another use:

    a. The benefits test involves significant time delay, financial cost and uncertainty of outcome for commercial developments on residential land (e.g. hotels, motels, supermarkets, large retailers etc). This is arguably unjustified for the use of residential land purchased to convert to another use in light of the objectives of the Bill. While it may be possible to obtain consent through this pathway, time delay, costs and uncertainty may result in some desirable investments not taking place.

    b. The benefits test in the Bill, which includes new mandatory conditions regarding residential land, would not permit overseas investment in some types of residential property that is an important but incidental part of business operations (e.g. staff accommodation and tenanted buffer land around airports). If investments did not take place, it could impact on the viability of some desirable commercial activities.

Recommendation

85. I agree with the points raised by submitters on this part of the Bill. I propose establishing a new basis for obtaining consent in the Bill for non-residential use of residential land (e.g. hotels and supermarkets) and residential uses of residential land that are incidental to a core business purpose (e.g. staff accommodation and tenanted buffer land), similar to the test for New Builds previously endorsed by Cabinet.

86. This new pathway for obtaining consent would only apply to residential land that is not already sensitive land under the Act. I propose, that in order to obtain consent, Ministers (or the OIO, under delegation) must be satisfied that such residential land would be used for:

    a. Non-residential purposes, including as shown by a change in property category on the District Valuation Roll (i.e. the land would no longer be "residential land" after the development takes place); or

    b. Residential purposes that are incidental to a core business purpose, as demonstrated by:

        i. the proximity of the land to the core business;

        ii. whether the acquisition of residential land for the intended purpose was part of the "ordinary course of business" for the applicant; and

[7] The counterfactual analysis used to assess applications: a number of the benefit factors require an assessment of what would likely happen with and without the overseas investment (e.g. new jobs, increased exports, new technology, increased local processing).

iii. whether no reasonable alternative existed to the purchase of the residential land by the applicant.

87. The OIO would be required to impose conditions to ensure the mandatory outcomes (i.e. a non-residential use or a residential use incidental to a core business purpose) were achieved within an appropriate specified period.

88. I propose that a counter-factual analysis would not apply to these transactions. Finally, I propose that the "investor test"[8] would continue to apply as an additional safeguard.

Benefits of this approach

89. The key benefit of this approach is that it provides a simplified basis for overseas investors to purchase residential land in circumstances that do not directly impact on achievement of our policy objectives for the Bill. This approach would minimise additional costs and ensure investments that were not the focus of the Bill have a pathway to obtain consent. However, rather than exempting these transactions outright, I propose that the OIO retains oversight through screening and the ability to impose conditions on consents to ensure that the new test does not undermine our objectives.

90. A concern with this approach is that it could incentivise the use of residential land for non-residential purposes over the construction of new housing because developers of non-residential facilities could retain the land after the development had been completed. However, this concern would be mitigated by the control vested in councils to define the activities that are permitted, controlled, and discretionary uses of land under the Resource Management Act. Despite the OIA, land can only be used for purposes consistent with local council zoning rules. This will be a strong factor in decisions by developers on how to use land.

Hotels developed under a lease-back model

Background

91. Though hotels are commercial operations, many hotel units have a property valuation category of "residential", meaning that they are "residential land" under the Bill. An overseas persons seeking to purchase a unit in a hotel (e.g. as an investment in a presold unit, to support the hotel's development) would need to obtain consent if the unit had a "residential" property category, and would be required to on-sell the unit.

Submissions

92. A number of submissions noted that the financing of hotel developments often relies on the outright pre-sale, or pre-sale and lease-back of hotel units. It is common for investors to be "overseas persons" as defined by the OIA (a separate issue from whether the hotel developer/owner itself is an overseas person).

93. Therefore, under the Bill as drafted, overseas persons wishing to invest in hotel units need to seek consent and, depending on the consent pathway used, may be required to on-sell. Lease-back arrangements, where the buyer leases the units back to the developer or hotel operator for use as a hotel unit, while possibly retaining rights to occupy the unit for a period of time each year, would not be allowed.

[8] The "Investor Test" is set out in section 16(1) of the Act. It requires an assessment of the prospective overseas investor's business experience and acumen, financial commitment to the investment, good character and eligibility for visas and entry permission under the Immigration Act.

94. Submitters have argued that a) overseas investors having to apply for consent to purchase a unit and potentially on-sell it, and b) having no options to enter into lease-back arrangements, would likely impose a significant compliance cost, time delay and uncertainty on a range of commercial developments that would make these investments unattractive. They argue this could result in some desirable commercial developments not taking place.

Recommendation

95. I recommend drafting an exemption into the current Bill, allowing all developers to enter into lease-back arrangements with overseas investors without requiring OIO consent. The exemption would allow the overseas investor to buy the unit and the overseas developer/hotel operator to lease the unit back from the overseas investor without consent. This exemption would be available where:

    a. The lease-back arrangements are contractually agreed at the point of sale.

    b. The overseas investor cannot reside in the room, or reserve the room for their own interests, for more than 30 days per annum.

    c. The hotel development has 50 or more units.

    d. The room must be used for the general purposes of operating the hotel.

96. These criteria will ensure that the exemption can only be used where presales under lease-back arrangements will have the biggest impact on the viability of projects (i.e. large developments) and that units are used for hotels and not as a means to circumvent the restrictions in the Bill on overseas persons owning residential land for their own use. An overseas developer seeking to purchase residential land to develop into a hotel would not be exempt under this proposal; they would still need to obtain consent.

97. These lease-back arrangements can be important to securing sufficient presales to make new hotel projects viable. Information provided by NZTE suggests that New Zealand will need an estimated 9,200 new hotel rooms by 2025 to meet demand. Many of these will need to be built in our regions.

<u>Treatment of network utilities businesses</u>

Background

98. Network utility businesses need to buy or lease residential land to establish and operate network infrastructure, e.g. cell towers and substations. The Bill as introduced would require overseas persons operating these businesses to apply for consent through the benefits test (described above) to buy or lease residential land (easements are not screened under the Act).

Submissions

99. Submissions were received from telecommunications network operators, electricity distribution businesses, and gas distribution and transmission businesses. These argued:

    a. Network utility infrastructure is essential for New Zealanders' quality of life and was never intended to be impaired by the Bill. The footprint of these networks on residential land is small.

b. Consent would be needed for purchasing or leasing a large number of small parcels of residential land to operate networks. For example, Spark has around 1,300 sites throughout the country and this may increase with the roll out of its 5G network.

c. The benefits test is costly (in time delay, costs and uncertainty), which is not justified given the vital role of network utilities.

d. These factors mean if the Bill proceeds as introduced, the provision of essential network infrastructure might be stifled, slowed, or developed with significant additional cost.

Recommendation

100. I agree with submitters from the network utilities sectors on these points. I consider that these operators provide essential services and use residential land for beneficial purposes. Subjecting them to any additional OIO consent processes would be very undesirable.

101. I propose introducing a class exemption to the Bill so that telecommunications network operators, electricity distribution businesses, and gas distribution and transmission businesses would not need to seek consent to own or lease residential (but not otherwise sensitive) land used for the purpose of their business. The exemption would draw on existing statutory definitions to ensure the exemption accommodated those network utility operators without risk of being used to undermine the objectives of the Bill.

Exemptions

Compliance with pre-existing RMA requirements

102. One submitter – Oceana Gold - has advised us of conditions imposed on them under the Resource Management Act that require them to purchase residential land. Oceana Gold is the operator of two large Gold Mines, including the Correnso Underground Mine in Waihi. It is required to purchase residential property from Waihi property owners that wish to sell in order to mitigate against the mine's amenity effects (daily vibrations caused by blasting, noise, etc).

103. The Bill as currently drafted would require Oceana Gold to apply for OIO consent through the benefits test for purchases of residential land required to comply with its resource consent. However, even if it obtained consent, the mandatory conditions for residential land mean it could not allow the houses to be occupied. This could impact on Oceana Gold's ability to continue to operate and provide jobs in Waihi.

104. I recommend granting a transitional exemption to cover pre-existing requirements imposed under the Resource Management Act (RMA) that require overseas persons to purchase residential land.

105. I do not believe it was our intention to capture residential land purchased to fulfil RMA requirements. I further consider that providing an exemption for pre-existing requirements only means that this exemption will have limited scope and cannot be used in a future case to undermine our objectives for the Bill. This exemption could be characterised as a transitional or 'grand parenting' provision.

106. If similar RMA requirements are imposed in the future, overseas persons could apply for an exemption or use one of the new pathways proposed in the Bill. Applications for exemptions or consent would need to be assessed on their merits against the objectives of the OIA and consent criteria for the relevant pathway.

Māori freehold land exemption

107. Cabinet agreed to provide an exemption, through regulations, in relation to Māori freehold land [CBC-17-MIN-0083]. The exemption would allow a person of Māori descent that is not a New Zealand citizen or "ordinarily resident in New Zealand" to have their recognised interest in a particular parcel of Māori freehold land that is "residential land" in the Bill recognised.

108. Māori freehold land is a type of land under Te Ture Whenua Maori Act 1993 (TTWM Act). It is jointly owned under tenancies in common. Ownership rights in relation to a particular parcel of land are passed to a "Preferred Class of Alienees" (descendants and relations of the owner) through a process supervised by the Māori Land Court. Māori freehold land will include land that is residential land under the Bill and land that is already sensitive land under the Act.

109. When the Bill was being considered by Cabinet for introduction, the Minister of Māori Development suggested that the exemption agreed for "residential land" should extend to all "sensitive land" under the Act.

110. I recommend changing the Bill to extend the exemption to all sensitive land under the Act. This exemption would apply to a narrow category of land and in a limited set of circumstances. An exemption of this nature would not undermine the objectives of the Bill or the Act. I also recommend including the exemption in the Act, not by regulations, which would better protect the exemption from future amendment.

Transitional exemption for the Te Arai property development in Mangawhai

111. The Bill as introduced would significantly impact on a development led by two iwi that has already been through extensive planning and community consultation. "Te Arai property development", led by Te Uri o Hau and Ngāti Manuhiri in Mangawhai, is intended to lead to the development of a limited number of housing sites; a 400 hectare publicly-owned coastal reserve with beach frontage and sensitive ecological areas vested to the Auckland Council; a golf course, and equestrian, walking and bike trails; as well as a camping ground. The development is intended to deliver economic, environmental, tourism and recreational benefits. The iwi set out in their submission on the Bill the special circumstances of this development and the extensive community consultation that has already been progressed for this development. I understand there have been significant delays to the development, and it is important to ensure the development is now able to proceed.

112. I have explored a range of options for addressing the concerns around the impact of the Bill on this development, including: taking no action, creating a regulation-making power to provide exemptions in certain circumstances, providing an exemption that would only effectively cover the first transaction out of the current ownership; and providing a time-limited exemption in the Bill for this specific development. I consider the special circumstances of this development and the stage of the process of this particular development are special and warrant being addressed. It is important, however, that precedent risks are mitigated. In particular, it should be clear that a decision to exempt this development is not due to the fact that the land was provided as Treaty redress.

113. I propose to include a specific transitional exemption for Te Arai property development in the Bill that is limited to a period of 15 years. I consider this approach strikes the best balance in terms of addressing the specific circumstances of this case and mitigating precedent risks.

Clarifying exemption-making powers in the Act (legally privileged)

114. 6(a), 9(2)(h)

115.

116.

117.

118.

Improving compliance and enforcement when exemptions are used

119. The existing Regulations under the OIA include a number of exemptions that could allow overseas persons to acquire residential land, or other sensitive assets, without consent. 9(2)(h)

120. I recommend amending the OIA so that, for specified exemptions contained in the Regulations, an overseas person who relies on the exemption to acquire sensitive assets previously subject to an OIO consent is treated as a "consent holder". They would be bound by the previous OIO conditions and could apply to modify them.

121. This will aid the OIO's ability to enforce conditions imposed to achieve the purposes of the Act.

Enforcement powers

122. The Bill introduced a new obligation on conveyancers (i.e. lawyers or registered conveyancers providing conveyancing services) to certify to the best of their knowledge that a purchaser of residential land will not contravene the OIA by giving effect to a transaction.

The New Zealand Law Society and Auckland District Law Society have raised concerns about the impact of certification requirements for conveyancers. The requirement to certify to the best of the conveyancer's knowledge creates some uncertainty and risk for conveyancers, and may increase costs for conveyancing services.

123. I propose a revised approach, which will centre on requirements for conveyancers to obtain a declaration from a purchaser that they comply with the OIA. The revised approach is modelled on existing requirements within conveyancing processes regarding residential land withholding tax, and adapted to fit within the overseas investment regime.

124. The revised approach will require a purchaser to provide a declaration[9] that they (and any person upon whose behalf they are purchasing property) comply with the OIA. The declaration could also specify the grounds upon which the person complies with the OIA, such as being a New Zealand citizen, permanent resident who is "ordinarily resident in New Zealand", holder of a consent from the OIO, or person covered by an exemption. To reduce compliance costs on New Zealand purchasers, this will not be a statutory declaration unless there are defined exceptional circumstances (such as a person not using a conveyancer). However, any false or misleading statement will constitute an offence under the OIA with a fine of up to $300,000.

125. The Bill will require the declaration in a manner approved by the relevant Minister, which will enable it to be made through a form provided by LINZ, or where appropriate, an updated version of the commonly-used Auckland District Law Society Agreement for Sale and Purchase.

126. In order to complete the conveyancing, a conveyancer will be required to have received a purchaser's declaration and the conveyancer's reliance on the declaration must be reasonable. A conveyancer will face a pecuniary penalty up to $20,000 if they do not comply. Submitters raised valid concerns with the current requirement for a certificate to be provided "before the transaction is given effect" and with the penalty being a fine.

127. There is a balance to be struck between ensuring high levels of compliance and managing compliance costs. The revised approach achieves policy effectiveness objectives by setting a pre-emptive measure to reduce the incidence of non-compliant transactions, rather than relying solely on public education and OIO enforcement. By providing certainty about what is required, it also provides low compliance costs for conveyancers and purchasers, relative to other options for safeguards in the conveyancing process. Guidance will make it clear that the conveyancer does not have to see identity documents before taking the declaration. This is necessary to limit compliance costs and inconvenience for New Zealand buyers.

Commencement and transitional provisions

128. The commencement approach and timeframe for the Bill must balance the need to have this legislation in effect before the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) enters into force and the desire to proceed quickly, while allowing sufficient time for the OIO and other key stakeholders to prepare and effectively implement the new provisions.

129. I understand the concerns of submitters that the 10-day timeframe in the draft Bill is too short. A longer timeframe would mitigate risks of reputational damage for the OIO and New Zealand. Allowing extra time for all who are impacted by the new provisions to prepare will

[9] Despite this paper referring to a declaration, the declaration will not be subject to requirements of the Oaths and Declarations Act 1956, which includes specific provisions about the form of a declaration and persons authorised to receive a declaration.

reduce the likelihood of uncertainty or confusion, process delays, errors made while working under pressure, and significant additional costs arising from such issues.

130. To support effective implementation of the new provisions, I therefore propose that:

    a. new regulation-making powers, changes to Ministerial directive letter provisions, and other provisions necessary to prepare for full commencement of the regime come into force immediately after Royal Assent; and

    b. the commencement date for other provisions be set at no later than 60 days after Royal Assent, with the actual commencement date set by Order in Council (so, if necessary, that date can be brought forward).

131. This is still a very ambitious timeline given the scale of change.

Other issues

Commitment to Reside Pathway

132. On 23 January 2018, Cabinet made decisions on further detail on the circumstances in which *permanent resident visa* and *resident visa* holders that are not "ordinarily resident in New Zealand" can obtain consent to purchase a home to live by demonstrating a Commitment to Reside in New Zealand [CAB-18-MIN-0004]. There are three matters of policy detail to ensure the workability of the Commitment to Reside in New Zealand pathway.

133. First, I propose that holders of Australian permanent resident visas are eligible for the Commitment to Reside in New Zealand pathway, in accordance with New Zealand's obligations under the Closer Economic Relations Investment Protocol (CER IP).

134. Secondly, I propose widening the existing exemption from requirements of the OIA (which applies to the partner of someone who is a New Zealand citizen or ordinarily resident in New Zealand) to include a partner of someone who receives consent under the Commitment to Reside in New Zealand pathway. This would ensure that a *permanent resident visa* or *resident visa* holder can obtain consent under the Commitment to Reside in New Zealand pathway, regardless of the immigration status of their partner.

135. Thirdly, I propose a mechanism to avoid unintended consequences and reduce administrative requirements where a person obtains consent under the Commitment to Reside in New Zealand pathway, but faces exceptional circumstances that warrant them spending time outside New Zealand, such as accompanying a sick relative. I propose providing a mechanism for a person to apply for relevant Ministers (who could delegate decision-making to the OIO) to pre-approve that the person's absence from New Zealand under specific circumstances and avoid their absence triggering the on-selling requirements.

Wahi Tapu land as "sensitive land"

136. The OIA currently provides that land over 0.4 hectares that adjoins land over 0.4 hectares listed as Wahi Tapu under the Heritage New Zealand Pouhere Taonga Act 2014 is "sensitive land". Te Puni Kōkiri (TPK) has recommended incorporating land set apart as a Māori reservation under section 338 of Te Ture Whenua Māori Act (TTWM Act) because it is a Wahi Tapu (within the meaning of that Act) within the definition of sensitive land in a similar way.

137. I agree with TPK's recommendation. This will recognise a further statutory category of Wahi Tapu land as sensitive land to improve the regulatory coherence of the OIA but without

undermining our objectives for the Bill. The statutory category of Wahi Tapu land in TTWM act must be Gazetted by TPK. Officials have found approximately 30 such Gazette notices.

Next Steps

138. If agreed, these changes will be incorporated into the Departmental Report to the Committee, which the Treasury is preparing.

139. The table below outlines the key next steps for the Bill and for the Forestry SOP.

Date	Residential Housing	Forestry
Thursday 29 March		Indicative closing date for written submissions on Forestry SOP
Tuesday 3 April	**Cabinet considers proposed policy changes for Departmental Report**	
Early April		Indicative dates for Oral hearings
Monday 9 April	Departmental Report lodged with Committee	
Wednesday 11 April	Present Departmental Report to Committee	
Thursday 19 April		Departmental Report to Select Committee
Wednesday 2 May		Select Committee considers the Departmental Report on Forestry SOP
Monday 14 May		PCO submits RT-Bill to Select Committee
Wednesday 23 May	Select Committee deliberate on thArae combined Bill and SOP	
29-31May	Report back/ third reading	

Consultation

140. The following departments have been consulted on the issues covered in this paper: Land Information New Zealand, Ministry of Business, Innovation and Employment, Ministry of Foreign Affairs and Trade, Ministry of Justice, Inland Revenue, Te Puni Kokiri, Crown Law and the Overseas Investment Office. The Department of Prime Minister and Cabinet has been informed.

141. However, many of the proposals in this paper have been developed under significant time pressure, with limited opportunities to fully consult on new proposals, including to obtain legal advice. As a result, there may be unforeseen policy and legal risks associated with some of these proposals.

142. 213 written or oral submissions were made by individuals and organisations through the Select Committee process.

Financial Implications

143. The Overseas Investment Office (OIO) is assessing costs associated with the changes outlined in this paper, including appropriate fees.

144. Any reduction to the expected volume of applications will lead to an increase in the application fee. This is because the fixed costs of the regime, which cannot be scaled, will be spread across a smaller group of people. LINZ has considered the impact of the two

options under consideration for who requires consent to purchase a home to live. The expected volumes and fees for the two options are shown below:

	Expected number of Commitment to reside applications	Application fee (incl GST)
Option 1 *This option treats permanent resident visa holders and resident visa holders in the same way*	2,500	9(2)(f)(iv)
Option 2 *Bill as introduced. This option treats permanent resident visa holders differently to resident visa holders*	5,300	9(2)(f)(iv)

145. Cabinet authorised Joint Ministers (Deputy Prime Minister, Minister of Finance, Minister for Housing and Urban Development, Associate Minister of Finance (Hon David Parker) and Minister for Land Information) to take decisions around design, implementation and associated charges associated with the Government's 100 day commitment to "ban overseas speculators from buying existing homes" [CAB-17-MIN-0489]. Joint Ministers are currently considering advice from the OIO on the financial and implementation implications of the wider OIA Amendment Bill.

146. If the changes outlined in this paper are agreed, I propose that the financial and implementation implications associated with these proposals be considered by the Joint Ministers group above. The OIO would provide advice to Joint Ministers on the financial and implementation implications associated with these proposals, as well as recently agreed changes to forestry rights subject to OIA screening and any changes to non-forestry rights, by 4 April 2018 so that any changes to 2018/19 appropriations can be incorporated before the Budget moratorium commences on 9 April 2018.

147. Preliminary analysis indicates that the financial implications of the Bill, including these proposals, can be managed within the funding set aside in HYEFU to fund the implementation of the non-residents ban as part of the 100-Day Plan, given the significant level of cost recovery proposed.

Human Rights

148. The proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. The proposals engage the right to freedom from discrimination (on the grounds on national origin). The limitation on the freedom is connected to the Bill's objective and is proportionate.

Legislative Implications

149. The Overseas Investment Amendment Bill is currently before the Finance and Expenditure Select Committee. Changes proposed in this paper, if agreed, will be incorporated into the Bill via the Departmental Report. The Committee is due to report back on the Bill by 31 May 2018.

150. The Overseas Investment Act is currently binding on the Crown. The Bill will be binding on the Crown on commencement.

Regulatory Impact Analysis

151. The RIA requirements apply to the proposals in this paper. A RIS has been prepared for new and substantive issues covered by this paper that were not addressed in the Treasury's earlier RIS on the Bill. This is attached.

Publicity

152. I do not propose any public announcements following decisions made in this paper, including because the Overseas Investment Amendment Bill remains before Select Committee.

Recommendations

The Associate Minister of Finance recommends that the Committee:

1. **Note** the Finance and Expenditure Select Committee is currently considering the Overseas Investment Amendment Bill and is scheduled to report back to the House on 31 May 2018.

2. **Note** written submissions on the Bill ended on 16 February 2018.

3. **Note** that based on submissions made on the Bill and further consideration by officials, a number of changes to the Bill are proposed.

Who requires consent to buy a house to live

4. **EITHER**

    4.1 [recommended] **Agree** to expand the Bill's definition of "ordinarily resident in New Zealand" to also include all resident visa holders who have resided in New Zealand for the past 12 months and have been present in New Zealand for at least 183 days in the past 12 months.

    OR

    4.2 [not recommended] **Agree** to retain the definition of "ordinarily resident in New Zealand" in the Bill as introduced. That is, all permanent resident visa holders who have resided in New Zealand for the past 12 months and have been present in New Zealand for at least 183 days in the past 12 months.

The operation of the new builds test for large apartment developments

5. **EITHER**

    5.1 [recommended] **Agree** to allow developers of multi-storied apartment buildings of 20 new units or more to apply for consent to sell a proportion of those units to overseas buyers without the requirement that the buyer on-sells (on the basis that the overseas buyer cannot occupy the unit). The proportion would initially be set at 60 percent, with flexibility to adjust this through regulations between zero and 100 percent.

    OR

    5.2 [not recommended] **Agree** to introduce a regulation-making power that could be used to allow developers of multi-storied apartment buildings of 50 new units or more to apply for consent to sell a proportion of units to overseas buyers with the requirement that the buyer on-sells (on the basis that the overseas buyer cannot occupy the unit). The proportion could be set through regulations between zero and 30 percent.

OR

5.3 [not recommended] **Agree** to retain the on-sell requirement for all overseas buyers of new housing purchased from developers "off-the-plans" and not introduce flexibility to relax this through regulations in the future.

Treatment of residential and shared equity housing developments

6. **EITHER**

6.1 [recommended] **Agree** to allow large-scale investors and property management firms that are in the business of providing rental housing or housing through shared equity arrangements to develop residential land into additional dwellings, without the requirement that they on-sell but provided that they rent out or maintain as a shared equity development.

OR

6.2 [not recommended] **Agree** to retain the on-sell requirement for all overseas developers of new housing and not provide flexibility to allow renting and shared equity schemes.

Tax residency

7. **Agree** to amend the definition of "ordinarily resident in New Zealand" in the Bill to introduce the 183 day rule for tax residency as an additional element of the test to be met in order for a non-NZ citizen to be excluded from the requirement to obtain consent to purchase residential land.

Residential tenancies

8. **Agree** to clarify that a residential tenancy of five years or more (including rights of renewal) is covered by the OIA.

9. **Agree** to clarify that a periodic lease (including a residential tenancy) with an initial term of less than five years (regardless of actual duration) is not covered by the OIA.

Treatment of commercial uses of residential land

10. **Agree** to amend the Bill to introduce a new simplified screening pathway for a business to acquire residential land for a non-residential purpose or a residential purpose that is incidental to a core business purpose.

11. **Agree** the proposed new simplified screening pathway should contain safeguards to prevent exploitation including:

11.1 the investor test[10]

11.2 clear tests for demonstrating the residential land would be used for either

11.2.1 non-residential use; or

[10] Set out in section 16(1) of the Act. It requires an assessment of the prospective overseas investor's business experience and acumen, financial commitment to the investment, good character and eligibility for visas and entry permission under the Immigration Act.

11.2.2 residential use incidental to core business,

11.3 the ability of the Overseas Investment Office to impose conditions on a consent to ensure mandatory outcomes are achieved within a specified period.

Hotels developed under a lease-back model

12. **Agree** to provide an exemption in the Bill allowing hotel developers and overseas investors to enter into lease-back arrangements without either the developer or overseas investor requiring OIO consent.

13. **Agree** that to be eligible for the exemption the following criteria must be met:

    a. The lease-back arrangements are contractually agreed at the point of sale;

    b. The overseas investor cannot reside in the room, or reserve the room for their own interest, for more than 30 days per annum;

    c. The hotel development has 50 or more units; and

    d. The room must be used for the general purposes of operating the hotel.

Treatment of network utilities businesses

14. **Agree** to amend the Bill to provide a new exemption from OIO consent requirements for telecommunications, electricity distribution and gas distribution and transmission network operators acquiring residential (but not otherwise sensitive) land for the purpose of their business.

Exemptions

15. **Agree** that a transitional exemption be granted in the Bill to allow overseas persons to buy residential (but not otherwise sensitive) land where required to enable compliance with pre-existing Resource Management Act consent requirements.

16. **Agree** to extend the Māori freehold land exemption to all sensitive land and include it in the Bill rather than regulations.

17. **Note** that the Bill would significantly impact a development being led by Te Uri o Hau and Ngāti Manuhiri (the “Te Arai property development”) that has already been through planning and community consultation.

18. **Agree** that an exemption be provided in the Overseas Investment Amendment Bill in relation to the Te Arai property development in Mangawhai for a period of 15 years.

19. **Agree** to clarify the breadth of the power to make class and individual exemptions by including legislative guidance in the regulation-making power on the sorts of exemptions that could be granted and reasons for which exemptions could be granted.

20. **Agree** to amend the OIA so that an overseas person who relies on an exemption in the Regulations to acquire sensitive assets previously subject to an OIO consent is treated as a “consent holder”.

Enforcement powers

21. **Agree** to remove existing requirements in the Bill for conveyancers to certify to the best of their knowledge that a purchaser of residential land will not contravene the Overseas Investment Act 2005 by giving effect to a transaction.

22. **Agree** to require purchasers of residential land to provide a declaration that they (and any person upon whose behalf they are purchasing property) comply with the Overseas Investment Act 2005.

23. **Agree** that before a conveyancing services provider completes the conveyancing for a person acquiring an interest in residential land:

    a. the provider must obtain a declaration from the purchaser that they (and any person upon whose behalf they are purchasing property) comply with the Overseas Investment Act 2005; and

    b. the provider's reliance on the declaration must be reasonable.

Commencement and transitional provisions

24. **Agree** to amend the Bill to specify that:

    a. new regulation-making powers, changes to Ministerial directive letter provisions, and other provisions necessary to prepare for full commencement of the regime come into force immediately after Royal Assent; and

    b. the commencement date for other provisions be set at no later than 60 days after Royal Assent, with the actual commencement date set by Order in Council (so, if necessary, that date can be brought forward).

Commitment to reside in New Zealand pathway

25. **Agree** that holders of Australian permanent resident visas that are not ordinarily resident in New Zealand are eligible for the Commitment to Reside in New Zealand pathway to purchase residential land.

26. **Agree** that an overseas person is exempt from Overseas Investment Act screening requirements in respect of acquiring or dividing relationship property if their spouse, civil union partner or de facto partner receives consent under the Commitment to Reside in New Zealand pathway.

27. **Agree** that relevant Ministers have the ability to grant pre-approval to an individual consent holder that an absence from New Zealand in specific circumstances will not trigger requirements for a consent holder to on-sell their interest in residential land.

Wahi Tapu as sensitive land

28. **Agree** to amend Table 2 of Schedule 1 of the Overseas Investment Act to broaden the definition of 'sensitive land' to include: land over 0.4 ha that adjoins land over 0.4 ha set apart as Māori reservation under section 338 of Te Ture Whenua Maori Act because it is a Wahi Tapu (within the meaning of that Act).

Financial Implications

29. **Note** that financial implications will arise through these proposed changes to the regime. The Overseas Investment Office (OIO) is assessing costs associated with the changes outlined in this paper, including appropriate fees.

30. **Note** that Cabinet authorised Joint Ministers (Deputy Prime Minister, Minister of Finance, Minister for Housing and Urban Development, Associate Minister of Finance (Hon David Parker) and Minister for Land Information) to take decisions around design, implementation and associated charges associated with the Government's 100 day commitment to "ban overseas speculators from buying existing homes" [CAB-17-MIN-0489].

31. **Note** that Joint Ministers are currently considering advice from the OIO on the financial and implementation implications of the OIA Amendment Bill, as introduced.

32. **Agree** that the financial and implementation implications associated with the proposed amendments to the OIA Amendment Bill covered in this paper be considered by the Joint Ministers group in recommendation 25 above.

33. **Note** that the OIO will provide advice to Joint Ministers on the financial and implementation implications associated with the approved proposals in this paper, as well as recently agreed changes to forestry rights subject to OIA screening and any changes to non-forestry rights, by 4 April so that any changes to 2018/19 appropriations can be incorporated before the Budget moratorium commences on 9 April.

34. **Note** that preliminary analysis indicates that the financial implications of the Bill, including these proposals, can be managed within the funding set aside in HYEFU to fund the implementation of the non-residents ban as part of the 100-Day Plan.

Power to Act

35. **Authorise** Associate Minister of Finance (Hon David Parker) to take decisions on minor policy changes to the Bill to be made through the Treasury's Departmental Report.

Next Steps

36. **Note** that following Cabinet agreement, changes will be incorporated into the Departmental Report, which is being prepared by the Treasury.

37. **Note** that the Finance and Expenditure Select Committee is currently considering the Supplementary Order Paper to the Overseas Investment Amendment Bill on forestry rights and profts a prendre.

Authorised for lodgement

Hon David Parker

Associate Minister of Finance

Annex One: Examples of Alternative Homeownership Structures

New housing-ownership structures could become more a more common feature of the New Zealand housing landscape in the future. While these models would take on specific forms that are agreed upon by the public, private, and household parties involved, some general features of these arrangements are:

- Rent-to-buy – a household gradually purchases a housing unit, possibly from a larger firm that owns many such unit. Some share of weekly rental payments go towards building up a down payment, with the tenant later getting a mortgage to purchase the unit. This approach is useful for those who do not have sufficient assets for a down payment and so helps to create a savings vehicle to eventually qualify for a mortgage. Some of the international investors that could provide rental housing may be interested in pursuing this ownership model with some tenants.

- Shared-equity – a household and some other entity, possibly a council or a private firm, essentially become the co-owners of a property. Each would have some share of the ownership in the property, which would provide them with the commensurate gains in the price of the asset over time. The Queenstown Lakes Community Housing Trust is one organization that is currently using this approach to make housing more affordable, since a household does not need to invest in the entire purchase price of the home. Some of the international investors that could be providing rental housing may be interested in maintaining some level of continued ownership in the property but selling some share of it to tenants.

Annex Two: Impacts of options on different visa types

	Visa category	Time in New Zealand test	Option 1: Alternative	Option 2: Bill as introduced
Residence class visas	**Permanent resident visas (PRVs)** PRV holders have a right to reside in NZ indefinitely, with no conditions attached to their visas. The visas cannot expire. PRVs are almost always granted to someone who already holds a resident visa and has demonstrated a commitment to New Zealand i.e. spent enough time here. Around 35,000 PRVs were granted in 2016/17. Of those, 22,000 were granted to principal applicants (the person who applied for residence), and 13,000 were granted to family members of a principal applicant (eg spouses and dependent children).	Has resided in New Zealand for the past 12 months and been present in New Zealand for at least 183 days in the past 12 months.	Ordinarily resident in New Zealand – can purchase residential land without consent	Ordinarily resident in New Zealand – can purchase residential land without consent
		Has not resided in New Zealand for the past 12 months or been present in New Zealand for at least 183 days in the past 12 months.	Cannot purchase residential land unless they obtain consent	Cannot purchase residential land unless they obtain consent
	Resident visas (RVs) RV holders have a right to reside in NZ indefinitely but the visa can expire if they leave NZ for a long period. They are eligible to obtain a PRV after two years if meet certain conditions. Nearly 48,000 RVs were granted in 2016/17. Of those, 28,000 were granted to principal applicants.	Has resided in New Zealand for the past 12 months and been present in New Zealand for at least 183 days in the past 12 months.	Ordinarily resident in New Zealand – can purchase residential land without consent	Cannot purchase residential land unless they obtain consent
		Has not resided in New Zealand for the past 12 months or been present in New Zealand for at least 183 days in the past 12 months.	Cannot purchase residential land unless they obtain consent	Cannot purchase residential land unless they obtain consent
	Temporary visas (work, student or visitors) These visas are time limited. For example: Essential Skills, Work to Residence, Recognised Seasonal Employer, Post Study Work , Working Holiday Schemes, Specific Purpose or Event, Partner of a NZ Citizen or Resident, International Students, Other students, Visitor	N/A	Cannot purchase residential land unless they obtain consent	Cannot purchase residential land unless they obtain consent

Annex Three: Existing consent criteria under the Overseas Investment Act

Applicants for consent to acquire sensitive land must satisfy a number of criteria. In addition to the core criteria (the investor test), consent will only be granted if either:

- in the case of an individual, the relevant overseas person intends to reside in New Zealand indefinitely,
- in the case of a non-individual, all the individuals with control of that overseas person are New Zealand citizens, ordinary New Zealand residents or are intending to reside in New Zealand indefinitely, or
- the transaction will, or will be likely to, benefit New Zealand (and if the land is non-urban land over 5 hectares, that benefit is substantial and identifiable) as assessed against 21 factors.

Special land has specific consent criteria which includes offering that land back to the Crown, and the Crown must decide whether to accept the offer.

Benefit to New Zealand factors

The Benefit Test involves assessing an investment against 21 factors, set out in section 17 of the OIA and regulation 28 of the Overseas Investment Regulations 2005. The factors are described below.

Benefit Factor		**Summary description**[11]
Economic factors	Additional investment for development purposes.	Additional investment occurs after the initial purchase and is distinct from the purchase price. Such investments often focus on upgrading facilities.
	Added market competition, greater efficiency or productivity or enhanced domestic services.	Added market competition usually results from the addition of new players or supply (quantity or quality) in a specific market where the additional players or supply will have a measurable increase in competition.
	Increased processing of primary products.	The increased processing must occur in New Zealand (this includes on board fishing vessels in the New Zealand Exclusive Economic Zone prior to export), and the increased processing may be carried out by another party (for example developing a new dairy farm may result in increased processing of milk products in New Zealand). The more direct the relationship between the overseas investment and the increase in processing, the more relevant this factor will be.
	Increased export receipts.	Exports are goods or services of a domestic origin which are sold in another country. New Zealand exports include the provision of domestic tourist and education services to overseas visitors to New Zealand.

[11] Exerts from the Overseas Investment Office webpage (https://www.linz.govt.nz/regulatory/overseas-investment)

	Creation of new job opportunities or retention of existing jobs.	Generally, two types of new job opportunity are recognised: **Direct jobs:** These are provided directly by the applicant or the business it is buying, such as additional staff for an expanding business. Direct jobs also include temporary jobs, such as seasonal workers or contractors for the construction of a new factory. **Indirect jobs:** These flow from the overseas investment indirectly via suppliers or elsewhere in the relevant industry. Indirect jobs must be sufficiently linked to the occurrence of the overseas investment.
	New technology or business skills.	This factor will not be relevant for many investments as, although the technology or skills may be new for the Applicant or in relation to the investment, in many cases they are already being used elsewhere in New Zealand by others.
Environmental factors	Walking access.	Walking access is the right of members of the public to gain access to the New Zealand outdoors by passing on foot. Walking access may be of particular relevance where it provides public access to: foreshore, lakes and rivers; conservation areas; areas of scenic or recreational value; sports fish; or adjoining public walking trails. In order to demonstrate a benefit under this factor, an applicant needs to show new or enhanced mechanisms for providing, protecting or improving walking access.
	Significant indigenous vegetation and significant habitats of indigenous fauna.	In order to demonstrate a benefit under one of these factors, an applicant needs to show new or enhanced mechanisms for protecting and enhancing: significant habitats; trout salmon wildlife and game; or historic heritage.
	Trout, salmon wildlife and game.	
	Historic heritage.	
Other factors	Consequential benefit.	Benefits that do not fall within the scope of other factors may be considered as a consequential benefit (for example, environmental benefits which do not meet the requirements of one of the recognised environmental benefit factors).
	Key person in a key industry	The key person may be an individual or an entity. The key person should be of high standing and influence in an industry and their involvement in such industry must be more than as a regular, or even prominent, player. It may be difficult to meet this factor if the key person is already operating in New Zealand.
	Affect image, trade or international relations and international obligations.	This factor is sometimes relevant to a large transaction with an international profile where the New Zealand portion of the transaction is small in the context of the overall transaction. An adverse effect to New Zealand's appeal as an investment location alone is generally not sufficient to adversely affect New Zealand's image overseas.

	Owner to undertake other significant investment.	This factor recognises that granting the application for consent may result in the owner (this is usually the vendor) of the relevant land undertaking other significant investment in New Zealand. For example, the vendor may direct the purchase proceeds into another significant investment.
	Previous investments.	In order to meet the requirements of this factor the previous investment must have been of benefit to New Zealand. Investments that have not yet resulted in benefits to New Zealand are irrelevant.
	Advance significant government policy or strategy.	The overseas investment must give effect to or advance a significant Government policy or strategy in a way that will measurably contribute to the policy or strategy. The policy or strategy may be either a central or local government policy or strategy and it must be significant.
	Enhance the viability of other overseas investments.	This factor recognises that some overseas investments may not otherwise meet the threshold in their own right, but nonetheless support or enhance another overseas investment. The other overseas investments must be previous investments that required consent under the Overseas Investment Act and were undertaken by the relevant overseas person.
	Strategically important infrastructure.	This factor is relevant when an investment is in strategically important infrastructure on sensitive land, and the investment assists New Zealand to maintain New Zealand control of that infrastructure. Strategically important infrastructure may include (but is not limited to) assets such as international airports, shipping ports, national power supply networks or national communication networks.
	New Zealand's economic interests.	The factor has a broader focus than the other economic factors and concerns the effect of the overseas investment on the wider New Zealand economy. The requirements of this factor will not be met if the overseas investment will not have any material affect on New Zealand's economic interests.
	Oversight and participation by New Zealanders.	This factor is intended to provide investors with an opportunity to show how they will allow for New Zealand oversight or involvement in the overseas investment.

Annex Four: Regulatory Impact Analysis