

The Treasury

Overseas Investment Act 2005: Phase Two Reform Package Information Release

December 2019

This document has been proactively released by **Hon David Parker, Associate Minister of Finance** on the Treasury website at

<https://treasury.govt.nz/publications/information-release/finance-portfolio-cabinet-material>

Cabinet Document Details

Title: **Cabinet Minute: DEV-19-MIN-0306: Overseas Investment Act 2005: Phase Two Reform Package**

Date: **13 November 2019**

Creator: Cabinet Office

Information Withheld

Some parts of this information release would not be appropriate to release and, if requested, would be withheld under the Official Information Act 1982 (the Act).

Where this is the case, the relevant sections of the Act that would apply have been identified.

Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Key to sections of the Act under which information has been withheld:

- [1] 6(a) - to avoid prejudice to the security or defence of New Zealand or the international relations of the government
- [33] 9(2)(f)(iv) - to maintain the current constitutional conventions protecting the confidentiality of advice tendered by ministers and officials
- [36] 9(2)(h) - to maintain legal professional privilege

Where information has been withheld, a numbered reference to the applicable section of the Act has been made, as listed above. For example, a [33] appearing where information has been withheld in a release document refers to section 9(2)(f)(iv).

Copyright and Licensing

Cabinet material and advice to Ministers from the Treasury and other public service departments are © **Crown copyright** but are licensed for re-use under **Creative Commons Attribution 4.0 International (CC BY 4.0)** [<https://creativecommons.org/licenses/by/4.0/>].

For material created by other parties, copyright is held by them and they must be consulted on the licensing terms that they apply to their material.

Accessibility

The Treasury can provide an alternate HTML version of this material if requested. Please cite this document's title or PDF file name when you email a request to information@treasury.govt.nz.



Cabinet Economic Development Committee

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Overseas Investment Act 2005: Phase Two Reform Package

Portfolio Associate Finance (Hon David Parker)

On 13 November 2019, the Cabinet Economic Development Committee (DEV), having been authorised by Cabinet to have Power to Act [CAB-19-MIN-0562]:

Background

- 1 **noted** that:
 - 1.1 on 8 October 2018, Cabinet agreed to the terms of reference for phase two of the review of the Overseas Investment Act 2005 (the Act) [CAB-18-MIN-0481];
 - 1.2 on 10 April 2019, DEV agreed to the release of a consultation document as part of the phase two review of the Act (Phase Two reform), and invited the Associate Minister of Finance (Hon David Parker) to report back in October 2019 on the outcome of consultation and with proposals for reform [DEV-19-MIN-0078];
- 2 **noted** that public consultation on options for the Phase Two reform highlighted the need for this review to:
 - 2.1 ensure the regime more effectively manages risks posed by overseas investment;
 - 2.2 simplify the decision-making process and remove transactions from the regime where screening does little to improve the management of risks associated with the investment;

Ensuring the Act more effectively manages risks posed by overseas investment

More enduring protection for farmland

- 3 **noted** that the special privilege involved in owning or controlling farmland is not adequately reflected in the Act;
- 4 **agreed** that overseas investments in farm land must generally demonstrate a substantial point of difference in their likely level of economic benefit or oversight or participation by New Zealanders to receive consent, with some exceptions, such as where transactions are minor or technical;
- 5 **noted** that the Associate Minister of Finance (Hon David Parker) is considering options to more precisely define farmland;

Ensuring New Zealanders have the opportunity to acquire farmland

- 6 **noted** that the Act and the Overseas Investment Regulations 2005 (the Regulations) require vendors to advertise farm land before an overseas person can obtain an interest in it, but the current advertising requirements are outdated and not achieving the intended objectives;
- 7 **agreed** to strengthen the farmland advertising requirements to reduce complexity and ensure that New Zealanders have the opportunity to acquire, enjoy and use farmland, including by:
- 7.1 updating the list of appropriate forms of advertising, increasing the minimum advertising period, and allowing the regulator to approve alternative forms;
 - 7.2 requiring advertising to occur before a vendor enters into a transaction;
 - 7.3 clarifying that only the interest in the farmland being acquired has to be advertised;
 - 7.4 allowing the Minister to place conditions on applications for exemptions from the advertising requirements;
 - 7.5 enabling an application for exemption from the advertising requirements to be submitted and decided before an application for consent is lodged, and enabling the regulator to impose a fee for deciding such an application;

Completing the Queen's chain

- 8 **noted** that the Act and the Regulations recognise the importance New Zealanders place on public ownership of or access to the foreshore, seabed, riverbed and lakebed (special land) by providing for this land to be offered to the Crown before being sold to an overseas person;
- 9 **noted**, however, that the process for offering special land to the Crown is complex, costly and time-consuming, and for this reason, the Crown has not yet been able to gain ownership of any special land it has been offered;

[1]

- 11 **agreed** that, in order to clarify whether the special land provisions are mandatory or voluntary, offering special land to the Crown (subject to paragraph 12.6 below) be mandatory for all sensitive land (and remain mandatory for the special forestry test);
- 12 **agreed** to amend the process by which the Crown acquires special land so that it works more effectively, including by:
- 12.1 requiring the Crown to decide within a specified timeframe whether it waives the right to acquire special land;
 - 12.2 specifying the circumstances when the Crown may waive the right to acquire special land;
 - 12.3 if the Crown wishes to acquire the special land, enabling the Crown to place a memorial on the title (at which point the special land provisions are satisfied, with a duty on the Crown to take ownership within 10 years or the memorial will lapse);

- 12.4 enabling standardised terms and conditions for the transfer of such special land to be prescribed in the Regulations, which would be mandatory unless the parties agree otherwise;
 - 12.5 specifying that if the Crown does not make a decision on the offer of special land within the current 30 working day timeframe, the offer is deemed to be waived, subject to a duty for the Minister to use his/her best endeavours to make a decision before then;
 - 12.6 clarifying that foreshore and seabed offered to the Crown is transferred to the common marine and coastal area in accordance with the Marine and Coastal Area Act 2011;
 - 12.7 confirming that the provisions apply only to the acquisition of freehold interests and perpetually renewable leasehold interests under the Crown Pastoral Land Act 1998;
- 13 **noted** that the Surveyor-General has indicated they are prepared to develop survey standards that adequately define the extent of the private and Crown land, to support the issue of titles with less cost and complexity;
- 14 **noted** that the Associate Minister of Finance (Hon David Parker) will work with the Minister for Land Information and the Minister of Conservation to determine (paragraph 91.2 below):
- 14.1 whether riverbed and lakebed are administered as Crown land under the Land Act 1948 or as conservation land under the Conservation Act 1987;
 - 14.2 any other design matter relating to special land that may arise during the drafting process;

Introduction of a national interest test

- 15 **noted** that the Act does not allow proposed overseas investments to be declined if they are contrary to New Zealand's national interest;
- 16 **agreed** to introduce a 'national interest test' that would empower the relevant decision making Minister (paragraph 38 below) to decline any investment in significant business assets, sensitive land, or fishing quota (or combination thereof) found contrary to New Zealand's national interest;
- 17 **agreed** that the national interest test would always apply to transactions with certain high-risk characteristics, including those:
- 17.1 where a foreign government or its associates would hold a 10 percent or greater interest (excluding transactions only including residential, but not otherwise sensitive, land);
 - 17.2 where the Government Communications Security Bureau or the New Zealand Security Intelligence Service identifies them as posing a risk to national security or public order; or
 - 17.3 in certain strategically important industries and high-risk critical national infrastructure, as prescribed by the Minister in regulations;

- 18 **agreed** that the national interest test could be applied to any other transaction screened under the Act on agreement between the Act's relevant ordinary decision making Minister/s and the Minister responsible for administering the national interest test (paragraph 38 above);

Introduction of a call in power

- 19 **noted** that international agreements that generally restrict New Zealand's ability to screen additional classes of investment provide exceptions for certain types of national security measures, and that some also allow for measures to uphold public order;
- 20 **agreed** to introduce a 'call in power' that would empower the government to review transactions (either prospective or concluded) in a limited set of assets (paragraph 27 below) not ordinarily screened under the Act (a consequential change to the purpose of the Act will likely also be required);
- 21 **noted** that the call in power is a reserve 'back stop' power, anticipated to be rarely used, and only to manage significant risks to New Zealand's national security or public order;

[36]

- 24 **agreed** that the Minister can, where necessary to mitigate significant risks to New Zealand's national security or public order, impose conditions on, decline, and unwind transactions within scope of the call in power;
- 25 **agreed** that transactions within the scope of the call in power can only be declined or unwound if the relevant Minister has reasonable grounds to believe that it will present significant risks of harm to national security or public order, but that in considering whether to decline or unwind the Minister(s):
- 25.1 must also have regard to:
 - 25.1.1 New Zealand's international obligations; and
 - 25.1.2 the extent to which any risks can be mitigated by conditions of consent;
 - 25.2 may have regard to economic or other benefits to New Zealand arising from the transaction;

Assets in scope of the call in power

- 26 **agreed** that assets covered by the call in power be defined in legislation, with further specification in regulations to balance the need to:
- 26.1 provide certainty to investors;
 - 26.2 allow the government to respond to emerging risks;
 - 26.3 ensure that the power does not capture more transactions than necessary to manage relevant risks;

- 27 **agreed** that transactions in the same high risk critical national infrastructure and strategically important industries as proposed to be automatically subject to the national interest test (paragraph 17.3 above), as well as transactions involving entities with control of, or access to, sensitive data, be subject to the call in power;
- 28 **agreed** that before making regulations to refine the definitions of assets/entities in scope of the call in power or other legislative instruments to specify entities covered by the call in power as referred to in paragraph 27 above, the Minister must be satisfied that the proposed regulation is no broader than necessary to manage risks to national security or public order and is consistent with New Zealand's international obligations;

Types of transactions in scope of the call in power

- 29 **noted** that the 'thresholds for investment' determine what percentage of an asset must be acquired by an overseas person before the asset can be called in;
- 30 **agreed** that the following thresholds for investment in an asset covered by the call in power must be met before a transaction can be potentially reviewed under the call in power:
- 30.1 for media entities: more than 25 percent ownership or control of the entity's governing body or voting power;
- 30.2 for non-publicly listed interests in all other assets covered by the call in power: 0 percent;
- 30.3 for listed equity securities in all assets covered by the call in power, excluding media entities: transactions that result in the acquirer holding 10 percent or more of that class of that entity's publicly listed equity securities, unless the investment grants special access to, or control of, that target entity;

Notification requirements for the call in power

- 31 **agreed** that investors would be required to notify the government of transactions in scope of the call in power related to assets captured by the definition of dual-use and military technology and listed as critical direct suppliers to the New Zealand Defence Force or security services;
- 32 **agreed** that investors have the option of, but are not required to, notify the government of transactions in all other assets within scope of the call in power not referred to in paragraph 31 above, but that if they do notify the government and the government does not take any action, the government generally cannot take any action in respect of that transaction in the future;

Options to operationalise the call in power

- 33 **agreed** that, to operationalise the call in power, the regulator establish an active screening regime, where the regulator [1] to identify and investigate those presenting substantial risks to national security or public order;
- 34 **agreed** that the responsible Minister can specify to the Chief Executive of the regulator the extent of screening (and associated costs and risks) they seek under the call in power;

[1], [33]

[1], [33]

[1]

Administration of the national interest test and call in power

- 38 **agreed** that the Minister responsible for decision-making under the national interest test and the call in power would:
- 38.1 not be a Minister ordinarily responsible for decision-making under the Act and the Regulations; and
 - 38.2 be unable to delegate this decision-making power to the regulator;
- 39 **agreed** that the Minister responsible for decision-making under the national interest test and the call in power be required to publicly report on decisions made under both tests, with exceptions such as decisions (or parts of decisions) that must remain confidential to protect national security, New Zealand's international relations, or commercial-in-confidence information;
- 40 **agreed** that the Minister be empowered to publish policy guidance on the types of matters likely to be considered when determining whether a transaction is contrary to New Zealand's national interest, or security and public order interests, as relevant;
- 41 **agreed** that the regulator be responsible for administering the national interest test and call in power, recognising the similar capabilities necessary to support decision making under both tests;

Protection of national security information in court proceedings

[33]

- 43 **agreed** that the Act include provisions that preserve the right to natural justice and procedural fairness to the extent possible while protecting national security information in court proceedings, that are broadly aligned with those in existing legislation (such as the Telecommunications (Interception Capability and Security) Act 2013) [33]

Simplifying the regime

Ensuring the investor test focuses on material risks

- 44 **noted** that the investor test currently imposes compliance costs that are disproportionate to the risks posed by most investors;
- 45 **agreed** to narrow the investor test and only focus on material risks, by:
- 45.1 introducing a purpose statement that reflects that the test is intended to assess an investor's character and capability to determine whether they are likely to realise the benefits of their proposed investment, or pose risks to New Zealand;
 - 45.2 excluding New Zealanders from the test;
 - 45.3 no longer requiring approved investors to satisfy the test after they have already satisfied it, unless there have been relevant changes to their character or capability;
 - 45.4 limiting the factors decision makers must consider when assessing an investor's character to whether they have:
 - 45.4.1 been convicted of an offence for which they have been sentenced to imprisonment for a term of five years or more, or, at any time in the preceding ten years, been convicted of an offence for which they have been sentenced to imprisonment for a term of 12 months or more;
 - 45.4.2 had any civil contraventions resulting in pecuniary penalties, or entered into any enforceable undertakings, in the preceding 10 years;
 - 45.4.3 allegations of offences or civil contraventions (for which the maximum penalty is at least equivalent to the penalties referred to in paragraphs 45.4.1 and 45.4.2 above) against them for which official proceedings have commenced;
 - 45.5 extending the test to enable consideration of offences and contraventions by, and allegations against, the corporate entity with substantive control over the investment (with offences, contraventions and allegations limited as above);
 - 45.6 removing the financial commitment criterion and the reference to section 15 of the Immigration Act 2009, and replacing the business experience and acumen criterion with an objective assessment of relevant factors (for example, disqualifications or undischarged bankruptcies);

Benefits test

- 46 **noted** that the current benefits test is unclear, time-consuming to apply, and could better recognise Māori cultural values;
- 47 **agreed** to simplify and strengthen the benefits test, which will include:
- 47.1 reducing the number of specific benefit factors while maintaining the range of benefits that can be recognised;
 - 47.2 enabling the benefits of protecting wāhi tūpuna, wāhi tapu areas, Māori reservations, and access for the purpose of resource stewardship to be recognised;

- 47.3 clarifying that negative effects of an investment should not be considered under the benefits test (subject to any agreement by Cabinet to paragraph 48.2 above, which would allow assessment of actual or likely environmental harms only);
 - 47.4 clarifying that an investment's benefits should be assessed relative to state of the land and activities on it;
 - 47.5 replacing the 'substantial and identifiable' benefit threshold for non-urban land greater than five hectares with a requirement that an investment's benefits should be proportionate to the sensitivity of the land and the interest being acquired in order to satisfy the benefit test;
 - 47.6 repealing the ability to add factors to the benefits test via regulation;
- 48 **agreed** that the benefits test, referred to in paragraph 47 above, in relation to investments involving water extraction for bottling, or in bulk for human consumption, include a factor that allows consideration of the proposal's positive or negative impact on water quality and sustainability;

Timeframes

- 49 **noted** that the Act does not require decisions on applications to be made within a specified timeframe, creating uncertainty for investors and discouraging investment by contributing to extended decision-making timeframes;
- 50 **agreed** to introduce timeframes for all decisions to provide greater certainty for investors, which will include:
- 50.1 enabling specific timeframes to be set via regulation;
 - 50.2 providing for the regulator to have an initial period to quality assure an application before statutory timeframes formally commence, and enabling the regulator to charge a fee for this;
 - 50.3 enabling the decision-maker to unilaterally extend the statutory timeframe by up to a period prescribed in regulations, or a different period with the applicant's agreement;
 - 50.4 ensuring that a breach of a timeframe will not render a decision on an application unlawful and the Crown will not be liable for any loss suffered by applicants;
 - 50.5 requiring the regulator to report on compliance with statutory timeframes;

Enforcement

- 51 **noted** that the effectiveness of the regulator's current enforcement tools is limited, and stronger enforcement tools are needed to enable proportionate responses to breaches of the Act and the Regulations, and to manage national security or public order risks;
- 52 **agreed** to strengthen the regulator's enforcement tools, by:
- 52.1 enabling it to accept enforceable undertakings and to seek court orders in response to a breach of an undertaking;
 - 52.2 increasing the maximum pecuniary penalty for individuals to \$500,000 and introducing a separate maximum pecuniary penalty for corporates of \$10 million, and introducing pecuniary penalties for a breach of an enforceable undertaking, being \$50,000 for an individual and \$300,000 for a corporate;

- 52.3 specifying the regulator's ability to seek injunctive relief to address and deter non-compliance;
- 52.4 empowering the responsible Minister to seek an Order in Council for managed disposal of an asset or investment when considered necessary to protect New Zealand's national security or public order;

Leases

- 53 **noted** that the Act screens short-term leases, imposing disproportionate costs on investors relative to the risks being managed;
- 54 **agreed** to extend the threshold for screening leases and other less than freehold interests over sensitive land, excluding residential land, to ten years or more (including rights of renewal), irrespective of whether that threshold is reached in one or more consecutive interests;
- 55 **agreed** to clarify that periodic leases should not be subject to screening;

Sensitive adjoining land

- 56 **noted** that the Act screens transactions if the land being acquired adjoins land with sensitive characteristics, but that some of this land is screened even though there is no prospect of achieving meaningful access or environmental benefits;
- 57 **agreed** to limit the screening of sensitive adjoining land to land adjoining foreshore, bed of a lake, national parks, regional parks if they exceed 80 hectares in area, and land adjoining the following types of land if they exceed 0.4 hectares in area:
- 57.1 land held for conservation purposes under the Conservation Act 1987;
- 57.2 reserves managed by the Department of Conservation;
- 57.3 some land significant to Māori;

Who is required to be screened under the Act

- 58 **noted** that some entities that most New Zealanders would consider to be fundamentally New Zealand entities, and that are majority owned and controlled by New Zealanders, are deemed to be overseas persons under the Act;
- 59 **agreed** to amend the definition of overseas persons:
- 59.1 to remove New Zealand listed and incorporated entities, unless they are either 50 percent or more owned by overseas persons ('ownership limb'), or where overseas persons holding 10 percent or more of a class of shares that grants control, cumulatively hold more than 25 percent of that class ('control limb');
- 59.2 to remove New Zealand regulated retirement schemes, in which New Zealanders own 75 percent or more of the assets under management;
- 59.3 to include a managed investment scheme, if the manager is an overseas person, or more than 25 percent of the scheme's funds are invested on behalf of overseas persons;

59.4 to increase the control and ownership interest threshold which ordinarily trigger consent requirements under the Act (other than listed bodies corporate) from 25 percent or more to more than 25 percent;

60 **agreed** to introduce exemptions from the definition of overseas person that:

60.1 New Zealand incorporated non-listed entities may apply for if overseas persons' control or ownership do not exceed the 'control limb' and 'ownership limb' (paragraph 59.1 above), and any foreign government or its associates do not hold 10 percent or more of its shares;

60.2 New Zealand regulated managed investment schemes may apply for, if:

60.2.1 10 percent or more of the schemes funds are not invested on behalf of any foreign government or its associates;

60.2.2 50 percent or more of the funds are not invested on behalf of overseas persons;

60.2.3 more than 25 percent of the scheme's funds are not cumulatively invested on behalf of overseas persons that each have 10 percent or more of the scheme's funds invested on their behalf;

60.3 in both cases, require Ministers to consider the body corporate or managed investment scheme's compliance with the law and the degree of a foreign government's control before granting an exemption;

When small transactions are subject to screening

61 **noted** that the Act screens some smaller, low risk transactions, harming New Zealand's attractiveness to investment, particularly in New Zealand's capital markets where smaller transactions are common;

62 **agreed** that overseas persons investing 25 percent or less of the total equity securities in a New Zealand incorporated and listed entity require consent only if the investment results in the entity breaching the control limb (paragraph 59.1 above);

63 **noted** that the Regulations allow overseas persons that already hold consent to increase their interest by small amounts without obtaining a further consent in certain circumstances;

64 **agreed** to amend the exemption from screening increases in an existing interest to:

64.1 allow the exemption to be used where a 25 percent or more subsidiary, or 25 percent or more parent entity, of a consent holder makes incremental increases in an existing interest, or where the overseas person acquired the interest in the asset before it became sensitive;

64.2 remove the requirement that the exemption may only be used within five years of the date of consent;

64.3 remove the requirement for a consent holder to obtain consent to increase their holding beyond a 90 percent interest in the relevant entity;

Facilitating trade in residential mortgage obligations

- 65 **noted** that the Reserve Bank of New Zealand has developed a Residential Mortgage Obligation (RMO), which is designed to improve banks' and non-bank deposit takers' (NBDTs) liquidity, but that the Act could serve as a barrier to their uptake because the trades in loans (that is, permitted security arrangements) necessary to support the issuance of RMOs will often require consent;
- 66 **agreed** to exempt transactions involving the purchase of permitted security arrangements from the Act's consent requirements where:
- 66.1 the transaction is necessary or desirable to support the issuance or management of RMOs;
 - 66.2 the transaction is between a registered bank or NBDT (the loan originator), and a licensed supervisor in respect of debt securities under the Financial Markets Supervisors Act 2011 (the trustee); and
 - 66.3 the transaction is entered into in good faith and in the ordinary course of business;
- 67 **noted** that new exemptions and amendments to existing exemptions (paragraphs 59.4 and 66 above) will require amendment to the statutory exemption criteria;

Changes to the Fisheries Act

- 68 **noted** that the Act incorporates the provisions of the Fisheries Act 1996 regulating screening of overseas investment in fishing quota;
- 69 **agreed** to align the changes agreed to the Act and the Regulations with the relevant overseas investment provisions in the Fisheries Act 1996, including renaming the 'national interest test' in the Fisheries Act 1996, the 'benefit to New Zealand test' and clarifying that the new 'national interest test' (paragraphs 16 and 47 above) can be applied to prospective investments in fishing quota;

International implications

[36]

[36]

[1]

Review of the Phase Two reform

75 **noted** that the Associate Minister of Finance (Hon David Parker) intends to review:

75.1 the proposed call in power three years after its commencement;

75.2 other Phase Two reform changes five years after their commencement;

Financial implications

[33]

[33]

[1], [33]

[1]

[1], [33]

Legislative implications

[33]

- 90 **invited** the Associate Minister of Finance (Hon Parker) to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above paragraphs by amendments to the Act, the Regulations, the Fisheries Act, the Corporations (Investigation and Management) Act 1989, Conservation Act 1987, the AML/CFT Act and any other legislation requiring amendment as a result of the changes proposed in the paper under DEV-19-SUB-0306;
- 91 **authorised** the Associate Minister of Finance (Hon David Parker) to make decisions on:
- 91.1 proposals to consider tax as part of the screening process in consultation with the Minister of Revenue, the Minister of Finance, the Associate Minister of Finance (Hon Dr Clark), the Minister for Land Information and the Associate Minister of Finance (Hon Shane Jones);
 - 91.2 proposals on which legislation, and agency, should administer riverbed and lakebed, and any other design matters which may arise in relation to the special land provisions during the drafting process, in consultation with the Minister for Land Information and the Minister of Conservation;

- 91.3 proposals to support information sharing between the Act's regulator and other agencies in consultation with Ministers from affected agencies;
- 91.4 any additional policy issues that arise during the drafting of the Act and the Regulations.

Janine Harvey
Committee Secretary

Present:

Rt Hon Winston Peters
Hon Kelvin Davis
Hon Grant Robertson (Chair)
Hon Phil Twyford
Hon Dr Megan Woods
Hon Chris Hipkins
Hon David Parker
Hon Nanaia Mahuta
Hon Stuart Nash
Hon Iain Lees-Galloway
Hon Jenny Salesa
Hon Shane Jones
Hon Kris Faafoi
Hon Willie Jackson
Hon James Shaw
Hon Julie Anne Genter
Hon Eugenie Sage

Officials present from:

Officials Committee for DEV

Hard-copy distribution:

Associate Minister of Finance (Hon David Parker)