

# The Treasury

## Reform of the Overseas Investment Act Information Release

July 2020

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- [23] 9(2)(a) - to protect the privacy of natural persons, including deceased people
- [29] 9(2)(d) - to avoid prejudice to the substantial economic interests of New Zealand
- [31] 9(2)(f)(ii) - to maintain the current constitutional conventions protecting collective and individual ministerial responsibility
- [33] 9(2)(f)(iv) - to maintain the current constitutional conventions protecting the confidentiality of advice tendered by ministers and officials
- [34] 9(2)(g)(i) - to maintain the effective conduct of public affairs through the free and frank expression of opinions
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## Treasury Report: Overseas Investment Act Review Phase Two – Report Back on Early Engagement

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<b>Date:</b>	6 December 2018	<b>Report No:</b>	T2018/3377
		<b>File Number:</b>	IM-5-3-8

### Action Sought

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	Action Sought	Deadline
Minister of Finance (Hon Grant Robertson)	<b>Note</b> the content of this paper	None
Associate Minister of Finance (Hon David Parker)	<b>Read</b> this paper ahead of your meeting with officials on 10 December 2018	10 December 2018

### Contact for Telephone Discussion (if required)

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Name	Position	Telephone	1st Contact
Megan Noyce	Principal Advisor, International	[39]	[23] ✓
Thomas Parry	Acting Manager, Financial Markets and International	[39]	[23]

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

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**Return** the signed report to Treasury.

Note any feedback on the quality of the report

**Enclosure:** No

## Treasury Report: Overseas Investment Act Review Phase Two – Report Back on Early Engagement

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### Executive Summary

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This report summarises the feedback from early engagement with stakeholders on the Phase Two review of the Overseas Investment Act 2005 (the Act). The stakeholders we met with represented a range of perspectives and indicated that the Terms of Reference and scope of the review are pitched at the right level. Stakeholders have also identified additional technical issues that are worthy of further consideration at some point, but would be difficult to consider through this review as the existing scope is already challenging.

This early engagement and initial policy analysis has revealed that the review will be more complex than initially anticipated. We wish to discuss the implications of this complexity with Minister Parker at his meeting with officials on 10 December 2018.

### Recommended Action

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We recommend that you:

- a **note** that feedback from early engagement with stakeholders indicated that the Terms of Reference and scope of the review address the most pressing issues of concern, and identified a range of additional technical issues.
- b **note** that officials propose to discuss the implications of issues identified during stakeholder engagement, and initial policy analysis, with Minister Parker on 10 December 2018.

Thomas Parry  
**Acting Manager, Financial Markets and International**

Hon David Parker  
**Associate Minister of Finance**

## Treasury Report: Overseas Investment Act Review Phase Two – report back on early engagement

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### Purpose of Report

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1. This report:
  - a outlines the themes and issues arising from early engagement with stakeholders;
  - b notes the implications of stakeholder feedback and initial policy analysis for the complexity of the review; and
  - c proposes topics for discussion at officials' meeting with Minister Parker, scheduled for 10 December 2018.

Stakeholders have appreciated the opportunity to engage early in the review and have identified opportunities for greater efficiency and effectiveness

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#### *We have sought a range of stakeholder perspectives*

2. Over the last month, Treasury has met with a range of stakeholders to seek their views on the Act's operation and opportunities for reform. We targeted key users of the Act with a view to hearing a range of perspectives. Annex One lists the stakeholders we approached for discussions and those we met.
3. We also met with Ministers Sage and Clark (in their roles as decision-makers under the Act) to hear about their experience with the Act, and sought feedback from Land Information New Zealand on their view of the priorities and opportunities for reform.
4. Recognising that engagement with Māori will be a critical component of the review, we have met with three individuals with expertise in overseas investment issues for Māori and the networks to facilitate conversations with a broader constituency. Our initial discussions have focused on building our understanding of the range of potential Māori perspectives, and seeking advice on how to best engage with Māori during the public consultation phase.
5. All stakeholders have appreciated the opportunity to express views at such an early stage of the review.

#### *Key insights from engagement*

6. Our advice in early November outlined our initial insights from engagement (T2018/2923 refers). Stakeholders had identified a range of technical issues with the Act, concern with how applications are processed and the timeframes for decision-making, and noted the potential implications of the Act's current settings for perceptions of New Zealand's openness to investment.
7. Further engagement has reinforced these high-level messages. A desire for clarity and certainty was one of the key messages from stakeholders with an investor perspective. Broadly, feedback fell into three categories:

- a overarching issues, such as the impact of the regime on New Zealand’s attractiveness as an investment destination, and the extent to which risks being managed relate specifically to overseas investment or if they could be more effectively dealt with through regulation of the activity itself (for example, through the Resource Management Act 1991);
  - b issues relating to specific parts of the Act, such as the definition of overseas person and the good character test in the investor test (discussed further below). Stakeholders felt that both these tests were cast too broadly in terms of who is captured by the tests, and the information that is required to pass the test; and
  - c operational issues, such as whether information/advice from agencies such as Walking Access Commission or Heritage New Zealand is sought proactively or reactively as part of the consent process.
8. Generally, feedback indicated that the Terms of Reference and scope of the review are pitched about right, addressing the most pressing issues of concern to stakeholders. In particular:
- a There was strong support for reviewing the **definition of overseas person** as it relates to bodies corporates. Stakeholders noted that under the current rules, fundamentally New Zealand companies (that is, New Zealand controlled and closely identified as being from New Zealand) are treated as overseas persons under the Act. They consider the current definition is outdated and does not reflect the way that markets work today.
  - b Stakeholders had a range of views on the **investor test**. Some stakeholders considered that the Act requires time consuming, costly and overly invasive investigations (that is, looking at issues not relevant to the exercise of control over a sensitive asset) to satisfy the **good character** component. Additionally, these stakeholders noted dissatisfaction that **repeat investors** had to satisfy the investor test anew with each new application. Other stakeholders considered the investor test was inadequate because it focuses on **individuals with control**, and does not consider the “character” of the corporate entity involved in a transaction.
  - c Concerns were raised about the **benefits test** and the use of the counterfactual. Stakeholders noted that the requirement to demonstrate that an investment would be more beneficial than a hypothetical **counterfactual** is onerous. Some stakeholders called for **simplification** of the factors, noting domestic regulatory regimes manage risks associated with some factors.
  - d A number of stakeholders expressed concern about the broad range of land captured by the **land adjoining sensitive land** provisions. Examples were given of transactions where adjoining land has triggered the need to seek approval, yet the adjoining land was of low value and the application process did not trigger any consideration of protection for the adjoining land.
  - e The option of a **national interest test** garnered a range of responses. Some stakeholders were not opposed to the concept, as long as there would be clarity about what the test would apply to and how it would be applied. Some stakeholders recognised that a national interest test could provide better ability to consider the holistic merits of an investment than the current benefits test. Further engagement may reveal other views on this issue.
  - f Most investors, or stakeholders representing investors, expressed concern about the **length of time** to get decisions on applications, and considered that this reduces confidence in New Zealand as an investment destination.

9. In addition, stakeholders identified a range of technical issues. Some of these are likely to offer scope to improve the Act's efficiency, and improve its overall coherence. Examples include:
  - a the appropriate treatment of passive portfolio investment in equity capital (where investors have no or limited ability to exercise control or influence);
  - b the treatment of entities beneficially owned by New Zealanders but controlled by overseas persons (for example, investment of Kiwisaver funds); and
  - c whether the scope of 'associate' provisions captures too broad a range of people (for example, should a New Zealander's association with an overseas person, unrelated to their acquisition of the asset, mean they need approval to acquire that asset).
10. The full list of issues currently under investigation is set out in Annex Two.
11. Our initial view is that many of the issues identified, including the more technical ones, are worthy of further consideration at some point. We note, however, the scope of the review is already challenging.

## Additional complexity

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12. Our discussions with stakeholders, and our initial analysis of the issues set out in the Terms of Reference, have revealed additional complexity that has implications for how we approach the review. This complexity relates to both the specific matters being reviewed as well as how the range of issues interact.
13. For example, we have received more information about how making changes to existing provisions that are of significant concern to stakeholders, such as the definition of 'overseas person', could also create new avenues for avoidance if not carefully designed.
14. In addition, our recent analysis has revealed that in many cases the policy choices made about individual issues will have implications for how to approach other issues. This means that while initial policy design can be undertaken concurrently across multiple work streams, there needs to be sufficient time to consider how the work streams fit together as a whole.
15. For example, there are a range of options for a potential national interest test, ranging from a broad discretionary power, to a narrow power based on specific criteria. For each option, we need to consider the inter-relationship with the benefits test (which is being considered separately, with options ranging from streamlining to promote efficiency and/or expanding to include additional factors).
16. We have also been asked to consider whether specific issues (such as tax residency) should be taken into account when granting consent. There are complexities in undertaking this exercise at the same time as reviewing the architecture because decisions about one influence the other.
17. [34]

We are conscious of the need to exercise caution when making change to avoid further complexity and compromising the Act's workability.
18. We also need to consider alignment of the Phase Two review with other Government priorities. One example, which we would like to discuss with you early in the New Year, is the connection between this project's consideration of a potential national

interest test and infrastructure with monopoly characteristics, and separate but related projects including:

- a [1]
- b the Infrastructure Funding and Finance (IFF) work programme (The Treasury).

## Meeting with officials

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19. Officials are scheduled to meet with Minister Parker on Monday 10 December at 3pm. We would like to discuss:
  - a the implications of stakeholder feedback and our initial policy analysis;
  - b our initial ideas about how to approach specific issues, including:
    - the inter-relationship between a potential national interest test and the benefits test, with a focus on how to manage tensions between providing more discretion to ministers while giving investors sufficient certainty;
    - water extraction, for example by focusing on water uses that do not add additional value through production; and
    - tax residency, for example by considering how much value an overseas investor will contribute to the New Zealand tax base.

## Annex One: Stakeholder lists

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We met with the following stakeholders:

- Heritage New Zealand
- New Zealand International Business Forum
- AMP Capital
- Bell Gully
- Russell McVeagh
- Buddle Findlay
- Chapman Tripp
- NZ Law Society
- Campaign Against Foreign Control of Aotearoa (CAFCA)
- Vodafone
- Walking Access Commission
- The Retirement Villages Association of New Zealand
- Petroleum Exploration and Production New Zealand (PEPANZ)
- New Zealand Banks Association
- Duncan Cotterill
- Fitzgerald Strategic Legal
- NZ Superfund
- Senate SJH
- Auckland Airport
- Todd Property
- New Zealand Wine
- Anaru Smiler (Chief Operating Officer, Federation of Maori Authorities)
- Rawson Wright (Managing Director, Wright Partners)
- Te Taru White (Director, Te Taru White Consultancy)

We also contacted, but did not hear back from:

- Queen Elizabeth II Trust
- Electricity Networks Association
- Porter Group Limited
- Shamubeel Eaqub
- BusinessNZ
- Straterra Inc
- Cavell Leitch
- Forest and Bird
- Fish and Game
- Synlait
- Craigmore Group
- Zespri
- Federated Farmers
- Catherine Reid (Barrister, former LINZ official and foreign investment specialist)
- Prestige Lawyers

## Annex Two: Additional issues raised by stakeholders

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- Common land (that is, consent required to obtain a small stake in sensitive common land)
- Definition of non-urban land (can it be clarified?)
- Treatment of portfolio investors (should non-controlling interests by portfolio investors require consent?)
- Treatment of entities beneficially owned by New Zealanders (should such entities be required to obtain consent?)
- Leases (should they be treated the same as freehold interests)
- Scope of the 'associate' provisions (should they be narrowed?)
- Fluctuations of shareholding after consent is granted (and whether such fluctuations should require consent)
- Treatment of investor that tips company into definition of overseas person and when this should require consent
- Treatment of sale of securitised assets and whether consent should be required
- Approval of LINZ guidelines by Minister (section 36(2) of the Act)
- Statutory timeframes for application decisions
- Enforcement
- Protection of confidential information
- Discretionary trusts (are they appropriately captured by the regime?)