

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
- [36] 9(2)(h) - to maintain legal professional privilege
- [37] 9(2)(i) - to enable the Crown to carry out commercial activities without disadvantage or prejudice
- [39] 9(2)(k) - to prevent the disclosure of official information for improper gain or improper advantage

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Treasury Report: Overseas Investment Act - Phase Two Reform: further advice on special land

Date:	18 September 2019	Report No:	T2019/2885
		File Number:	IM-5-3-8 (Overseas Investment Act Phase Two)

Action sought

	Action sought	Deadline
Associate Minister of Finance (Hon David Parker)	Indicate your decisions on special land. Refer to this report to the Associate Minister of Finance (Hon. David Clark), the Minister for Land Information, and the Minister for Conservation.	19 September 2019
Minister of Finance (Hon Grant Robertson)	Note the contents of this report.	N/A

Contact for telephone discussion (if required)

Name	Position	Telephone	1st Contact
Megan Noyce	Principal Advisor, International	[39]	[23] ✓
Mary Llewellyn-Fowler	Senior Analyst, International	[39]	N/A (mob)

Minister's Office actions (if required)

Return the signed report to Treasury.

Refer to this report to the Associate Minister of Finance (Hon. David Clark), the Minister for Land Information, and the Minister for Conservation.

Note any feedback on the quality of the report

Enclosure: No

Treasury Report: Overseas Investment Act - Phase Two Reform: further advice on special land

Executive Summary

This report provides advice on the Overseas Investment Act's provisions to offer special land to the Crown before it is sold to an overseas investor. It seeks your decisions on:

- The payment of compensation for special land acquired by the Crown.
- Improvements to the process for offering special land to the Crown.
- The scope and status of the special land provisions (i.e. whether they should include adjoining strips of land, be limited to freehold land, and be mandatory).

It follows from:

- Our previous advice on the Overseas Investment Act's provisions to offer special land to the Crown before it is sold to an overseas investor (TR2019/2426), which we discussed during our meeting with you on 2 September.

[1]

- Your meeting with the Minister for Land Information on 10 September, during which officials from Land Information New Zealand provided advice on relaxing survey standards and acquiring strips of land adjoining the special land.

We have copied this report to the Minister of Finance for his information and future discussion as proposals are finalised for Cabinet consideration.

Next steps

We will reflect your decisions on special land in the Cabinet paper on the broader package of reforms to the Overseas Investment Act. We will provide this paper to you on Monday 23 September. We have proposed that it is submitted to Cabinet Office on 17 October, for consideration by DEV on 23 October and Cabinet on 29 October.

The complexity of two issues means they require further consideration, and so we recommend Cabinet delegates decision-making on them to you, the Minister of Land Information and the Minister of Conservation:

- The model used for the adjoining strips of land acquired by the Crown (e.g. whether they are moveable riparian strips or some other option).
- The regime under which riverbed, lakebed and adjoining strips of land are administered once acquired by the Crown (either under the Land Act 1948 or the Conservation Act 1987).

If you agree to this approach, Treasury will work with officials from Land Information New Zealand and the Department of Conservation to provide further advice by mid-October.

Recommended Action

We recommend that you:

Compensation for special land acquired by the Crown

a **agree** that:

- i. the Crown will pay compensation for special land and adjoining strips of land it acquires under the special land provisions.

Agree/disagree.

[1]

Agree/disagree.

[1]

Agree/disagree.

Improvements to the process for offering special land to the Crown

b **agree**:

- i. to amend the Regulations to shift responsibility for the special land process from the owner to the overseas investor.

Agree/disagree.

[1]

- ii. that responsibility for the special land process remains with the owner, as under the status quo.

Agree/disagree.

- c **agree** to amend the Regulations to require the Crown to make a decision, within a certain number of days of notification that a transaction involves special land, about whether it wishes to waive its right to acquire the special land (with acquisition being the default).

Agree/disagree.

- d **agree** that if the Crown chooses to waive its right, the special land provisions are satisfied for the purpose of consent under the Act.

Agree/disagree.

- e **agree** to amend the Regulations to require the Minister to issue guidance on the circumstances in which the Crown may consider waiving its right to acquire special land (e.g. where it offers no amenity or conservation value, or where likely ownership costs or liabilities are considered prohibitive).

Agree/disagree.

- f **agree** to amend the Regulations to provide that, if the Crown wishes to acquire the special land, it places a memorial on the title, at which point the special land provisions are satisfied for the purpose of consent under the Act.

Agree/disagree.

- g **note** that the Surveyor-General is prepared to develop standards of survey that adequately define the extent of the private and Crown land for the movable margins of water bodies, and which would support the issue of title. This is likely to reduce the cost and complexity of such surveys.

Noted.

- h **agree**

- i. [1] to amend the Regulations to:

- provide a process for special land to be offered to the Crown at nil value if the parties chose to do so, and
- require a valuation for the special land only if the Crown rejects the offer price.

Agree/disagree.

- ii. [1]

Agree/disagree.

- i **agree** to amend the Act to enable standardised terms and conditions to be set in the Regulations, which would be mandatory unless other agreement was reached with the Crown.

Agree/disagree.

- j **agree** to amend the Regulations so that if the Crown does not make a decision on the offer of special land within the current 30 day timeframe, the offer is deemed to be waived.

Agree/disagree.

- k **agree** to amend the Act to clarify that foreshore and seabed offered to the Crown is transferred to the common marine and coastal area under the Marine and Coastal Area Act 2011, through pathways provided for under that Act.

Agree/disagree.

- l **note** that riverbed, lakebed and adjoining strips of land could be transferred to the Crown either as Crown land administered under the Land Act 1948 or conservation land administered under the Conservation Act 1987.

Noted.

- m **agree** the Cabinet paper on the package of reform to the Act will delegate a decision on the matter in recommendation l above to you, the Minister of Land Information, and the Minister of Conservation.

Agree/disagree.

Scope and status of the special land provisions

- n **agree** to extend the scope of the special land provisions so strips of land adjoining the special land are also acquired by the Crown, as a way to help secure public access to waterways.

Agree/disagree.

- o **note** that there are several possible models for these adjoining strips of land.

Noted.

p **agree** that the Cabinet paper on the package of reform to the Act will delegate a decision on the matter in recommendation o above to you, the Minister of Land Information and the Minister of Conservation.

Agree/disagree.

q **agree** to amend the Act to [33] applying the provisions to the acquisition of freehold interests only.

Agree/disagree.

r **agree** to:

- i. amend the Act and Regulations to make the special land provisions non-mandatory.

Agree/disagree.

OR

- ii. if you wish the Crown to have the right to acquire all special land, [1] amend the Act and Regulations to make the special land provisions mandatory.

Agree/disagree.

s [1]

Noted.

t **note** that there are a number of costs associated with this proposal e.g.:

- Process costs (for surveying, valuation, negotiation, and conveying the land to the Crown). LINZ / the OIO is not currently funded for any of these activities.
- Acquisition costs [1]
- Maintenance costs if the land is taken into the conservation estate and administered by DOC.

We will provide advice on these costs alongside the advice on the delegated decisions.

Noted.

u **refer** this report to the Associate Minister of Finance (Hon. David Clark), the Minister for Land Information, and the Minister for Conservation.

Referred/not referred.

Megan Noyce
Principal Advisor, International

Hon David Parker
Associate Minister of Finance

Hon Grant Robertson
Minister of Finance

Treasury Report: Overseas Investment Act - Phase Two Reform: further advice on special land

Purpose

1. This report provides further advice and seeks decisions on:
 - The payment of compensation for special land acquired by the Crown.
 - Improvements to the process for offering special land to the Crown.
 - The scope and status of the special land provisions (i.e. whether they should include adjoining strips of land, be limited to freehold land, and be mandatory).
 2. It follows from our previous advice on the Overseas Investment Act's ('the Act') provisions to offer special land to the Crown before it is sold to an overseas investor (TR2019/2426). This advice was discussed during our meeting with you on 2 September, in which you:
 - Indicated your interest in using the special land provisions to secure public ownership of and access along New Zealand's waterways.¹
 - Sought advice from Land Information New Zealand (LINZ) on relaxing survey standards for special land as a way to expedite the acquisition process.
- [1]
3. Following this meeting, you also met with:
 - the Ministry of Foreign Affairs and Trade (MFAT) on 5 September, [1]

and

 - the Minister for Land Information on 10 September, during which officials from Land Information New Zealand provided advice on relaxing survey standards and acquiring strips of land adjoining the special land.
 4. We will reflect your decisions on special land in the Cabinet paper on the broader package of reforms to the Act, which you will receive on Monday 23 September.

¹ Note that in the case of foreshore and seabed, Crown acquisition would not result in Crown ownership. Instead, as per the provisions of the Marine and Coastal Area Act 2011, it would enter the common marine and coastal area.

Background

5. Foreshore, seabed, riverbed and lakebed are defined as 'special land' under the Act. As a way to secure public ownership of this land, the Act provides for it to be offered to the Crown before being sold to an overseas investor. This reflects the concept of 'ownership value', that is, that some New Zealanders derive a welfare benefit from knowing that certain types of land are owned and controlled by New Zealanders.
6. Approximately 16 per cent of sensitive land applications in the past five years have involved special land (approximately 20 applications per year), as have 75 per cent of forestry applications under the special forestry test since it was introduced in October 2018 (because land suitable for forestry tends to also contain waterways).
7. Currently, the special land provisions are:
 - *Failing to achieve their original policy intent*: the Crown has not been able to secure full legal ownership of the special land it has been offered since the provisions were introduced in the 2005 Act.
 - *Undermining other policy objectives*: the special forestry test, introduced in October 2018, was designed to streamline the consent process for overseas investment in the forestry sector, which is highly dependent on foreign capital. However, under the special forestry test, processing times for applications with special land are around 40 percent longer than those without. This means the provisions are becoming a barrier to overseas investment in forestry, which is important for enabling the Government's One Billion Trees programme.

Moreover, because the requirement to offer special land must occur before each piece of land is acquired, it is incompatible with the special forestry test's standing consent option (the purpose of which is to speed up the consent process by allowing an applicant to acquire land without first having to meet consent criteria).
8. The problems with the special land provisions primarily stem from practical difficulties with the offer and acquisition process prescribed in the Overseas Investment Regulations 2005.²
9. The full range of process difficulties are described in annex one, but one of the most problematic steps is surveying the special land. This is required in order to define the special land, which allows it to be excluded from the existing title and then transferred to Crown ownership.
10. Under the current rules set by the Surveyor-General, surveying to a standard sufficient to create a new title can be complex, time-consuming (the Overseas Investment Office (OIO) estimates it can take 3-6 months) and costly. These difficulties are most

² The offer process as prescribed in the Regulations involves: the owner notifying the Crown that a proposed sale to an overseas investor includes special land; the Crown choosing whether to waive its right to acquire the special land; the Crown surveying and valuing the special land at its own cost; a negotiation between the Crown and owner over the price and other terms and conditions of sale; the owner offering the land to the Crown (at which point the special land provision is satisfied for the purposes of the consent process); and, the Crown deciding whether to accept the offer.

pronounced when an offer includes riverbed, which is involved in around 90 per cent of special land applications [37]

As surveying needs to take place before consent can be granted, it can cause a bottleneck in the consent process. Moreover, as LINZ / the OIO do not receive funding for surveying (or any other part of the special land process), they have never actually been able to undertake this part of the process – meaning the Crown has never been able to take full legal ownership of this land.

11. As well as these problems, there are also issues with both the scope and status of the provisions:
 - a. *Scope*: special land is restricted to the *beds* of waterways. In practice, this limits the extent to which the provisions are able to secure public access to these waterways. In addition, the Act provides no guidance on the scope of ownership interest to which the provisions apply (e.g. freehold only, or leasehold too). [33]
 - b. *Status*: the Act and Regulations treat the status of the special land provisions differently, also generating uncertainty for investors:
 - in the Act's benefits test, an offer of special land to the Crown is one of 21 factors that decision makers *may consider* when assessing the benefits of a potential overseas investment in sensitive land, but
 - in the Act's special forestry test and in the Regulations, offering special land to the Crown is *mandatory*.

Recommendations

Compensation for special land acquired by the Crown

[1]

[1]

[1]

[1]

[1,36]

[1]

Improvements to the process for offering special land to the Crown

22. To improve the process for offering special land to the Crown, we recommend a two-step approach, as follows:
- Upon notification that land potentially being purchased by an overseas investor involves special land, the Crown decides, within a certain number of days, whether it wishes to waive its right to acquire the special land (the default position would be acquisition). If it wishes to acquire the land, the Crown records a memorial on the title that gives it a future right to acquire the special land. Once the memorial is recorded, the special land provisions are satisfied for the purposes of consent under the Act. If the Crown decides to waive its right to acquire the special land, the special land provisions are also satisfied.
 - If/when the Crown exercises its right to acquire the special land, the process for doing so would likely be a version of the status quo i.e. valuation ^[1] negotiation of terms and conditions, and issuing a new title for the remaining private land.

[1]

23. The interim step of placing a memorial on the title of the relevant land will ensure that the consent decision is not delayed by the acquisition process. Coupled with the following process improvements (the majority of which were included in our previous advice), this approach should significantly improve the efficiency of the special land provisions.

<p>Notification</p>	<p>We recommend amending the Regulations to shift responsibility for notification – as well as the rest of the special land process – from the owner to the overseas investor.</p> <p>This will make the provisions consistent with other consent requirements in the Act and Regulations, which will improve certainty for owners and investors.</p> <p>Or</p> <p>[1] we recommend that the responsibility remains with the owner in order [1] [1]</p>
<p>Right of waiver</p>	<p>We recommend amending the Regulations to require the Crown to make a decision, within a certain number of days of notification, about whether it wishes to waive its right to acquire special land (with acquisition being the default). If it chooses to waive its right, the special land provisions are satisfied for the purpose of consent under the Act.</p> <p>We also recommend amending the Regulations to require the Minister to issue guidance on the circumstances in which the Crown may consider waiving its right (e.g. where it offers no amenity or conservation value, or where likely ownership costs or liabilities are considered prohibitive).</p>
<p>New step: memorial on title</p>	<p>As discussed above, we recommend amending the Regulations to provide that if the Crown wishes to acquire the special land, it places a memorial on the title – at which point the special land provisions are satisfied for the purpose of consent under the Act.</p> <p>Ahead of placing the memorial on the title, the Crown could negotiate matters such as access provisions to and liabilities for the special land (which could be made conditions of the overseas investor’s consent).</p>
<p>Surveying</p>	<p>LINZ has advised that the Surveyor-General is prepared to develop standards of survey that adequately define the extent of the private and Crown land for the movable margins of water bodies, and which would support the issue of title. This is likely to reduce the cost and complexity of such surveys.</p> <p>This work will inform the further advice officials provide on the adjoining strips of land acquired by the Crown (see ‘next steps’ below).</p>
<p>Valuation</p>	<p>[1] we recommend amending the Act to:</p> <ul style="list-style-type: none"> • provide a process for special land to be offered to the Crown at nil value if the parties chose to do so, and • require a valuation for the special land only if the Crown rejects the offer price.

	<p>We also recommend that Cabinet invite the Valuer-General to provide guidance for valuing special land.</p> <p>Or</p> <p>[1]</p>
Negotiation	<p>We recommend amending the Act to enable standardised terms and conditions to be set in Regulations. These would cover matters such as liabilities (including for rates, fencing, weeding and maintenance) and access provisions (for Crown, public or applicant). They would be mandatory unless other agreement was reached with the Crown.</p> <p>This approach would enable transparency about the starting point for negotiations on key aspects such as access (for investor or Crown) and contribute towards consistency of agreements. It would also contribute to improving the efficiency of the process.</p>
Crown decision	<p>We recommend amending the Regulations so that if the Crown does not make a decision on the offer of special land within the current 30 day timeframe, the offer is deemed to be waived. This would improve certainty for both owners and investors.</p> <p>Note that the timeframes for making decisions on special land offers would need to be reviewed in line with decisions about the reform of the rest of the offer process and the proposed timeframes for deciding consent applications.</p>
Conveyance	<p>We recommend amending the Act to clarify that foreshore and seabed offered is transferred to the common marine and coastal area under the Marine and Coastal Area Act 2011 through the pathways provided for under that Act.</p> <p>Riverbed, lakebed and adjoining strips of land could be transferred to the Crown either as Crown land administered under the Land Act 1948 or conservation land administered under the Conservation Act 1987.</p> <p>As LINZ and DOC require further time to determine the most appropriate approach, we recommend the Cabinet paper on the package of reform to the Act delegates a decision on this matter to you, the Minister of Land Information, and the Minister of Conservation, and directs officials from relevant agencies (LINZ, DOC) to provide advice to inform this decision.</p>

Scope and status of the special land provisions

24. In our meeting of 2 September, you proposed extending the scope of the provisions so strips of land adjoining the special land are also acquired by the Crown, as a way to help secure public access to waterways.⁵ [1]

⁵ Note that any access across private land in order to reach these will still need to be negotiated separately.

25. In your meeting with Minister Sage on 10 September, LINZ officials discussed several possible models for these adjoining strips of land. Their preferred option involved creating 'moveable riparian strips' which in most cases could be surveyed with aerial imagery and excluded from the owner's title.
26. However, subsequent discussions between LINZ, the Department of Conservation (DOC), and the Ministry of Primary Industries (MPI) have surfaced issues with the moveable riparian strip model (e.g. concerns about having titles without clearly defined boundaries). Given these issues, we recommend that the Cabinet paper on the package of reform to the Act delegates a decision on this matter to you, the Minister of Land Information and the Minister of Conservation, and directs officials from relevant agencies (Treasury, LINZ and DOC) to provide advice to inform this decision.
27. A further scope issue relates to the type of ownership interest to which the special land provisions apply (e.g. freehold only, or leasehold too). As noted in our previous advice, we recommend amending the Act to confirm the current practice of applying the provisions only to the acquisition of freehold interests (either directly or in clear cases of total ownership, such as through using a holding company). We also recommend clarifying that the provisions apply to freehold land being acquired through the transfer of shares.
28. In terms of status, at present the Act and Regulations treat the special land provisions differently (in some places they are mandatory and in others they are non-mandatory). Our previous advice recommended removing this inconsistency by making the provisions non-mandatory across the Act and Regulations.⁶ However, we understand your preference is for Crown to have the right to acquire *all* special land. To achieve this, [1], the provisions would need to be mandatory. This would mean:
- offering special land to the Crown would be made a mandatory factor in the benefits test
 - offering special land would remain part of the special forestry test, and
 - the Regulations would be amended to clarify that the offer of special land is mandatory.

Treaty of Waitangi implications

[1,36]

⁶ Under this option, there is a risk that applicants would choose not to offer special land to the Crown due to the complexity of the offer process, which may mean the Crown would miss acquiring special land that was of public interest. We think this could be mitigated by providing direction (via the Ministerial Directive Letter) about weighting of this factor.

Funding implications

32. There are a number of costs associated with this proposal:
- Process costs i.e. for surveying, valuation, negotiation, and conveying the land to the Crown. LINZ is not currently funded for any of these activities.
 - Acquisition costs ^[1]
 - Maintenance costs if the land is taken into the conservation estate and administered by DOC.
33. We will provide advice on these costs alongside the advice on the delegated decisions (discussed below).

Next steps

34. We will reflect your decisions on special land in the Cabinet paper on the broader package of reforms to the Overseas Investment Act. We will provide this paper to you on Monday 23 September. We have proposed that it is submitted to Cabinet Office on 17 October, for consideration by DEV on 23 October and Cabinet on 29 October.
35. The complexity of two issues means they require further consideration
- The model used for the adjoining strips of land acquired by the Crown (e.g. whether they are moveable riparian strips or some other option).
 - The regime under which riverbed, lakebed and adjoining strips of land are administered once acquired by the Crown (either under the Land Act 1948 or the Conservation Act 1987).
36. We therefore recommend Cabinet delegates decision-making on these issues to you, the Minister of Land Information and the Minister of Conservation. If you agree to this approach, Treasury will work with officials from Land Information New Zealand and the Department of Conservation to provide further advice by mid-October.

[36]

Annex One: difficulties with the current special land process

Notification	The responsibility for notification – and the rest of the special land process – sits with the owner, despite it being relevant to whether the overseas investor receives consent. This is inconsistent with the treatment of other consent requirements (which sit with the overseas investor), and can hold up the consent process.
Right of waiver	While the Crown may waive its right to acquire the special land at any time after a notice has been given, in practice it rarely executes this right early in the process. This is because the circumstances in which the Crown would seek to accept or waive an offer of special land are not clear. While the most recent Ministerial directive letter states that the Government's general policy approach is to acquire special land if it is in the public interest to do so, there is no guidance on determining public interest.
Surveying	<p>A survey is required to create a new title and enable transfer of land to the Crown, and may be required for valuation. For riverbed in particular, surveys can be very complex, time-consuming (3 - 6 months) and costly. This is because rivers are often located in inaccessible terrain, making it difficult to accurately survey the land in an efficient and effective manner (e.g. large forestry blocks).</p> <p>Surveys are not required if the Crown chooses to take an equitable interest rather than legal ownership (i.e. an 'option' to buy the land at a point in the future). This does not provide the same rights as ownership, e.g. any access requirements would still need to be negotiated with the legal owner.</p> <p>While the regulations require the Crown to pay for the survey, no funding is provided for this purpose.</p>
Valuation	<p>The Act is unclear as to whether the special land can be gifted to the Crown, avoiding the need to value it.</p> <p>Waterways – especially rivers – are not usually sold, so there is no comparable market on which to base valuations of special land, which makes valuations complex and time-consuming (can take 3 - 6 months).</p>
Negotiation	<p>Negotiations typically cover matters such as sale price, liabilities (including for rates, fencing, weeding and maintenance) and access provisions (for Crown, public or applicant).</p> <p>Negotiating terms and conditions can be time-consuming (e.g. 2 - 4 months for applications under the special forestry test), particularly because they occur between the owner and the Crown but impact on the investor - who must also be a party to the agreement.</p>
Crown decision	The Regulations require Ministers to decide whether to accept or waive offers of special land within 30 days of the offer being made. In practice, decisions are taking longer, and the Act is silent on the effect of exceeding the timeframe.
Conveyance	For the Crown to acquire land, it needs to be held under a specific legislative regime and for a specific purpose. The Act is silent on this.

Annex Two: proposed special land process

Owner [1] *or overseas investor* [1] notifies the OIO that land potentially being acquired by an overseas investor involves special land.



Within x days of receiving notification, Crown confirms to owner/overseas investor it wishes to acquire special land (default position). *Or*, within x days of receiving notification, Crown notifies owner/overseas investor waives its right to acquire the special land.



Crown records memorial on the title of the land which gives it a future right to acquire the special land.



✓
Special land provisions satisfied for purpose of consent under the Act.



✓
Special land provision satisfied for purpose of consent under the Act.



Post-consent, Crown exercises right to acquire the special land.

As under the status quo, this process would involve surveying ('lighter' than the status quo), valuation and negotiation over sale price [1]. It would also involve issuing a new title for the remaining private land.

Upon acquisition, the special land would enter the common marine and coastal area (for foreshore and seabed) or become either Crown or conservation land (for riverbed, lakebed, and adjoining strips of land, if included).