

The Treasury

Reform of the Overseas Investment Act Information Release

July 2020

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- [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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Date: 21 October 2019

To: Minister of Finance (Hon Grant Robertson)
Associate Minister of Finance (Hon David Parker)

Deadline: 23 October 2019
(if any)

Aide Memoire: Phase Two reforms to the Overseas Investment Act: talking points for DEV

Purpose

On 23 October 2019, Cabinet's Economic Development Committee is scheduled to consider a package of reforms to the Overseas Investment Act 2005. This Aide Memoire supports these discussions. It includes:

- key messages, and
- 'back pocket' points aspects of the package that Ministers and agencies have raised questions about, and core features of the proposed reforms and.

Key messages (*further detail set out in Annex*)

- Overseas investment can bring significant benefits. It creates jobs, improves access to foreign markets, and brings new technologies that boost productivity.
- However, it can also pose risks. It can be inconsistent with many New Zealanders' views that sensitive land should remain in New Zealand ownership. Investors may not behave in line with our values, profits may move offshore, and – in rare cases – investments may threaten national security.
- The Overseas Investment Act serves to balance these tensions. However, there is strong evidence that the balance is not right. Processing times and red tape costs are unnecessarily high and the Act has clear gaps that leave us exposed.
- To strengthen our ability to manage risk, the paper proposes to:
 1. embed a higher-bar for investments in farm land
 2. introduce new tools to protect national security and other core national interests, and
 3. grant the regulator new enforcement tools to deter, and appropriately respond to, non-compliance.
- These enhancements give us scope to cut unnecessary red tape such as:
 4. streamlining consent requirements, without compromising our ability to manage material risks

5. removing fundamentally New Zealand companies from the regime, and
 6. no longer screening some low risk transactions, like purchasing land adjoining a local park or small increases in a shareholding.
- Timing of reform: the Cabinet paper refers to the Legislation Programme priority of referring to Select Committee in 2019. You may wish to note that you are now working towards introduction in April 2020, with a shortened legislative timeframe in order to enact the legislation this Parliamentary term.

Talking points – response to issues raised by Ministerial colleagues

Completing the Queen’s Chain (treatment of special land)

Raised by: [1]

Proposal:

- [1]
- Two options are presented. Clarifying that either the offer of special land is *mandatory* OR *voluntary*. In either case, [1] the process would be improved.
- Public ownership of, and access to, our waterways is important to New Zealanders.
- That is why the Act includes provisions for the transfer of special land (foreshore, seabed, riverbed, and lakebed) to the Crown before being sold to foreign investors. Problems in the Act and Regulations with the process for such transfers have meant that no land has been transferred to the Crown since the Act was introduced.
- The paper puts forward two options to clarify the provisions’ operation, both coupled with improvements to the underlying process. These are either making clear that the offer of special land to the Crown is mandatory, or that it is voluntary. The Act and Regulations conflict on this point.
- The paper also proposes that foreshore and seabed be transferred to the common marine and coastal area.

Consultation with Māori

Raised by: [31] suggested consultation with Māori [1] and enshrining the rural land directive, either before Cabinet makes policy decisions or prior to the Bill being introduced.

Proposal: Not addressed in the Cabinet paper.

- It is not feasible to undertake consultation ahead of the legislation going to LEG (in late March) – Treasury is at full capacity on outstanding policy issues and it will be difficult to arrange for the relevant Māori stakeholders to be available at short notice.
- It would be possible to consult in February, but any resulting changes (if needed) would need to be made after the Bill has been introduced to Parliament.

Active protection of Māori rights and interests and participation by Māori in matters of concern to Māori

Raised by: [31] asked how the reforms will enable active protection and participation by Māori.

Proposal: The simplified, positively framed benefits test, will better provide for Māori cultural values

- The benefits test will recognise benefits from protecting or enhancing wāhi tupuna, wāhi tapu areas and Māori reservations, and providing, protecting or enhancing access across land for the purposes of stewardship of historic heritage or a natural resource.
- The OIO is currently exploring ways for more productive engagement with external stakeholders, including Māori. There are opportunities to improve guidance to assist applicants to identify sites sensitive to Māori and to contact iwi.

A future review of the Act to focus on how to prioritise Māori wellbeing

Raised by: [31] there should be a future, wider, review of the Act which could consider the process of selling former Māori lands (including Raupatu lands) to foreign interests, and potential opportunities for Māori with an interest in that land to purchase before approval is granted under the OIA. [31]

a review could consider alignment with other government policies to support Māori aspirations to realise benefits from whenua.

Proposal: No broad review, but review the proposed reforms to the Act after five years, except for the call in power, which is to be reviewed after three years.

- I understand the interest in considering the Act from the perspective of how it could better prioritise and support Māori wellbeing and aspirations for the whenua. Overseas investment is an important source of capital to support these aspirations and the reforms will help in this regard.
- However, committing to such a review could create additional uncertainty about our openness to foreign investment and risk detracting from our broader reform message.
- [34]

- This does not foreclose the possibility of Cabinet considering this in the future.

Operationalising the call in power

Raised by: [1, 31] [1]

Proposal: The Cabinet paper presents two options and does not express a preferred approach. [1]

- The call in power, no matter how it is implemented, will improve our ability to protect and maintain our national security.

- It is a significant change and it is important to balance the need to protect against these risks with the burden that we place on investors and taxpayers.

- [1]

-

- [1]

[1. 33]

Automatically applying the national interest test to irrigation schemes

Raised by: [31] asked for irrigation schemes to be included.

Proposal: The national interest test is to automatically apply to transactions involving high risk critical national infrastructure (such as telecommunications and energy networks). It can be applied to any other transaction with Ministers' agreement.

- The proposed national interest test aims to balance the need to provide certainty to investors while ensuring that we can always protect our interests.
- One way to achieve this is by stating that transactions involving our most high-risk critical national infrastructure will always be subject to the national interest test.
- Irrigation schemes should not be included on that list at this time. It would be inconsistent with the definition of critical national infrastructure recently agreed by Cabinet and those used overseas.
- There are also other mitigating factors.
 - a. the higher threshold for farmland will make it very difficult to obtain an interest in a co-operative scheme;
 - b. the national interest test can always be applied to any transaction that poses significant risks; and
 - c. the list of 'high risk' assets will be specified in Regulations, and these can be updated in the future if evidence of significant risks emerge.

Allowing environmental harms to be considered in some circumstances

Raised by: [31] for environmental harm to be added to the factors that can be considered in the benefits test.

Proposal: The Cabinet paper now presents two options. Allowing Ministers to *only consider positive* effects on the environment when determining whether to consent to an investment in sensitive land OR *also allowing actual or likely harms* to physical and natural resources to be considered in respect of non-urban land over five hectares.

- Our natural environment underpins much of our economic success and supports our wellbeing in many ways.

- Overseas investors are subject to our environmental laws and must meet legislated standards.
 - Given these existing protections, one option is to only consider an investment's *environmental benefits* when determining whether to grant consent, and rely on the national interest test to manage any significant risks. An environmental factor in the benefits test would be framed more broadly than is currently the case. This proposal was the preferred approach in the first draft of the Cabinet paper consulted on with Ministers, and remains Treasury's preferred option.
 - The current test refers specifically to protecting/enhancing existing areas of significant indigenous vegetation and significant habitats of indigenous fauna, and protecting/enhancing existing significant habitats of trout, salmon, wildlife and game protected under the Wildlife Act.
- An alternative option, included in the Cabinet paper following coalition consultation, would be to *allow likely or actual harms to the physical and natural resources* to be considered as part of determining whether to grant consent to investments in non-urban land over five hectares. However, this could reduce the Act's coherence, increase complexity, and reduce New Zealand's attractiveness to investment, with consequences for jobs and growth.

How the Act will allow effects on water to be considered (if raised)

Proposal: A broad environmental factor in the benefits test will improve the Government's ability to consider an investment's effect on water.

- The Terms of Reference ask whether the Act should allow greater consideration of investments involving water extraction under the benefits test.
- There are public concerns about overseas investments involving water extraction. However, the Act cannot comprehensively address these concerns. The Resource Management Act remains the principal and best tool for managing risks related to water extraction.
- My proposed changes to the benefits test, however, will enhance the Government's ability to consider an investments impact on water quality and sustainability – as well as other environmental issues – relative to the status quo.
- *If necessary (note link to above issue on environmental harms):* Allowing consideration of likely or actual environmental harms in respect of some transactions would further increase our capacity to manage these concerns.
- [1]

Ryan Walsh, Senior Analyst, International, [39]
 Megan Noyce, Principal Advisor, International, [39]

Annex: Talking points – core features of the proposed reforms

1. Embedding a higher bar for investments in farm land

Proposal: Only allow overseas persons to acquire farm land if they can demonstrate a substantial point of difference to a New Zealand (such as introducing new technology).

- Farm land has significant economic and cultural importance. It is a special privilege for overseas persons to own it.
- In 2017, we used the Ministerial Directive Letter to set a higher threshold for the purchase of rural land. Foreign investors must have a genuine point of difference.
- I propose to embed this requirement in the Act, ensuring that if a future Government wants to have our farm land priced on an international – rather than domestic – market, they will need to return to Parliament to do so.

2. A national interest test and national security and public order call in power

Proposal: Empower the government to reject transactions ordinarily screened under the Act that are contrary to the national interest and block smaller transactions (not ordinarily screened) if they pose a significant risk to national security or public order.

- We have almost no ability to block investments that pose risks to our security or other national interests. [1]
- For transactions already screened, a new *national interest test* will allow us to block investments that are contrary to our core interests. It will apply automatically to high risk transactions, such as certain critical national infrastructure, but will be able to be applied to any other transaction to ensure that our core interests can be protected.
- A *call in power* will supplement this test. It will apply to investments in certain strategically important industries – such as the media and military technology – and allow us to block those transactions that threaten our national security or public order.
- These changes are essential to protecting New Zealanders' wellbeing and are consistent with many comparable countries across the globe.

3. New enforcement tools to deter and respond to non-compliance

Proposal: Introduce enforceable undertakings, increase maximum pecuniary penalties and empower Minister to seek an Order in Council for managed disposal of an asset/investment where needed to protect national security or public order.

- There are limits on the effectiveness of the regulator's current enforcement tools, especially to respond to mid-level breaches where divestment is not appropriate, or breaches where national security may be at risk.
- Enforceable undertakings will enable the regulator to accept an undertaking to remedy a breach, and later enforce that undertaking in court and seek pecuniary penalties for breach.
- Increase pecuniary penalties from \$300,000 for individuals and corporates to \$500,000 for individuals and \$10 million for corporates, consistent with comparable penalty frameworks elsewhere.
- Empower the Minister to seek an Order in Council for managed disposal (and pending that disposal, statutory management) of an investment where ongoing

management and control of the asset poses national security or public order risks.

4. Streamlining the consent process for low-risk transactions

Proposal: Target the investor test at material risks, simplify the benefits test without reducing the benefits that can be considered, and introduce statutory time limits.

- It can cost more than \$100,000 and regularly take more 100 working days to get consent. This has implications for productivity and growth.
- The Cabinet paper proposes re-focusing the Act on the risks that matter. We should no longer investigate minor offences or allegations that have no bearing on a person's suitability to invest. We should also make it easier for investors of good character that have delivered for New Zealand to invest here again.
- The proposals will also simplify how investors can demonstrate, and the regulator can assess, how their proposals will benefit New Zealand. Reducing the number of factors investors can report against from 21 to seven, without reducing the range of benefits that we can take into account, will significantly improve this core piece of the Act.
- We should impose statutory timeframes on decisions (*timeframes will be set in regulations and decided at a later date*). This will provide greater certainty and create strong incentives for investors to lodge better quality applications and the regulator to push back on applications that do not meet our high standards.

5. No longer screening fundamentally New Zealand bodies corporate

Proposal: Remove New Zealand incorporated and listed bodies corporate from the Act that are majority owned (50%+), and controlled by, New Zealanders (*overseas persons with holdings of 10%+ cannot collectively hold 25% of shares or 50% of the Board*). Allow other entities to apply for exemption from the Act if they meet the requirements.

- We treat a range of fundamentally New Zealand companies, that are majority owned and controlled by New Zealanders (like Air New Zealand), as overseas persons.
- The Act was not intended to capture these entities. Screening them imposes unnecessary costs and distracts regulatory resources from transactions that we should care more about.
- The proposals would remove listed companies that meet these New Zealand ownership and control requirements from the Act entirely, and give other companies and entities that meet them the opportunity to apply for an exemption.

6. No longer screening some low risk transactions

Proposal: Only screen leases if their term is 10 years or more, remove low-risk sensitive adjoining land from the regime and limit the screening of small transactions.

- The Act covers assets that are not particularly sensitive, such as short to medium term leases, sensitive adjoining land where there are no environmental or access concerns, and incremental changes in shareholding that do not materially impact on the ownership or control of sensitive assets.

- Reducing this overreach will encourage productive investment in New Zealand, and ensure the regulator focuses on transactions that impose material risks.