

The Treasury

Reform of the Overseas Investment Act Information Release

July 2020

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- [1] 6(a) - to avoid prejudice to the security or defence of New Zealand or the international relations of the government
- [2] 6(b)(i) - to avoid prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the Government of any other country or any agency of such a Government
- [4] 6(c) - to avoid prejudice to the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial
- [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:
determining acquisition process for special land**

Date:	14 November 2019	Report No:	T2019/3474
		File Number:	IM-5-3-8 (Overseas Investment Act Phase Two)

Action sought

	Action sought	Deadline
Hon David Parker Associate Minister of Finance	<p>Agree to the recommended changes to the special land provisions.</p> <p>Agree to authorise the Treasury to provide drafting instructions to Parliamentary Counsel Office reflecting the decisions in this report.</p> <p>Agree to refer this report to, and discuss your preferred approach with, the Minister for Land Information and the Minister of Conservation.</p>	23 November 2019
Hon Grant Robertson Minister of Finance	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]	✓
Maisie Thursfield	Analyst, International	[39]	N/A (mob)	

Minister's Office actions (if required)

Return the signed report to Treasury.

Refer this report to the Minister for Land Information and the Minister for Conservation.

Note any feedback on the quality of the report

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Enclosure: No

Treasury Report: Overseas Investment Act - Phase Two Reform: determining acquisition process for special land

Executive Summary

On 13 November 2019, the Cabinet Economic Development Committee (DEV) authorised you to work with the Minister for Land Information and the Minister of Conservation to make further decisions on the phase two review of the Overseas Investment Act 2005 in relation to special land, specifically on:

- whether riverbed and lakebed are administered as Crown land under the Land Act 1948 or as conservation land under the Conservation Act 1987, and
- other design matters relating to special land that may arise during the drafting process (DEV-19-MIN-0306 refers).

This report provides advice and seeks your decisions on these matters. We have copied it to the Minister of Finance for his information.

Next steps

We recommend that you refer this report to, and discuss your preferred approach with, the Minister for Land Information and the Minister of Conservation, in accordance with DEV's direction.

We will then reflect your decisions in drafting instructions sent to Parliamentary Counsel Office.

Note that there will be financial implications if the Crown wishes to acquire special land. This is because Land Information New Zealand (LINZ) is not currently funded for the costs of the acquisition process or for the cost of the special land itself. A funding request to cover these costs will be put forward by LINZ as part of Budget 2020.

Recommended Action

We recommend that you:

- a **agree** that riverbed and lakebed will be administered as Crown land under the Land Act 1948 when it is acquired by the Crown, with the option for it then to be transferred, as appropriate, to another party for administration under other legislation.

Agree/disagree

- b **agree** to amend the Overseas Investment Act Regulations 2005 to:

shift responsibility for the special land acquisition process from the vendor to the overseas investor;

Agree/disagree

clarify that the overseas investor can offer the special land to the Crown for nil consideration, should they choose to do so; and

Agree/disagree

authorise LINZ to determine a suitable process for acquiring special land on Crown pastoral lease properties if and when required.

Agree/disagree

- c **note** there will be financial implications if the Crown wishes to acquire special land, because LINZ is not currently funded for the costs of the acquisition process or for the cost of the special land itself. A funding request to cover these costs will be put forward by LINZ as part of Budget 2020.

Noted

- d **agree** to authorise the Treasury to provide drafting instructions to Parliamentary Counsel Office reflecting the decisions in this report.

Agree/disagree

- e **note** that during the drafting process, further decisions on the process for acquiring special land may be required.

Noted

- f **agree** to refer this report to, and discuss your preferred approach with, the Minister for Land Information and the Minister of Conservation, in accordance with DEV's direction.

Agree/disagree

Megan Noyce

Principal Advisor, International

Hon David Parker

Associate Minister of Finance

Treasury Report: Overseas Investment Act - Phase Two Reform: determining acquisition process for special land

Purpose

1. This report provides further advice and seeks decisions on outstanding policy issues relating to the process by which the Crown acquires special land, specifically:
 - the legislation, and agency, which will administer any lakebed and riverbed acquired by the Crown; and,
 - other matters relating to the design of the special land process.
2. This follows the Cabinet Economic Development Committee (DEV)'s decision on 13 November to authorise you to work with the Minister for Land Information and the Minister of Conservation on these issues (DEV-19-MIN-0306 refers).
3. We have consulted with Land Information New Zealand (LINZ), the Department of Conservation (DOC), and the Ministry of Foreign Affairs and Trade in preparing this report.

Background

4. The Act defines foreshore, seabed, riverbed and lakebed as 'special land'. As a way to secure public ownership of this land, the Act provides for a vendor to offer it to the Crown before they sell it to an overseas investor. Approximately 16 per cent of sensitive land applications in the past five years have involved special land (approximately 20 applications per year), and 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).
5. 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, the special land provisions do not work with the special forestry test's standing consent option. This is because standing consents provide overseas investors pre-approval to enter into future forestry transactions, instead of requiring them to apply to the Overseas Investment Office (OIO) for consent for each individual transaction (which is the usual point at which special land would be considered).

6. The problems with the special land provisions stem primarily from practical difficulties with the acquisition process prescribed in the Regulations. To address these problems, on 13 November 2019 DEV agreed that:
- offering special land to the Crown will be mandatory for all applications involving sensitive land under the benefits test pathway (and will remain mandatory for the special forestry test pathway);
 - the process by which the Crown acquires special land will be amended so that it works more effectively, including by:
 - requiring the Crown to decide within a specified timeframe whether it waives the right to acquire special land;
 - specifying the circumstances when the Crown may waive the right to acquire special land;
 - enabling the Crown to place a memorial on the title (with a duty on the Crown to take ownership within 10 years or the memorial will lapse), at which point the special land factor would be satisfied for the purposes of consent;
 - 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;
 - 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;
 - 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; and
 - confirming that the provisions apply only to the acquisition of freehold interests and perpetually renewable leasehold interests under the Crown Pastoral Land Act 1998.
7. DEV also:
- noted that the Surveyor-General has indicated they are prepared to develop 'lighter touch' survey standards that adequately define the extent of the private and Crown land, to support the issue of titles with less cost and complexity;
 - authorised the Associate Minister of Finance (Hon Parker) to work with the Minister for Land Information and the Minister of Conservation to determine:
 - whether riverbed and lakebed are administered as Crown land under the Land Act 1948 or as conservation land under the Conservation Act 1987, and
 - any other design matter relating to special land that may arise during the drafting process.

Recommended action

Administering lakebed and riverbed acquired by the Crown

8. For administrative ease and speed, we recommend that riverbed and lakebed acquired through the special land process is initially vested in the Crown under the Land Act 1948 (and administered by the Commissioner of Crown Lands and LINZ).¹
9. If, once in Crown ownership, it is determined by LINZ, in consultation with other agencies, that the land is better administered by a different party under different legislation, it can be transferred. For example, where the land is assessed as having particular conservation value, it may be better transferred to DOC for administration under conservation legislation.

Other design matters

Responsibility for the special land acquisition process

10. In our initial advice, we recommended shifting responsibility for the special land acquisition process from the vendor to the overseas investor (T2019/2426). This was to align the special land provisions with the other consent requirements in the Act, and to simplify the process so that negotiations involve two parties rather than three.
11. [1]

[1,36]

12. [1]

Our recommended approach is to amend the Regulations to shift responsibility for the special land process to the overseas investor, in line with our initial advice.

Offering land for nil consideration

13. Sometimes, overseas investors may choose to offer the special land to the Crown for nil consideration (i.e. for free). At present, there is no provision in the Regulations to cover this circumstance. We therefore recommend amending the Regulations to clarify that the overseas investor can offer the special land to the Crown for nil consideration, should they choose to do so.

Determining the process for acquiring special land on Crown Pastoral lease properties

14. LINZ have advised that due to the nature of Crown Pastoral leases, a separate process will be required for special land on Crown Pastoral lease properties.

¹ Where the Crown acquires riverbed in the Whanganui River catchment, ownership would immediately pass to Te Awa Tupua (Whanganui river and its tributaries) under Te Awa Tupua River Claims Settlement Act 2017.

15. However, as very few Crown pastoral lease properties are sold to overseas buyers (in the last five years there have only been two), and most leases already exclude riverbed, we recommend amending the Regulations to authorise LINZ to determine a suitable process for acquiring special land on Crown pastoral lease properties if and when required.

Other issues

Loss of Crown leverage under proposed special land acquisition process

16. In the proposed special land acquisition process, negotiation of the terms and conditions of the agreement in principle will take place post-consent.
17. We designed the process in this way to reduce delays to the consent process, but acknowledge that it does reduce the Crown's leverage in negotiations with the overseas investor. However, we assess that this loss of leverage is sufficiently addressed by:
 - Prescribing standardised terms and conditions for the transfer of special land in the Regulations, and making these mandatory unless the parties agree otherwise (as agreed by DEV); and
 - Current Regulation 22 which caps the price the Crown will pay for the special land at the value determined by the public valuer.

Preserving the amenity or environmental value of the special land prior to acquisition

18. DOC has noted there is a risk that the amenity or environmental value of the special land that the Crown intends to acquire is degraded prior to the Crown actually acquiring the land, particularly as this could take place up to ten years following the memorial being registered. They have suggested that landowners could be required to adopt land management practices that preserve the amenity or environmental value of the special land prior to it being acquired by the Crown.
19. We will consider this matter further and report back to you with options to address if required.

Next steps

20. We recommend that you refer this report to, and discuss your preferred approach with, the Minister for Land Information and the Minister of Conservation, in accordance with DEV's direction.
21. We will then reflect your decisions in drafting instructions sent to Parliamentary Counsel Office. During the drafting process, further issues may arise on which we require your decision.

22. Note that there will be financial implications if the Crown wishes to acquire special land. This is because LINZ is not currently funded for the costs of the acquisition process or for the cost of the special land itself. LINZ will put forward a funding request to cover these costs as part of Budget 2020.