The Treasury

Reform of the Overseas Investment Act Information Release

July 2020

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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

[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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Reference: T2019/3636 IM-5-3-8 (Overseas Investment Act Phase Two)

TE TAI ŌHANGA
THE TREASURY

Date: 12 November 2019

To: Associate Minister of Finance (Hon David Parker)

Deadline: 13 November 2019
(if any)

Further DEV consideration of the Overseas Investment Act Phase Two reform package

Background

Cabinet has referred the Overseas Investment Act 2005 (the Act) Phase Two reform package back to the Cabinet Economic Development Committee (DEV) for further consideration at its meeting on 13 November 2019 and authorised DEV to have Power to Act for this item.

Including water bottling in the benefits test

Your office has asked for further advice on the possibility of including water extraction for bottling as a factor in the benefits test.

The Cabinet paper currently includes a split recommendation with two options for factors in the benefits test to ensure that environmental matters can be appropriately considered under the Act. These are:

- recommendation 48.1: **Agree** that the benefits test include a factor that allows consideration of an investment's likely or actual benefits relating to the natural and physical resources on the relevant sensitive land, or the natural and physical resources on other land as a result of activities occurring on the relevant land;

OR

- recommendation 48.2: **Agree** that the benefits test include a factor as described in 48.1, but that can also be used to assess likely or actual environmental harms associated with an application to acquire non-urban land greater than five hectares.

However, if Ministers want to be able to consider negative environmental effects resulting from water bottling on sensitive land, a recommendation could be included that would replace recommendation 48 (an environmental factor will still be included in the benefits test as per recommendation 47). This recommendation could be worded as:

> **Agree** that the benefits test, referred to in recommendation 47, 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.

Adding this factor would only affect a small number of applications (only three unique proposals involving water bottling appear to have been submitted since the Overseas Investment Act was introduced in 2005). It would enable Ministers greater discretion over affected applications, as although applicants could still meet other factors within the benefits test, Ministers could consider risks to water quality and sustainability.

A negatively framed factor will impact on the design of the positively framed benefits test. However, because it would only capture a small number of applications, this impact is relatively small, and it would send a less negative signal about New Zealand's openness to investment than the "environmental harm" factor currently proposed in the Cabinet paper. It would also reduce (but not eliminate) the risk of decisions made under the Act conflicting with decisions made by consenting authorities under the Resource Management Act (RMA).

The Cabinet paper states that the Act is not the appropriate tool for managing the risks associated with water extraction. This is because the RMA already exists to manage the environmental effects of water extraction, and because any factor in the benefits test would not apply to bottling plants on non-sensitive land, and could be easily avoided. To address this, during consultation some submitters suggested making water a new class of sensitive assets subject to screening under the Act. [1]

Other split recommendations

Your office has also asked for further advice on the other split recommendations that are in the Cabinet paper.

Recommendation 11 – clarify whether the special land provisions are mandatory or voluntary

On 23 October, DEV agreed to recommend that Cabinet:

> **Agree** 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).

Comment

The effect of this recommendation is that:

- It will be mandatory for special land to be offered to the Crown. Recommendation 12.6 seeks agreement in relation to special land that is foreshore and seabed offered to the Crown to be transferred to the common marine and coastal area in accordance with the Marine and Coastal Area Act 2011.
- [1]
- The alternative recommendation, not agreed to by DEV, had proposed that the special land provisions be voluntary.

Recommendation 33 – operationalising the call in power through a active screening regime [1]

On 23 October, DEV agreed to recommend that Cabinet:

> **Agree** that, to operationalise the call in power, the regulator establish an active screening regime, where the regulator [1] identify and investigate those presenting substantial risks to national security or public order.

Comment

The effect of this recommendation is that:

[1]

[1]

Harry Nicholls, Senior Analyst, International, [39]
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