

The Treasury

Reform of the Overseas Investment Act Information Release

July 2020

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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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Treasury Report: Overseas Investment Act Reform Phase Two: Additional Policy Decisions

Date:	12 December 2019	Report No:	T2019/3935
		File Number:	IM-5-3-8 (Overseas Investment Act Phase Two)

Action sought

	Action sought	Deadline
Associate Minister of Finance (Hon David Parker)	Agree to the recommendations in this report	19 December 2019
Minister of Finance (Hon Grant Robertson)	Note the contents of this report	19 December 2019

Contact for telephone discussion (if required)

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

Minister's Office actions (if required)

Return the signed report to Treasury.

Send the attached letters to the relevant Ministers regarding the proposals on information sharing.

Note any feedback on the quality of the report

Enclosure: Yes (attached)

Treasury Report: Overseas Investment Act Reform Phase Two: Additional Policy Decisions

Executive Summary

This report seeks your decisions on several additional policy matters regarding the Overseas Investment Act Reform: Phase Two. You have delegated authority from the Cabinet Economic Development Committee [DEV-19-MIN-0306] and Cabinet [CAB-19-MIN-0593] to make these decisions.

The report recommends legislative change (including an amendment to the Tax Administration Act 1994) to enable the Overseas Investment Office (OIO) and other agencies to share and receive information to implement policy decisions. In particular, to operationalise the national security and public order aspects of the new national interest test and call-in power, the OIO will need to work with other agencies to identify and consider whether national security and public order risks can be mitigated. Although the OIO has broad information sharing powers under the Overseas Investment Act 2005, the Privacy Act 1993 may hinder the ability of the OIO and other agencies to share information in this context.

To support the implementation of decisions to include serious breaches of tax law where penalties are imposed by tax authorities (rather than by a court) in the investor test, we recommend amending the Tax Administration Act 1994 to enable information to be shared with the OIO. Tax secrecy laws limit Inland Revenue's ability to share tax information with the OIO.

The report also seeks decisions to address a gap in the investor test regarding the limb that captures convictions for offences in relation to 'corporate character'. The threshold for convictions is currently framed around the length of imprisonment imposed. As corporate entities are fined, rather than imprisoned, we recommend expanding the scope of the investor test to include fines imposed on corporate entities for convictions for offences within the last ten years.

Regarding the transitional provisions of the Bill, we recommend that the Bill generally applies prospectively (which is consistent with best practice). In terms of the new farm land advertising requirements, we recommend that these will apply to transactions entered into on or after the Act's commencement, even if the farm land was advertised prior to commencement.

The report also provides an update on stakeholder engagement. We have copied this report to the Minister of Finance for his information.

Recommended Action

We recommend that you:

Information sharing

- a **Agree** there should be a statutory power allowing a specified government agency to disclose any information it holds in relation to the performance or exercise of its functions, duties, or powers, if it has reasonable grounds to believe that the disclosure of that information is necessary or relevant for the purposes of assessing national security and / or public order risks that might arise from a proposed or actual overseas investment.

Agree/disagree.

- b **Agree** that this power should over-ride tax secrecy provisions.

Agree/disagree.

- c **Agree** that officials should work with PCO to develop safeguards and empowering provisions around information sharing.

Agree/disagree.

- d **Direct** officials to report back to you in the New Year on the provisions developed pursuant to recommendation c above.

- e **Agree** that these information sharing provisions should be limited to agencies listed in the legislation, with the ability to add additional agencies through regulation.

Agree/disagree.

- f **Agree** that the government agencies to be listed in legislation should be the Department of Inland Revenue, Department of Internal Affairs, Department of the Prime Minister and Cabinet, Land Information New Zealand, Government Communications Security Bureau, Ministry of Business Innovation and Employment, Ministry of Defence, Ministry of Foreign Affairs and Trade, New Zealand Customs Service, New Zealand Security Intelligence Service, The Treasury, New Zealand Defence Force, New Zealand Police, and New Zealand Trade and Enterprise.

Agree/disagree.

- g **Agree** to enable Inland Revenue to share tax information with Land Information New Zealand where Inland Revenue has reasonable grounds to believe that the disclosure of the tax information is reasonably necessary for the purposes of Land Information New Zealand considering an application, and monitoring compliance, investigating, and enforcing the Act.

Agree/disagree.

- h **Agree** that Inland Revenue be only required to provide information for the purposes set out in recommendations (a) and (g) if the information is readily available to Inland Revenue, and it is satisfied that it is reasonable and practical to provide this information.

Agree/disagree.

- i **Sign** the attached letters consulting Ministers of agencies to be covered by the information sharing provisions.

Agree/disagree.

Investor test

- j **Note** that the limb relating to convictions for offences in the investor test is based around length of imprisonment, which means that corporates entities convicted of offences are not captured as corporates are punished through fines.

- k **Agree** that this limb of the investor test should also include convictions for offences where a fine has been imposed on a corporate entity in the last ten years.

Agree/disagree.

Transitional provisions

- l **Agree** that the amendments to the Overseas Investment Act will generally apply prospectively to transactions entered into on or after commencement.

Agree/disagree.

- m **Agree** the new farm land advertising requirements will apply to transactions entered into on or after commencement, even if the farm land was advertised prior to commencement.

Agree/disagree.

- n **Note** we are considering whether some aspects of the reforms (such as enforceable undertakings) should apply to existing applications on commencement.

Megan Noyce
Principal Advisor, International

Hon David Parker
Associate Minister of Finance

Hon Grant Robertson
Minister of Finance

Treasury Report: Overseas Investment Act Reform Phase Two: Additional Policy Decisions

Purpose of Report

1. On 13 November 2019, the Cabinet Economic Development Committee¹ (DEV) authorised you to make decisions on proposals to support information sharing between the Act's regulator and other agencies in consultation with Ministers from affected agencies [DEV-19-MIN-0306]. DEV decisions have been confirmed by Cabinet.² This report provides advice on the options to support information sharing.
2. In addition, DEV authorised you to make additional policy decisions on issues that arise during the drafting of the Act and Regulations in the Phase Two reform of the Overseas Investment Act [DEV-19-MIN-0306]. This report also provides advice on ensuring the investor test captures fines imposed on corporates as a result of convictions for offences, and on the approach to the transitional provisions of the Bill.
3. Finally, this report provides a brief update on stakeholder engagement following policy announcements.

Information sharing

Ensuring the OIO has sufficient information sharing powers

4. As discussed in T2019/3412, to operationalise the national security and public order aspects of the new national interest test and the call-in power, the Overseas Investment Office (OIO) will need appropriate information gathering and sharing powers. You have agreed that the OIO be granted targeted information gathering powers related to 'non-notified voluntary transactions' (T2019/3412 refers), but not made any decisions on information sharing between government agencies.
5. National security and public order risks will be relevant to transactions screened by both the national interest test and the call-in power. The OIO will need to lead information sharing with and across a group of agencies, to identify these risks, and consider whether and how the risks can be mitigated. It will need these powers throughout the process, including before applications are called-in. Although the OIO has broad information gathering powers, the Privacy Act creates practical and perhaps legal difficulties for the OIO's, and other agencies', ability to share information. In circumstances where a foreign investor is proposing to purchase (or has purchased) a sensitive undertaking or asset, allowing for a review of that investor and their background is an appropriate balance between protecting New Zealand's national security and the privacy of the individual concerned.
6. In this report, following consultation with the Ministry of Justice, the Office of the Privacy Commissioner, the OIO, Inland Revenue, and other agencies, we seek agreement to a legislative mechanism to allow the OIO and other agencies to share information about prospective investors and transactions when considering national security and public order risks.

¹ Under Power to Act from Cabinet [CAB-19-MIN-0562].

² [CAB-19-MIN-0593].

This includes (but is not limited to) sharing information about non-notified transactions that are subject to voluntary notification only – in those circumstances, Privacy Principle 11 exceptions (which allow sharing of information in certain circumstances) will not apply, and the investor will not have consented to that sharing.

Enabling information sharing across a group of agencies

7. To achieve this objective, we recommend a legislative amendment to the Overseas Investment Act to enable the sharing of information, including personal information, between agencies. This scheme would be based on, in particular, similar provisions in the Outer Space and High Altitude Activities Act 2017, and the Anti-Money Laundering and Countering Financing of Terrorism Act 2009. Under this option, government agencies could share information related to transactions screened under the national interest test or the call-in power that may be relevant to the effect of a proposed or completed investment on New Zealand's national security or public order.
8. The option would allow a government agency to disclose any information it holds in relation to the performance or exercise of its functions, duties, or powers, if it has reasonable grounds to believe that the disclosure of that information is necessary or desirable for the purposes of assessing national security and public order risks. This is a narrow purpose that serves to balance the need to protect New Zealand's core interests against the privacy rights of investors.
9. We propose over-riding the general principle of tax secrecy (Inland Revenue supports this recommendation). This will require amending the Tax Administration Act 1994, to allow sharing for the purposes set out in paragraph 8. To ensure, however, that this over-ride does not overly impact Inland Revenue's ability to administer the tax system, we propose providing Inland Revenue with the ability to not provide information unless the information is readily available to Inland Revenue; and Inland Revenue is satisfied that it is reasonable and practicable to provide the relevant information.
10. To further ensure that the right to privacy is appropriately recognised and in addition to limiting this provision to the assessment of national security and public order risks and transactions screened under the national interest test or call-in power, we recommend:
 - a enabling the agency sharing information to impose conditions that it thinks fit relating to the use of the information or document;
 - b providing that regulations may be made, to govern information sharing;
 - c noting that nothing in these provisions limits disclosure under other provisions of the Privacy Act 1993; and
 - d listing in legislation the agencies that will share information. Ministers would have the option of adding further agencies through regulation (which would require consultation with the Privacy Commissioner). We recommend that the agencies to be listed in legislation are the Department of Inland Revenue, Department of Internal Affairs, Department of the Prime Minister and Cabinet, Land Information New Zealand, Government Communications Security Bureau, Ministry of Business Innovation and Employment, Ministry of Defence, Ministry of Foreign Affairs and Trade, New Zealand Customs Service, New Zealand Security Intelligence Service, The Treasury, New Zealand Defence Force, New Zealand Police, and New Zealand Trade and Enterprise.

An Approved Information Sharing Agreement is not sufficient

11. We also considered, whether, instead of using the Act to authorise information sharing, the OIO could enable multilateral sharing within existing legislative provisions through an Agreed Information Sharing Agreement (AISA) with the relevant agencies. However, following consultation with the Ministry of Justice, we are not recommending an AISA because:
 - a the type of information sharing sought is not a data-matching or a mass-data-transfer regime – it is individualised, and triggered by an investment into New Zealand by a foreign person;
 - b it will involve sharing of information between agencies, including from and to the intelligence and security agencies, [1]
– and having a clear legislative framework around protection of that information may create greater comfort for overseas agencies; and
 - c providing for information sharing through primary legislation would provide all agencies with a clear basis for information sharing, would make it clear to potential investors what the state’s powers are in this area, and is consistent with other statutory schemes where data-matching is not proposed (such as the Outer Space and High Altitude Activities Act 2017 or the Anti-Money Laundering and Countering Financing of Terrorism Act 2009).

Enabling Inland Revenue to share information with the OIO for other purposes

12. The OIO will also need to access tax information from Inland Revenue to consider tax as part of the investor test within the screening regime (T2019/3570 refers). Although the OIO has broad information gathering powers, tax secrecy laws limit Inland Revenue’s ability to share tax information with the OIO.
13. To address this, we recommend amending the Tax Administration Act 1994 to enable Inland Revenue to share information for the following purposes:
 - a *Considering an application:* when the OIO requests tax information from Inland Revenue for the purposes of considering whether an investor connected to an application meets the investor test. This is because we are introducing new provisions in the investor test that consider penalties imposed by tax authorities for serious contraventions of tax law. We note that information about such penalties is generally not public, hence the need to request information from Inland Revenue. However, for penalties imposed by overseas jurisdictions, the OIO would need to rely on publicly available information, as Inland Revenue is unlikely to be able to provide this information.
 - b *Monitoring compliance, investigating and enforcing the Act:* when the OIO requests tax information from Inland Revenue for the purposes of considering whether an investor is complying with ongoing conditions of a consent (or standing consent). As per paragraph a above, this information may not be publicly available.
14. We propose the same safeguards apply as set out in paragraph 10 – that is, that Inland Revenue will have the ability not to share information in certain circumstances.
15. In addition to these legislative changes, Inland Revenue and OIO will need to enter into a memorandum of understanding to agree how tax information will be shared in practice, and establish the further safeguards Inland Revenue will require to safeguard its general tax secrecy requirements.

Additional policy decisions

Ensuring the investor test captures corporate convictions

16. DEV has agreed to expand the investor test to include consideration of offences, contraventions of the law, and allegations against, corporate entities with substantive control over the investment ('corporate character'). DEV has also agreed that consideration of these matters should be limited to:
 - a convictions for offences where the investor has been sentenced to imprisonment for a term of five years or more, or, sentenced to imprisonment for a term of twelve months or more, at any time in the preceding ten years;
 - b civil contraventions which result in pecuniary penalties being imposed or enforceable undertakings being entered into, in the last ten years; and
 - c allegations of offences or civil contraventions as outlined above, for which official proceedings have been commenced.
17. Following DEV decisions, Ministers have also agreed that decision makers should be able to consider the following serious breaches of tax law where penalties are imposed by tax authorities (rather than by a court):
 - a penalties for evasion or similar acts (including equivalents in other jurisdictions);
 - b penalties for abusive tax position (including equivalents in other jurisdictions); and
 - c tax defaults, where the investor has failed to pay an amount of tax payable of more than NZ\$5 million (this will not include merely late payments).
18. In terms of how this may apply to corporate entities, the threshold for criminal offences will not capture convictions of corporate entities. This is because the investor test's threshold for convictions (the first limb) is based around the length of imprisonment imposed. This is broadly consistent with section 15 of the Immigration Act 2009 and balances the seriousness of offending (for which time of imprisonment is a proxy) with relevance (for which time passed since offending is a proxy). Corporate entities that are convicted of offences are punished by a fine rather than imprisonment.
19. It is intended that corporate convictions for offences is captured by the investor test. We therefore recommend that decision-makers be able to consider fines imposed on a corporate entity where the entity has been convicted of an offence. Consistent with the thresholds for convictions and civil contraventions we recommend that the consideration of fines is limited to those imposed in the last ten years (using time as a proxy for relevance).
20. This threshold is consistent with the policy rationale for the investor test, which has been designed to focus on material risks. It will exclude lower level offending (such as traffic offences, which are usually infringement offences and do not result in convictions) which is not relevant to an investor's suitability to invest in New Zealand.
21. As with other changes to the investor test, our approach is to design a test which manages the potential risks of the majority of investors, whilst relying on the national interest back stop in rare cases.
22. In developing this advice we have also considered whether, the investor test should also capture individuals who are fined as a result of a conviction, as well as those who are imprisoned. However, individuals are subject to a far greater range of offences than corporate entities, meaning the scope of potential fines captured could be much broader and capture a range of less significant offending.

In addition, we continue to see merit in remaining consistent with the Immigration Act which uses imprisonment as a proxy for seriousness.

23. We expect that the inclusion of fines imposed on corporate entities, within the last ten years, will not create a significant burden for investors or for the OIO as it is consistent with the second limb of the test agreed to by DEV which captures proven civil contraventions resulting pecuniary penalties or enforceable undertakings.

Transitional provisions

24. The Bill will contain transitional provisions to clarify how the new provisions will apply in respect of existing applications or enforcement action. We seek agreement to our approach to transitional provisions below, and are working through the detail with PCO.
25. We recommend that the new provisions will generally apply prospectively to transactions entered into on, or after commencement. This aligns with the Legislation Design and Advisory Committee's guidance, regarding a presumption against retrospectivity in that legislation should not affect existing rights and should not punish conduct that was not punishable at the time it was committed. We are continuing to consider whether there are aspects of the reforms that could or should apply to existing applications on commencement – for example, allowing an overseas investor and OIO to enter into enforceable undertakings in relation to ongoing enforcement action.
26. We also recommend that the new farm land advertising requirements will apply to transactions entered into on or after commencement, even if the farm land was advertised prior to commencement.
27. The Act will also need to allow for pre-notification of transactions subject to mandatory notification under the call in power, to avoid delays once the new notification requirements come into force.

Update on stakeholder engagement

Meeting with stakeholders to discuss technical details of the reform

28. The Treasury held information sessions with stakeholders in Wellington, on 10 December, and in Auckland on 12 December. These sessions updated stakeholders on the technical details of the Phase Two Reforms agreed by Cabinet and provided an opportunity to continue to build stakeholder relationships and understand the areas that stakeholders are interested in for the next part of the reform process. These sessions also provided an opportunity to discuss stakeholders' views of the various reforms, which is useful preparation ahead of Select Committee consideration of the Bill.
29. Participating stakeholders included those who attended the technical round tables in May and who regularly engage in the technical aspects of the Overseas Investment Act. Treasury has also separately engaged with a large number of investors, intermediaries (firms that seek investment on behalf of a client), industry associations, and businesses to offer briefing on the proposed national security and public order call-in power. This work is ongoing.