

# 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 2: Additional design decisions

<b>Date:</b>	30 January 2020	Report No:	T2019/4139
		File Number:	IM-5-3-8 (Overseas Investment Act phase 2)

### Action sought

	Action sought	Deadline
Minister of Finance (Hon Grant Robertson)	<b>Note</b> the contents of this report.	7 February 2020
Associate Minister of Finance (Hon David Parker)	<b>Agree</b> to the recommendations in this report.	This deadline will ensure PCO has sufficient time to draft the Bill in time for us to provide it to Minister Parker by 20 February.

### Contact for telephone discussion (if required)

Name	Position	Telephone	1st Contact
[39]	[39]	[39]	N/A (mob) ✓
Chris Nees	Principal Advisor, International	[39]	[23]

### Minister's Office actions (if required)

**Return** the signed report to Treasury.

**Forward** a copy of the report to the Minister for Land Information and the Minister of Conservation, the Minister of Revenue, and the Minister responsible for the GCSB and NZSIS.

Note any feedback on the quality of the report

**Enclosure:** No

# Treasury Report: Overseas Investment Act Phase 2: Additional design decisions

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## Executive Summary

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This report seeks your (Minister Parker's) decisions on the following issues:

- **Section 1:** refined definitions of assets within the call in power's scope and/or automatically subject to the national interest test,
- **Section 2:** outstanding policy issues relating to special land, and
- **Section 3:** a range of other technical design issues identified during the drafting of the Overseas Investment Amendment Bill (the **Bill**).

Decisions in **Section 1** will ensure that we can finalise drafting instructions for the regulations for the Parliamentary Counsel Office (**PCO**), and prepare a document summarising the key elements of proposed regulations to support engagement through the Parliamentary process. The decisions in **Section 2 and 3** will allow drafting of the Bill to be completed.

This report is copied to the Minister of Finance for his information.

### Section 1: refined asset definitions

This section recommends refinements to the definitions of assets subject to the call in power and/or automatically subject to the national interest test.

While Cabinet has agreed what these assets will be at a high level, regulations must be used to refine their definitions, to ensure that they are no wider than necessary to manage significant risks to national security and/or public order (to reduce regulatory burden), and ensure consistency with New Zealand's international obligations.

#### *Refining the definitions of critical national infrastructure*

The call in power and national interest test will always apply to the following critical national infrastructures (**CNIs**): significant ports and airports, electricity generation and distribution businesses, water infrastructure and telecommunications infrastructure.

Consistent with Cabinet's direction, and a desire to use existing legislative definitions where possible, we recommend using existing definitions for all CNI categories excluding telecommunications infrastructure (see **Annex 1**).

Due to limitations with existing definitions of telecommunications infrastructure, we recommend a bespoke definition: "*entities that provide telecommunications services to other entities that allow communication between telecommunications devices.*"

This definition is arguably broader than the definition used in the Telecommunications (Interception Capability and Security) Act 2013 (**TICSA**), which also seeks to manage national security risks.

We consider this necessary to manage the full range of national security risks and/or public order risks posed by overseas investment in telecommunications infrastructure. [1,36]

### ***Refined definition of sensitive personal data***

The call in power will apply to entities that hold, produce, or otherwise have access to sensitive personal data (genetic, biometric, health and financial data) as well as government information related to national security and/or public order. Given the number of entities that hold sensitive personal data, it is particularly important to ensure that this definition is very carefully refined to reduce unnecessary regulatory burden. Consistent with the approach taken in the United States, we recommend refining the definition by:

- excluding data that will not pose risks, namely anonymised data (that cannot be re-identified), publicly available data, and data about the target entity's own employees,
- narrowing each category of sensitive personal data to focus on information that poses the most material risks (see **Annex 2**), and
- only include overseas investments in entities that:
  - have tendered to or supplied services to sensitive government employees or contractors, including an intelligence and security agency, the Department of Prime Minister and Cabinet, the Ministry of Foreign Affairs and Trade, the Ministry of Defence and the New Zealand Defence Force [1]  
or
  - produce, maintain or otherwise have access to large datasets of 30,000 or more individuals [1]

Due to data limitations, even with these refinements it is difficult to predict exactly how many transactions will be subject to the call in power and whether it will capture all transactions that pose material risks. We are recommending a relatively high threshold for dataset size before an entity is subject to the call in power to reduce regulatory burden. However, we commit to reviewing this threshold if it becomes apparent that it is not adequately managing risks.

### ***Refined definition of significant irrigation schemes***

Cabinet agreed that transactions involving irrigation schemes should always be subject to the national interest test. To ensure that this test is truly a 'backstop', we recommend that these irrigation schemes be limited to: *“water supply systems involving the collection, storage, and/or reticulation of water primarily for agricultural production, with a resource consent or consents to abstract more than 75 million cubic metres of water per year”*.

This definition will capture the country's 16 largest schemes (in contrast, a broad definition could capture more than 16,000 schemes). Investments outside this threshold can still be subject to the national interest test at Ministerial discretion.

## **Section 2: outstanding special land policy and design issues**

This vesting process may involve extinguishing existing registered third party interests over the special land (such as easements), which - consistent with obligations under the Bill of Rights Act and PWA, and Cabinet's decision to compensate the special land's owners - may require compensation. We seek your agreement to compensate third parties for the loss of their interests, if required, and note that LINZ intends to seek additional funding for this.  
[1,36]

Separately, Land Information New Zealand (LINZ) notes that the criteria for when the Crown will waive its right to acquire special land should be extended to include situations where the ownership of the special land will impose significant costs to the Crown. LINZ notes that the current limited ability to waive the acquisition of special land will result in additional costs for the Crown and if the criteria are not changed, it will need to seek additional funding, either through Budget 2020 or in future years.

### **Section 3: other technical issues identified during drafting of the Bill**

There are number of other minor issues we seek your decisions on to finalise the Bill. Specifically:

- extending the scope of the investor test to allow consideration of any breach of the Act that resulted in a court-imposed penalty in the prior 10 years. This is because breaches of the Act are directly relevant to determining an investor's suitability to acquire additional sensitive assets,
- specifying the requirements for a complete consent application and call in notification in regulations (rather than the Government Gazette as currently), given the implications this has for the operation of timeframes and fees,
- (relatedly), clarifying that the OIO can refund fees in full or in part (for example, where an application is rejected for not meeting the above requirements), and
- given its expertise, making Inland Revenue responsible for enforcement action where an investor provides false or misleading tax information under the investor test.

### **Next steps**

We recommend that you consult the Minister for Land Information before making decisions on the special land issues.

We also recommend you forward this briefing to the Minister of Revenue and the Minister responsible for the GCSB and NZSIS.

We will provide the draft Bill (reflecting decisions in **Sections 2 and 3**), the document summarising key elements of the proposed regulations (reflecting decisions in **Section 1**), and a Cabinet paper by 20 February. We recommend that the Bill be considered by Cabinet Legislation Committee on 17 March, and be introduced to Parliament by 24 March.

### **Recommended Action**

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*Associate Minister of Finance (Hon David Parker)*

We recommend that you:

#### **Section 1: Refining the definitions of assets within scope of the call in power or automatically escalated to the national interest test**

- a **Note** that Cabinet has agreed that the assets covered by the call in power and/or automatically screened under the national interest test will be defined at a high level in legislation, with further specification in regulations.

### **Critical National Infrastructure**

b **Note** there are clear existing definitions able to be adapted or used for most critical national infrastructure assets (that is, for ports, airports, electricity generation and distribution, water infrastructure and financial markets infrastructure) that we recommend adopting for the regulations, as set out in **Annex 1** of this report.

c **Agree** with the refined definitions of critical national infrastructure set out in **Annex 1**, with modifications as necessary for drafting purposes.

*Agree/disagree.*

d **Note** the lack of a suitable existing definition of telecommunications infrastructure that captures both current and emerging risks, which has required us to develop a bespoke, technology-neutral definition that is broader than existing comparable definitions.

e [1,36]

f **Note** that we consider the broader definition of telecommunications infrastructure is necessary to manage the full range of national security risks and/or public order risks posed by overseas investment in telecommunications infrastructure.

g **Agree** to define telecommunications infrastructure (with minor modifications as necessary for drafting purposes) as: “*transactions in entities that provide telecommunications services to other entities that allow communication between telecommunications devices.*”

*Agree/disagree.*

### **Sensitive data**

h **Note** that narrowing the definition of sensitive personal data through regulation will be critical to avoid capturing entities that pose low or no risks, while ensuring the call in power’s scope can be justified under our international obligations.

i **Agree** to exclude the following types of data from the definition as they pose less national security or public order risk if acquired through overseas investment: data that is anonymised (and not at risk of re-identification), publicly available data, or data about a firm’s own employees.

*Agree/disagree*

j **Agree** with the refined categories of sensitive personal data set out in **Annex 2**, with modifications as necessary for drafting purposes.

*Agree/disagree.*

k **Agree** to narrow the scope of sensitive data to only include entities that produce, maintain, or otherwise have access to data in accordance with the definitions in **Annex 2**, and:

- have tendered to or supplied services to sensitive government employees or contractors, including those of the Government Communications Security Bureau, the New Zealand Security Intelligence Service, the Department of Prime Minister and Cabinet, the Ministry of Foreign Affairs and Trade, the Ministry of Defence or the New Zealand Defence Force, or
- produce, maintain or hold large datasets on 30,000 or more individuals.

*Agree/disagree*

- l **Note** the call in power is set for review three years after its implementation, however the threshold of “large datasets” in recommendation k may need to be revised earlier if evidence emerges that overseas investments in datasets below this threshold are routinely raising significant national security or public order risks.

### ***Irrigation Schemes***

- m **Agree** to define irrigation schemes to be automatically screened under the national interest test as: “*water supply systems involving the collection, storage, and/or reticulation of water primarily for agricultural production that have a resource consent or consents to abstract more than 75 million cubic metres of water per year.*”

*Agree/disagree.*

## **Section 2: Outstanding policy and design issues for special land**

- n **Note** that Cabinet has noted you will work with the Minister for Land Information and the Minister of Conservation on any design matter relating to special land that may arise during the drafting process [CAB-19-MIN-0593 refers].

### ***Land transfer process and third party interests***

- o **Agree** that the Crown acquire special land through a declaration and vesting process similar to that prescribed in the Public Works Act 1981.

*Agree/disagree.*

- p **Agree** that the Crown will pay compensation to third parties for the loss of any interests as a result of the vesting process, where those interests were registered on the title of the special land prior to it being purchased by the overseas investor.

*Agree/disagree.*

- q **Agree** that the compensation paid by the Crown to third parties will be determined using the compensation mechanism provided through the Public Works Act 1981, with necessary modifications.

*Agree/disagree.*

**LINZ Recommendations:**

r **Note** that LINZ recommends that the criteria for waiving acquisition of special land be extended to include considerations of ongoing risks, costs and liability to the Crown

s **Agree** that the decision to acquire special land should allow for the public interest in the acquisition to be balanced against the risks, costs and liability to the Crown.

*Agree/disagree*

t **Note** that the proposal for third party compensation and the current limited ability to waive the acquisition of special land will result in additional costs for the Crown and that LINZ intends to either update its current budget bid or seek funding in future years.

**Binding nature of memorial**

u **Agree** that third parties whose interests were registered on the title of the special land after it was purchased by the overseas investor and the memorial was recorded on the title will not be eligible for compensation after the interest is extinguished through the vesting process.

v **Agree** to clarify that the Crown will be able to retain some third party interests in the special land where it is deemed preferable to do so.

*Agree/disagree.*

w **Agree** to clarify that the Crown will be able to negotiate new third party interests in the special land where it wishes to do so.

*Agree/disagree.*

x **Agree** to clarify that the memorial noting the Crown's right to acquire the special land will be binding on all future owners (including New Zealand owners) where the overseas person sells the land before the Crown has acquired the special land (or before it has waived its right to do so).

*Agree/disagree.*

**Section 3: Other technical policy and design issues for the Bill**

***Amend the investor test to consider certain breaches of the Overseas Investment Act in the preceding 10 years***

y **Agree** to introduce a new factor into the investor test that would allow the Overseas Investment Office (OIO) to consider whether an investor has received a court-imposed penalty in the preceding 10 years for a contravention of the Overseas Investment Act (the Act).

*Agree/disagree.*

***Ensuring the requirements for a complete application or call in notification are clear***

z **Note** that there is currently limited legislative guidance on what constitutes a complete application under the Act (instead, the OIO has published unofficial application templates with the required information).



- aa **Agree** that the regulations will prescribe the requirements for a complete consent application and a call in notification.

*Agree/disagree.*

***Ensuring the OIO can refund application fees***

[36]

- cc **Agree** that the regulations should provide the OIO with authority to refund fees in full or in part.

*Agree/disagree.*

***Designating Inland Revenue as the agency responsible for enforcement under the new tax information disclosure requirement***

- dd **Agree** that Inland Revenue be the agency responsible for taking enforcement action where an investor provides false or misleading tax information under the new tax information disclosure requirement in the Overseas Investment Amendment Bill, with consequential amendments being made to the Tax Administration Act 1994.

*Agree/disagree.*

***Streamlined investor test process for repeat investors***

- ee **Note** that the drafting of the Bill has made it unnecessary to introduce a power for the OIO to request information from repeat investors where the OIO becomes aware of a change that it considers may be relevant (as you previously recommended should occur).

**Referring this report to Ministerial colleagues**

- ff **Refer** this briefing to the Minister for Land Information and the Minister of Conservation, the Minister of Revenue, and the Minister responsible for the GCSB and NZSIS.

Chris Nees  
**Principal Advisor, International**

Hon Grant Robertson  
**Minister of Finance**

Hon David Parker  
**Associate Minister of Finance**

# Treasury Report: Overseas Investment Act Phase 2: Additional design decisions

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## Purpose of Report

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1. Cabinet has authorised you (Minister Parker) to make decisions on any additional policy issues that arise during the drafting of the Overseas Investment Act (the **Act**) and the Regulations [CAB-19-MIN-0593].
2. Based on Cabinet's decision, this report seeks your decisions on:
  - **Section 1:** refined definitions of the assets within the call in power's scope and/or automatically subject to the national interest test,
  - **Section 2:** outstanding policy issues relating to special land, and
  - **Section 3:** a range of other technical design issues identified during the drafting of the Overseas Investment Amendment Bill (the **Bill**).
3. We are seeking decisions on the definitions of assets in **Section 1**, which are key to setting the scope of the call in power and national interest test, for the following reasons:
  - so that we can include the definitions in a document setting out key aspects of the reforms that will be specified in regulations. The purpose of this document is to give the select committee and potential submitters a better view of the overall shape of the reforms and support engagement throughout the Parliamentary process, and
  - so that we can issue drafting instructions to PCO for the Regulations.
4. We are also seeking the decisions in **Sections 2 and 3** so that the Parliamentary Counsel Office (**PCO**) can finalise its drafting of the Bill. We intend to provide the draft Bill to you, along with a Cabinet paper, on 20 February, for consideration by the Cabinet Legislation Committee (**LEG**) on 17 March and introduction to Parliament by 24 March.

## Section 1: Refining the definition of assets within scope of the call in power and the national interest test

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5. This section seeks your decision on how to refine the definitions of the following assets within the call in power's scope and/or automatically screened under the national interest test:
  - critical national infrastructure (**CNI**) (call in power and national interest test),
  - sensitive data (call in power only), and
  - irrigation schemes (national interest test only).
6. [1]

## The call in power's scope will be refined in regulations

7. Cabinet has agreed that the call in power and national interest test will apply to overseas investment in a limited set of strategically important assets and high-risk CNI. Cabinet agreed that these assets should be defined at a high level in primary legislation. Detailed definitions will be set in regulation to balance the need to:
  - provide sufficient certainty to investors, and
  - provide flexibility for the government to respond to emerging risks while also ensuring that the call in power does not capture more transactions than necessary to manage relevant risks (by updating regulations over time).
8. Cabinet agreed that when setting definitions in regulations, the relevant Minister must be satisfied they are no wider than necessary to manage significant risks to national security or public order, and be consistent with New Zealand's international obligations. We seek your decisions on detailed definitions for CNI and sensitive data within the call in power's scope in accordance with these parameters.
9. The same definitions of CNI, with the addition of irrigation schemes, will be used to specify the transactions automatically escalated to the national interest test if screened under the Act's broader consent framework.

[1]

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[1]

[1]

## Options for refining the definitions of CNI

### **Recommended definition:**

We recommend adopting the definition of CNI outlined in **Annex 1**, with minor modifications as necessary for drafting purposes.

### **Developing a bespoke definition of telecommunications networks**

14. As **Annex 1** shows, there was a clear existing definition of telecommunications networks able to be adapted or used for most types CNI. We recommend using existing definitions in these cases, as the regulated community already understands such definitions.
15. However, there was no suitable, up-to-date definition of telecommunications infrastructure. We therefore recommend adopting a bespoke definition:  

*“transactions in entities that provide telecommunications services to other entities that allow communication between telecommunications devices.”*
16. The definitions of ‘telecommunications service’ and ‘telecommunications device’ are drawn from the Telecommunications (Interception Capability) Act 2013 (**TICSA**) to create a new, technology neutral definition.
17. [1]
  
18. [1,36]

## Access to and control of sensitive personal data also poses <sup>[1]</sup> risks

### **Recommended definition:**

We recommend that overseas investment in New Zealand entities holding sensitive personal data be within scope of the call in power, where the target entity:

- develops, produces, maintains, or otherwise has access to genetic, biometric, health and financial data but excluding types of data that do not routinely pose risks, and either:
  - targets its services to sensitive government employees (as likely targets of foreign interference), or
  - has data on 30,000 or more people.

New Zealand eEntities that hold official information of the New Zealand Government particularly relevant to the maintenance of public order or national security are also within scope of the call in power.

19. <sup>[1]</sup>

20. <sup>[1]</sup> Cabinet agreed that overseas investments in New Zealand entities that produce, maintain, or otherwise have access to core sensitive personal data (that is, genetic, biometric, health and financial data) will be within scope of the call in power. This high level definition will be in primary legislation and be refined in regulation.

### **Options for refining the definition of sensitive personal data**

21. In refining the scope of sensitive data through regulation, we note that:

- <sup>[1]</sup>
  - there are clear trade-offs in using the call in power to manage risks arising from access to sensitive data in an increasingly data-driven economy. A broader definition with comprehensive risk coverage comes at the cost of regulatory burden on firms that are unlikely to routinely pose risks, administrative burden on the regulator, and ultimately, the negative perceptions of New Zealand as a country open to foreign investment in productive assets.

22. As such, we previously advised (T2019/2431 refers) that targeting the scope of sensitive personal data through regulation would be critical to avoid capturing entities that pose low or no risks, [1,36]

It will also ensure the regulator is not overwhelmed with a large number of notifications. We propose doing this by:

- **policy choice one:** excluding certain types of data that pose little risk,
- **policy choice two:** refining the definitions of the four categories of core personal data, and
- **policy choice three:** targeting the definition to sensitive populations.

23. We have drawn on the approach taken by the United States' Treasury in its regulations implementing the Foreign Investment Risk Review Modernization Act of 2018 (**FIRRMA**), which extended national security screening of foreign investment into the US to sensitive personal data.

***Policy choice one: excluding data that poses little risks***

24. As a starting point, we recommend excluding personal data that pose less national security and public order risk (consistent with FIRRMA exclusions). Specifically we propose excluding:

- anonymised personal data (that is, data that cannot be linked back to an identified individual). [1]

However, we note the increasing risk that poorly anonymised data can be re-identified. This provision will need to be drafted carefully and guidance used to ensure poorly anonymised data at risk of re-identification can be screened,

- publicly available personal data, because the risks posed by public data cannot be mitigated by investment screening. This provision will have to be drafted carefully to avoid unintended consequences (such as a privacy breach meaning a company is no longer covered by the call in power), and
- data about the target entity's own employees (noting firms that hold official information of the New Zealand government, including its employees, will be captured through other limbs of the definition).

***Policy choice two: refining the definitions of the four categories of core personal data***

25. We propose refining the four categories of core personal data agreed to by Cabinet (i.e. genetic, biometric, financial and health data), to provide more certainty to investors about types of transactions within scope, while targeting the definition to the specific risks to be mitigated.

26. We seek your agreement to refine the categories of sensitive personal data consistent with the approach set out in **Annex 2**, with modifications as necessary for drafting purposes.

***Policy choice three: targeting sensitive populations***

27. Not all entities that hold data that meets the criteria in policy choice one and two will routinely pose national security or public order risks sufficient to justify their inclusion within the call in power's scope – [1]

[1]

We therefore recommend only including within the scope of the call in power entities that hold information as described in **policy choice 1 and 2**, and that:

- have tendered to or supplied services to sensitive government employees or contractors [1] including the Government Communications Security Bureau, the New Zealand Security Intelligence Service, the Department of the Prime Minister and Cabinet, the Ministry of Foreign Affairs and Trade, the Ministry of Defence and the New Zealand Defence Force. [1]

We are considering whether this should be extended to other agencies (such as Immigration New Zealand and the New Zealand Police), and will provide further advice if necessary, or

- produce, maintain, or otherwise have access to large datasets on 30,000 or more individuals. [1]

28. While determining the appropriate threshold for a large dataset is a subjective judgement call, we consider the 30,000 number appropriately balances risk coverage while minimising compliance costs on small low-risk firms as well as maintaining New Zealand's attractiveness as investment destination. [1]

We have recommended a higher threshold because:

- while the 30k threshold is higher than if we adopted the US threshold on a population adjusted level, we think this is appropriate given NZ's comparatively greater struggles in attracting foreign direct investment,
- the call in power is significant new regulatory tool and given that we lack reliable data on the number of firms likely captured by the 'sensitive data' category overall, it is difficult to predict the extent of the new regulatory burden and the distortions it may have in the NZ economy (particularly for the growth and investment in innovative new firms the Government wishes to support, consistent with its economic strategy),

- [1]

- regulations can be swiftly updated if evidence suggests firms below the threshold are routinely the subject of hostile foreign investment that poses significant national security or public order risks.

29. Cabinet has noted you intend to review the operation of the call in power after three years [CAB-19-MIN-0593]. The definition of sensitive data and the numeric threshold for large datasets should be an explicit focus of the review. However, if earlier evidence emerges that the definition is routinely missing transactions of interest, there is potential to amend it earlier and prior to the conclusion of the planned review.

## Significant irrigation schemes will automatically be subject to the national interest test

### **Recommended definition:**

Our recommended definition of irrigation schemes to be automatically subject to the national interest test is:

*“A water supply system involving the collection, storage, and/or reticulation of water primarily for agricultural production, with a resource consent or consents to abstract more than 75 million cubic metres of water per year”.*

30. Cabinet decided that irrigation schemes should also be automatically subject to the national interest test [CAB-19-MIN-0593]. This reflects Cabinet’s view that overseas control of significant volumes of water that support agriculture may be contrary to New Zealand’s national interest. However, irrigation schemes are not within scope of the call in power because foreign access or control is unlikely to pose significant national security or public order risks.
31. Our starting point for the definition was the ordinary usage of irrigation schemes for agricultural production. However, this definition would capture small, minor and insignificant irrigation schemes. Consistent with Cabinet’s decision that the national interest test is backstop tool to be used rarely, we therefore propose including a ‘significance’ threshold to the definition. This will also help investors understand what types of transactions will be subject to the national interest test.
32. Our recommended definition is therefore: *“a water supply system involving the collection, storage, and/or reticulation of water primarily for agricultural production, with a resource consent or consents to abstract more than 75 million cubic metres of water per year”.*
33. A threshold based on the maximum annual volume of water the irrigation scheme is permitted to extract<sup>2</sup> in its resource consent was deemed most suitable. It can be consistently applied across irrigation schemes and directly relates to the amount of water an investor will be allowed to control.
34. We considered alternative thresholds, such as the monetary value of the scheme or the size of the irrigated land. These were not suitable as they were not measures that can be applied consistently. The size of irrigated land does not correspond to the amount of water consented (as some types of production are more water-intensive than others). There is no consistent way for valuing irrigation schemes, the monetary value is not directly related to the amount of water investors will control, and it could create confusion about the ‘significant business asset’ value threshold already contained in the Act.
35. The proposed threshold of more than 75 million cubic metres per year captures New Zealand’s 16 largest irrigation schemes<sup>3</sup> and we consider it an appropriate proxy for significance. We propose this threshold because there is a cluster of five similar sized schemes just above this threshold, and then a large gap before a consistent tail of smaller schemes (see **Figure 1** below). All but one of the 16 schemes supply multiple farming entities (the exception being Ngāi Tahu Farming Ltd’s irrigation scheme, which draws from the Waimakariri River).

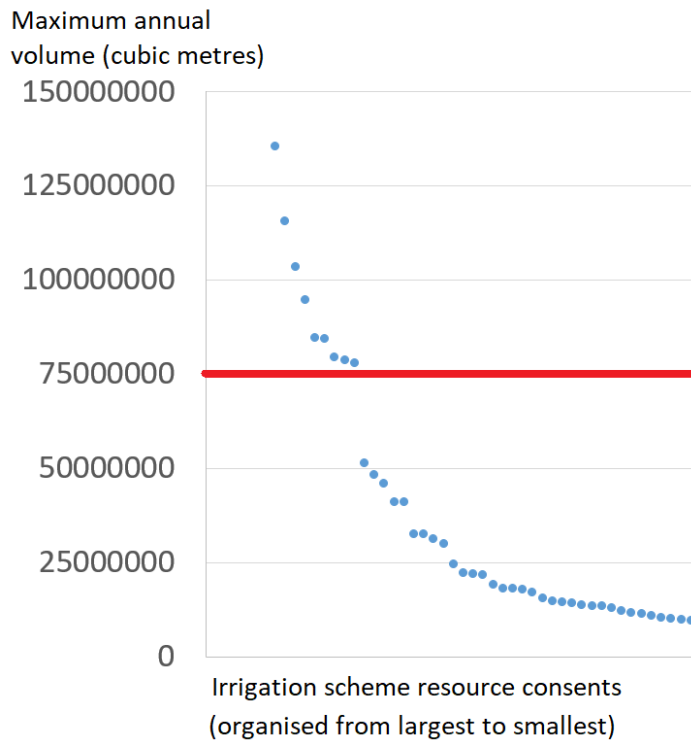
<sup>2</sup> Calculated by applying the maximum rate of abstraction to the number of days abstraction is allowed.

<sup>3</sup> Based on 2018 data from the Ministry for the Environment



36. The Ministry for Primary Industries supports using this definition for concerns about the potential control of large volumes of water. The Ministry for the Environment's view is that if the issue is around control of significant volumes of water, then the restriction should apply to control of all (or possibly all consumptive) takes, not just irrigation schemes (this approach would be inconsistent with Cabinet's policy decision to only include irrigation schemes).
37. We note that overseas investments in irrigation schemes that fall outside this threshold but are otherwise screened under the Act can be subject to the national interest test at ministerial discretion if it is determined they pose risks to the national interest.

*Figure 1: Maximum annual volumes consented for abstraction in New Zealand irrigation schemes<sup>4</sup>*



Note: Figure 1 groups consents for irrigation schemes that cumulatively meet the threshold of 75 million cubic metres. It does not show irrigation resource consents. This threshold captures another six much larger schemes that are not included in the graph, and there are more than 16,000 smaller resource consents not included.

## Section 2: Outstanding policy decisions relating to special land

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38. This section seeks your decisions on:
  - the process by which special land is transferred to the Crown, and
  - the binding nature of the memorial that preserves the Crown's right to acquire the land.
39. It also provides information on two other issues: preserving the amenity and/or environmental value of special land prior to the Crown's acquisition, and the criteria by which the Crown may waive its right to acquire such land.

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<sup>4</sup>

## Background

40. On 13 November 2019, Cabinet decided that it will be mandatory to offer special land to the Crown for all overseas investment applications involving special land, and agreed a range of improvements to the process by which the Crown acquires special land [CAB-19-MIN-0593 refers].
41. You subsequently agreed that:
  - responsibility for the special land acquisition process will be shifted from the vendor to the overseas investor,
  - 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,
  - the overseas investor can offer special land to the Crown for nil consideration, should they choose to do so, and
  - LINZ will determine a suitable process for acquiring special land on Crown pastoral lease properties if and when required [T2019/3474 refers].

## Land transfer process and third party interests

42. When the Crown acquires special land, it may wish to remove third parties' registered interests over the land if it considers these inconsistent with the ownership and access objectives of the special land policy. For example, third parties' rights to take gravel from a riverbed may impede public access.<sup>5</sup>
43. Under the standard conveyance process used by the OIO, removing such interests from the land's title can be difficult because it requires negotiation with the relevant third parties. This can be complex and time-consuming, particularly where there are multiple titles and multiple third parties. While LINZ does not hold data on the number or nature of third party interests in past sensitive land applications, it does note that most involve titles on which third party interests are registered.
44. We therefore recommend transferring land into Crown ownership through a vesting process, similar to that used in the Public Works Act 1981 (**PWA**) and Resource Management Act 1991 (**RMA**). Because such a process does not require the Crown to negotiate with third parties whose interests are being removed, it provides a much more streamlined approach than the status quo.
45. Where third parties have their registered interests removed from the title, we recommend they are compensated for their losses. Providing compensation is consistent with Cabinet's decision to compensate others affected by the special land process (i.e. the overseas person, and through them, their mortgagee).<sup>6</sup> It is also in

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<sup>5</sup> Other examples of third party interests include leases, mining rights and easements for phone lines, power lines or other uses. There may also be interests over the land that are not registered on the title, e.g. Māori customary rights. However, in this report we focus only on registered interests.

<sup>6</sup> Paying compensation is also consistent with [1] our common law, as outlined in the guidelines of the Legislation Design and Advisory Committee (which state that compensation should generally be paid for property taken by government and if it is not, cogent policy justification is

line with the treatment of third party interests that are extinguished in the PWA, under which such interests are valued and compensation is provided through an established process that will be familiar to key stakeholders.

46. However, we do not recommend extending compensation to third parties whose interests over the special land were registered post-settlement. This is because at this point, the Crown's interest in the special land will already be established and publicly notified through the memorial that is registered on the title. It will therefore be obvious to anyone seeking to add further interests to the title that their interest may only be temporary.

47. [33]

48. Finally, while the Crown may generally seek to remove third party interests from the title, there may be circumstances in which retaining them would be preferable (e.g. where removing the right to cross a riverbed would mean the third party could not access their property). We therefore recommend clarifying that the Crown is able to retain third party interests where it determines it is preferable to do so. Similarly, the Crown may sometimes wish to negotiate new interests over the special land.

## **Binding nature of memorial**

49. In November 2019, Cabinet agreed that for the purposes of obtaining consent, the special land requirement will be satisfied by a memorial being placed on the title noting the Crown's right to acquire the special land (CAB-19-MIN-0593 refers). This memorial will require the overseas person to comply with the special land process as outlined in the Regulations, and will lapse after 10 years if the Crown has not taken ownership of the special land.

50. In line with the treatment of similar situations under the PWA, we recommend clarifying that this memorial is binding on future owners – including New Zealanders. This would mean that if the overseas person sells their land before the Crown acquires the special land (or waives its right to do so), the new owner would “step into the shoes” of the previous owner and be bound by the special land process, including any actions that had been completed before the sale. This is appropriate because the new owner would have been aware of the Crown's right to purchase the special land as would have seen the memorial on the title during their due diligence process.

## **Other issues**

### ***Preserving amenity and/or environmental value***

51. As per previous advice, Department of Conservation (**DOC**) has noted that there is a risk that the amenity or environmental value of the special land the Crown intends to acquire is degraded prior to acquisition, particularly as this could take place up to 10

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required). As the Ministry of Justice has advised, achieving the special land policy objective of public ownership of and access to New Zealand's waterways does not rely on avoiding compensation, nor is it undermined by providing compensation. Moreover, as the third party would not have been involved in the decision to sell the property to the overseas person, there is a strong policy rationale in favour of compensating them for their loss.

years following the memorial being registered (T2019/3474 refers). Therefore, DOC would like the Act to require overseas investors to adopt specific land management practices to preserve the amenity and/or environmental value of the special land prior to it being acquired by the Crown.

52. We undertook to consider this matter and report back to you with options to address it if required. However, we have concluded that no further action is needed because it is addressed with existing provisions:

- The OIO's sale and purchase agreement for special land already requires overseas investors to not 'wilfully or negligently damage' the special land prior to the Crown's acquisition. While we acknowledge that this clause offers a different level of protection from that requested by DOC, it strikes an appropriate balance between imposing obligations on landowners and protecting the special land in question.
- The Act contains a wide condition making power which allows the OIO to impose requirements on the overseas person at the time of consent and the power to enforce these. This means that as needed, the OIO can require the overseas person to maintain the amenity or environmental value of the special land and request reporting on this ahead of its acquisition by the Crown.

**Acquisition criteria: LINZ comments**

53. You previously agreed that the Crown will waive its right to acquire special land only where the land offers little amenity or conservation value (TR2019/2885 refers).

54. LINZ has noted that the risk of such a narrow waiver criteria is that the Crown will be unable to waive its right where ownership of the special land will impose significant costs relative to the amenity and environmental values offered, for example where there:

- are structures such as bridges and dams/weirs (particularly if they are unsafe or not consented) which will either need to be removed, or require ongoing management and maintenance,
- is dumping and contamination, which the Crown would be responsible for rectifying, or
- are poor biosecurity practices, which may mean the Crown has to undertake plant/animal pest management and eradication measures.

55. In such cases, LINZ notes the cost of remedying the issues may be significantly higher than any perceived value arising from acquiring the special land. LINZ therefore recommends that the acquisition criteria be extended so that the public interest arising from the acquisition can be balanced against the risks, costs and liability to the Crown arising from maintenance and ensuring public safety can be considered.

### Section 3: Other technical policy and design issues

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56. This section seeks decisions on a range of other technical issues identified during the drafting process, namely:

- amending the investor test to consider some breaches of the Act,

- ensuring that the requirements for a complete application for consent to invest in sensitive New Zealand assets (**consent application**) and for a notification under the call in power (**call in notification**) are clear,
- ensuring that the OIO can refund fees,
- designating Inland Revenue as the agency responsible for taking enforcement action for any false or misleading information provided under the new tax information disclosure requirement, and
- not introducing an information gathering power in respect of the streamlined investor test process for repeat investors.

## **Amending the investor test to consider certain offences or contraventions of the Overseas Investment Act**

### ***The investor test does not consider some types of offenses and contraventions in the Act***

57. Cabinet has decided to focus the investor test on material risks by narrowing the factors considered under the investor test to:
- offences committed in the last 10 years for which there is a sentence of imprisonment for a term of 12 months or more,
  - offence committed at any time for which there is a sentence of imprisonment for a term of 5 years or more,
  - civil contraventions in the last 10 years resulting in pecuniary penalties,
  - enforceable undertakings, or their equivalent, entered into in the last 10 years, and
  - allegations of offences or civil contraventions (with the same thresholds as above) for which official proceeds have commenced.
58. In addition, you have agreed that when considering a corporate entity, the investor test should include convictions in the last 10 years for offences where a fine was imposed on the entity [T2019/3935].
59. These factors all relate to breaches (or alleged breaches) of New Zealand or foreign legislation, for which a penalty is imposed by a court (with the exception of enforceable undertakings).
60. These factors would however not capture some types of court-imposed penalties that can be applied under the Act, such as fines on individuals, court-ordered disposals of property or injunctions.

### ***Recommendation: amend the investor test to include other court-ordered penalties and settlement agreements made under the Act, but not administrative penalties***

61. We recommend that a new factor be introduced to the investor test, considering whether an investor has committed any offenses or contraventions of the Act that resulted in a court-ordered penalty in the last 10 years.
62. We consider that such offences and contraventions of the Act resulting in court-ordered penalties should be within scope of the investor test, as they may be material to an assessment of the investor's character. This is because any breach of the Act leading

to a court-imposed penalty is likely to be relevant in predicting whether an investor will meet their obligations under the Act in the future. This is especially the case where an investor has made multiple breaches of the Act that do not otherwise meet the currently high threshold of the investor test.

63. However, we do not recommend including in this new factor other lower-level penalties such as administrative penalties (which are imposed directly by the OIO) and non-statutory enforcement action such as compliance letters. This would be inconsistent with Cabinet's intention to simplify and clarify the investor test as a bright-line assessment and to reduce the burden on investors and the OIO of the assessment. Such penalties and enforcement action are typically for relatively minor breaches, such as late filing of documents or inadvertent failure to seek consent.
64. We also recommend a 10-year time limit for this new factor, as breaches beyond this date are less likely to be material for the investor test. This time limit is in line with others factors in the investor test.

## **Ensuring the requirements for a complete application and call-in notification are clear**

### ***The requirements for a complete application and call-in notification need to be clear for the introduction of statutory timeframes***

65. There is currently limited legislative guidance on what constitutes a complete application under the Act. The Act empowers the Minister to specify this via notice in the Government Gazette, however no Gazette notice has been issued to date. Instead, the OIO currently publishes template forms setting out the information required for each application (however these are not official lists of information required for a complete application).
66. It is important to be clear about what constitutes a complete application or notification, and when an application or notification can be rejected as incomplete. This is because the reforms will introduce statutory timeframes for decisions by the OIO and Ministers, which will include an initial quality assurance (**QA**) period during which the OIO can 'stop the clock' if an application or notification is incomplete.
67. It is also important to be clear about what constitutes a complete call in notification, to provide certainty to investors once the call in power is introduced.
68. We also consider that Gazette notices are not the most accessible medium for specifying requirements for complete applications and notifications

### ***Recommendation: prescribe requirements for a complete application and notification in regulations***

69. We consider that regulations provide greater certainty and transparency for applicants than a Gazette notice and better align with the good regulatory practice. We will develop the requirements in consultation with the OIO, and these will differ depending on the type of application or notification that is being submitted.
70. We will seek further decisions from you on the content of the regulations later in February 2020.

## Ensuring the OIO can refund application fees

### ***Recommendation: empower the OIO to provide refunds on application fees***

71. The Act allows regulations to be made, providing (among other things) for the refund of fees, charges or other amounts paid to the regulator. However, no such regulations have been made to date. [36]
72. We are also considering whether applicants should be required to pay the full consent application fee when lodging an application, or after the QA period (see paragraph 65). If we require applicants to pay before the QA period, the OIO would need the power to refund the fee if the application is incomplete (minus a “QA fee”).
73. We recommend that regulations be made to allow the OIO to refund fees in full or in part.

## Designating Inland Revenue as the agency responsible for enforcement under the new tax information disclosure requirement

74. We are seeking your agreement that Inland Revenue be the agency responsible for taking enforcement action, where an investor provides false or misleading tax information as part of the new requirement to disclose tax information in the Bill.
75. LINZ, Inland Revenue and the Treasury agree that Inland Revenue is best placed to take enforcement action, as it will be assessing the tax information provided by investors and conducting some monitoring of taxpayers more generally. Requiring LINZ to take enforcement action on behalf of Inland Revenue would be a less efficient approach.
76. Our proposed approach would require amendments to the Tax Administration Act 1994, as this false or misleading tax information would be provided to Inland Revenue under the Act. We will also work with PCO and LINZ to determine whether any additional changes would be needed to the enforcement provisions in the Act.

## Streamlined investor test process for repeat investors

### ***Your decision to introduce a new information gathering power is no longer necessary***

77. You previously agreed to introduce a power for the OIO to seek information from investors who are granted an “approved investor” status, where the OIO becomes aware of a change in the investor’s character or capability that may have a bearing on the investor test [Recommendation qq of T2019/3412]. This was intended to manage any risks that may arise from having an investor cease to be of good character while holding an “approved investor” status, by providing an ability to revoke the status where appropriate.
78. This information gathering power is no longer needed because PCO has drafted the Bill such that an investor may only use the streamlined investor test process if (among other things):
  - there has been no change to their character or capability that can be considered under the investor test, or
  - the Minister determines that any changes to their character or capability do not affect their suitability to invest in new sensitive assets.

79. This approach means that no “approved investor” status exists, and there are no risks arising from investors holding such a status while ceasing to be of good character.
80. We also note that investors are required to make a statutory declaration stating any changes to their character or capability if they wish to use the streamlined investor test process. This provides an additional safeguard where such changes have occurred.

## Next Steps

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81. We recommend that you discuss the special land recommendations in this report with the Minister for Land Information before agreeing to them, and refer this report to:
- the Minister of Revenue
  - the Minister responsible for the GCSB and NZSIS, and
  - the Minister for Land Information.

## Consultation

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82. We have consulted with the following agencies:
- Department of the Prime Minister and Cabinet, Government Communications Security Bureau, New Zealand Security Intelligence Service, Ministry of Business, Innovation and Employment, Ministry of Foreign Affairs and Trade, Police, New Zealand Defence Force, Ministry for the Environment, Ministry for Primary Industries and LINZ (on the definitions of assets in **Section 1**),
  - LINZ, DOC, Ministry of Justice and Te Arawhiti (on the special land issues in **Section 2**), and
  - Inland Revenue, Te Puni Kōkiri, Ministry of Housing and Urban Development, Crown Law, Ministry for Culture and Heritage and New Zealand Trade and Enterprise (on **Section 3** and the report more broadly)



## Annex 1: Preferred options for definitions of critical national infrastructure

This annex seeks your agreement to refined definitions of critical national infrastructure as set out in the table below, with modifications as necessary for drafting purposes:

Asset	[1]	Preferred option for further specificity in the regulations	Minister's decision
Significant ports and airports	[1]	Ports and airports of significance have been identified in the Civil Defence and Emergency Management Act (CDEM) as 'lifeline utilities'. We recommend the same ports and airports should be within scope of the call in power. That is the airports at Auckland, Bay of Islands, Blenheim, Christchurch, Dunedin, Gisborne, Hamilton, Hokitika, Invercargill, Napier, Nelson, New Plymouth, Palmerston North, Queenstown, Rotorua, Tauranga, Wanganui, Wellington, Westport, Whakatane, and Whangarei. The ports specified as lifeline utilities are those at Auckland, Bluff, Port Chalmers, Gisborne, Lyttelton, Napier, Nelson, Picton, Port Taranaki, Tauranga, Timaru, Wellington, Westport, and Whangarei.	<i>Agree / Disagree</i>
Electricity generation and distribution businesses	[1]	Generation: transactions in entities engaged in the generation or aggregation of electricity (within the meaning of the Electricity Industry Act 2010). To avoid capturing businesses that pose little risk of being used as leverage, the total installed generation capacity or demand controlled by an entity will need to exceed 250 MW.	<i>Agree / Disagree</i>

Asset	[1]	Preferred option for further specificity in the regulations	Minister's decision
	[1]	Distribution: transactions in entities that provide electricity lines services within the meaning of the Commerce Act 2005. This captures the 17 electricity distributors subject to price-quality regulation (e.g. Wellington Electricity).	
Drinking water	[1]	Transactions in entities that operate drinking water supply schemes serving 5,000 or more people as registered under Part 2A of the Health Act 1956. The 5,000 or more threshold targets this definition to those suppliers of a scale that could undermine national security or public order.	<i>Agree / Disagree</i>
Waste and storm water		Transactions in entities that provide a waste water or sewerage network, or that dispose of sewage or storm water, that service 5,000 or more people. This definition adapts that in the Civil Defence Emergency Management Act with a 5,000 or more threshold added to target this definition to those suppliers of a scale that could undermine national security or public order.	<i>Agree / Disagree</i>

Asset	[1]	Preferred option for further specificity in the regulations	Minister's decision
Systemically important financial institutions and market infrastructure	[1]	<p>Transactions in:</p> <ul style="list-style-type: none"> <li>domestic systemically important banks as determined by the Reserve Bank of New Zealand's (RBNZ) framework (currently ANZ, ASB, BNZ and Westpac), and</li> <li>financial markets infrastructure designated as systemically important under the forthcoming Financial Markets Infrastructure Bill (once in force).</li> </ul> <p><b>Note:</b> The 'sensitive personal data' category will capture personal financial data that poses risks to national security and public order. We will also keep a watching brief on whether certain insurers could pose significant risks to national security and public order that would justify screening by the call in power (and automatic escalation to the national interest test). The RBNZ's review of the Insurance Act in 2020 will be considering whether certain insurers are systemically important and we will draw on these assessments.</p>	<i>Agree / Disagree</i>

## Annex 2: Recommended approach to refining the categories of sensitive personal data within scope of the call in power

This annex seeks you agree with the four refined categories of sensitive personal data as set out in the table below, with modifications as necessary for drafting purposes.

High level definition agreed to by Cabinet	[1]	Proposed refined definition for the regulations	Minister's decision
Genetic data	[1]	Any information about a person's inherited or acquired genetic characteristics resulting from the analysis of a biological sample.	<i>Agree / Disagree</i>
Biometric data for the purpose of uniquely identifying a natural person	[1]	<p>Biometric data in accordance with the Customs and Excise Act 2018 (with one addition). That is, information that comprises one or more of the following kinds of information:</p> <ul style="list-style-type: none"> <li>• a photograph of all or any part of the person's head and shoulders,</li> <li>• impressions of the person's fingerprints,</li> <li>• a scan of the person's irises, and</li> <li>• An electronic record of the information that is capable of being used for biometric matching.</li> </ul> <p>On the advice of the intelligence and security agencies, we recommend extending this to include behavioural indicators (such as speech and gait analysis) as this is an emerging area of national security risk.</p>	<i>Agree / Disagree</i>

High level definition agreed to by Cabinet	[1]	Proposed refined definition for the regulations	Minister's decision
Data concerning health or a natural person's sex life and/or sexual orientation	[1]	<p>Any information about a person's:</p> <ul style="list-style-type: none"> <li>• drug or alcohol abuse or addiction and any other addictions</li> <li>• mental health</li> <li>• physical health</li> <li>• sex life and/or sexual orientation.</li> </ul> <p>This is based on, in part, information sought in an application for a New Zealand government security clearance.</p>	<i>Agree / Disagree</i>
Data about the financial position of a natural person or entity/juridical person	[1]	Any information that can be used to analyse or determine a person's financial position (i.e. information about a person's total assets, liabilities, or cash flow), as well as credit scores (which provide a proxy for a person's financial position).	<i>Agree / Disagree</i>