

The Treasury

Overseas Investment Act - Phase Two: Policy Advice December 2020 - April 2021 Information Release

September 2021

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- [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
- [35] 9(2)(g)(ii) - to maintain the effective conduct of public affairs through protecting ministers, members of government organisations, officers and employees from improper pressure or harassment
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Treasury Report: Overseas Investment Act: Provisional Timeframes

| | | | |
|--------------|---------------|---------------------|-------------|
| Date: | 18 March 2021 | Report No: | T2021/238 |
| | | File Number: | IM-5-3-8-12 |

Action sought

| | Action sought | Deadline |
|--|--|---------------|
| Hon Grant Robertson Minister of Finance | Note the report | N/A |
| Hon David Parker Associate Minister of Finance | <p>Agree the remaining design features for statutory timeframes</p> <p>Agree the provisional timeframes, against which the Overseas Investment Office will monitor progress ahead of final timeframes being agreed and commencing</p> <p>Refer this report to the Minister for Land Information and Associate Minister of Finance as decision-making Ministers under the Overseas Investment Act.</p> | 26 March 2021 |

Contact for telephone discussion (if required)

| Name | Position | Telephone | 1st Contact |
|-------------------|------------------------|-----------|----------------|
| Rebecca Mountfort | Analyst, International | [39] | N/A (mob) ✓ |
| Thomas Parry | Manager, International | [35] | |

Minister's Office actions (if required)

Return the signed report to Treasury.
Refer this report to the Minister for Land Information and Associate Minister of Finance.

Note any feedback on the quality of the report

Enclosure: Yes (Annexes 1 and 2)

Executive Summary

This report seeks your (Minister Parker's) agreement to:

- the remaining design features for statutory timeframes under the Overseas Investment Act (the Act), and
- provisional timeframes, against which the Overseas Investment Office (the OIO) will monitor performance, to inform recommendations on final timeframes ahead of their commencement six months after the Overseas Investment Amendment Bill (No 3) (the No 3 Bill) receives Royal assent.

It follows Cabinet's decision to introduce timeframes, and your subsequent agreement to the objectives for doing so (including that timeframes will provide a meaningful improvement over existing processing times with the goal of improving New Zealand's attractiveness to high quality foreign investment) (DEV-20-MIN-0066).

Recommended design features

While you have already agreed some design features for timeframes (such as that timeframes will apply to the both the regulator and to Ministers), we are now seeking your decisions on final matters. These are detailed in **Section 1** of the report, but in short we are recommending:

- **Length and structure:** A single timeframe per application type, with no timeframe (except for fishing quota) being over [33]. This approach is simple, offers investors clarity, and is a marked improvement on current processing times. While the alternative approach of each statutory test under the Act having its own timeframe (and investors having to add these up for their specific application type) was considered, it was rejected on complexity grounds.
- **Extensions:** A unilateral extension period of up to [33] that can be exercised by the OIO, with the OIO also having the ability to agree a further extension with the applicant in certain situations (for example where the OIO discovers during the initial extension that significant third-party consultation is required). A constrained ability to extend timeframes a second time balances the need to prevent the OIO from breaching timeframes due to factors beyond its control, while still ensuring that timeframes are credible and offer improvements on the status quo.
- **Implications of the national interest test:** The timeframe for the national interest test being the longer of either: the statutory timeframe that applies to the consent application, or [33]. This is to ensure that the OIO has the ability to conduct a full [33] national interest assessment even on applications types that have timeframes shorter than the [33] (for example, the proposal for significant business assets is [33]). The recommended approach delivers more timely outcomes than an 'add on' model for applications where the national interest test is required (that is, where an additional number of days are added to the total timeframe).
- **Managing applicant delays:** The timeframe being automatically extended where applicants miss *reasonable* deadlines for providing the regulator *necessary* additional information or paying their application fees. This is intended to prevent

the OIO from breaching timeframes due to applicant delays, which currently can account for more than half the application processing time, but is sufficiently constrained to ensure that the OIO cannot use information requests to unduly extend its due dates.

Recommended provisional timeframes

Introducing timeframes is a significant change for the OIO. We therefore support a three to four month trial period (depending on when the No 3 Bill passes) during which the OIO will monitor its performance against a set of provisional timeframes. **Section 2** seeks your agreement to these provisional timeframes, which are based on the average time taken to process transactions over the last two years.

The OIO anticipates that due to the efficiencies resulting from the reforms, around 80 per cent of transactions should be completed within these provisional timeframes compared to 50 per cent today.

Next steps

Following the trial period, we will report back on our final recommendations for statutory timeframes. Statutory timeframes will come into force six months from the No 3 Bill receiving Royal Assent, except for the timeframes associated with the benefit to New Zealand test that will commence when the test commences (one year after Royal Assent, at the latest).

Recommended Action

We recommend that you:

Section 1: Design features

Length and structure

a **agree** that:

- i. No single timeframe, except for fishing quota, will be over [33] , and
- ii. Each type of application will have one timeframe, which will include the period available for Ministers to make a decision ([33] , as standard, with the capacity to extend in exceptional circumstances).

Agree/disagree.

Extensions

b **agree** that the period by which the decision-maker can unilaterally extend the applicable timeframe be up to [33]

Agree/disagree.

c **note** that consistent with previous decisions, appropriate reasons for an extension would be: needing to manage complex applications; extensive third party consultation; and 'other exceptional circumstances' (for example, the discovery of significant new information late in the assessment process).

Noted.

d **note** that while Cabinet agreed the extension power would be used once per application, the Overseas Investment Office subsequently requested a further extension to prevent it breaching timeframes for circumstances beyond its control – for example when during the initial extension it discovers that extensive third party consultation is required.

Noted.

e **agree**, therefore, that in certain situations (for example, when extensive third party consultation is required), applications may be extended by a period agreed to by the applicant, in addition to the unilateral period prescribed in the Regulations.

Agree/disagree.

National interest test

f **agree** when an application includes the national interest test, the timeframe will be the longer of the following periods:

- i. the statutory timeframe that applies to the consent application, or
- ii. [33]

Agree/disagree.

Applicant delays

g **agree** that the overall statutory timeframe is automatically extended by any additional time that the applicant takes to respond to the Overseas Investment Office’s request for further necessary information or to pay a fee, beyond the reasonable deadline provided by the Office.

Agree/disagree.

Section 2: Provisional timeframes

h **agree** the following provisional timeframes against which the Overseas Investment Office will monitor performance to inform recommendations on final timeframes in [33] :

| Total working days | Type of application | Agree/Disagree |
|--------------------|--|----------------|
| [33] | Fishing quota | |
| | Benefit to NZ: modified test for farm land Standing consents for residential and forestry land | |
| | Benefit to NZ: benefits only Variations of consent conditions (excluding variations seeking an extension of time to fulfil one or more of the conditions of consent) | |
| | Residential land development One-off consent under the special forestry test National interest test, where the overall statutory timeframe is shorter (than 55 days) Exemptions (except farmland advertising) Non-residential land – intention to reside | |
| | Significant business assets Farmland advertising exemption Residential and otherwise sensitive land – one home to live in Variations of consent conditions - extension of time to fulfil one or more of the conditions of consent | |
| | One home to live in | |

i **refer** this report to the Minister for Land Information and Associate Minister of Finance as decision-making Ministers under the Overseas Investment Act.

Referred/not referred.

Thomas Parry
Manager International

Hon David Parker
Associate Minister of Finance

Treasury Report: Overseas Investment Act: Provisional Timeframes

Purpose of Report

1. This report seeks your (Minister Parker's) agreement to:
 - **Section 1:** The remaining design features for statutory timeframes under the Overseas Investment Act (the Act).
 - **Section 2:** Provisional timeframes, against which the Overseas Investment Office (the OIO) will monitor performance in order to inform recommendations on final timeframes in [33]
2. Note that Cabinet has authorised you (Minister Parker) to make decisions on any additional policy issues that arise during the drafting of the Overseas Investment Regulations 2005 (the Regulations) (DEV-20-MIN-0066).

Background

3. In November 2019, Cabinet agreed to introduce timeframes for decisions made under the Act (DEV-19-MIN-0306) and set the framework for statutory timeframes, including:
 - a enabling specific timeframes to be set via regulation;
 - b providing for the regulator to have an initial period to quality assure (QA) (that is assess an application for completeness) an application before statutory timeframes formally commence, and enabling the regulator to charge a fee for this;¹
 - c enabling the decision-maker to unilaterally extend the statutory timeframe by up to a period prescribed in regulations, or a different period with the applicants' agreement;
 - d ensuring that a breach of a timeframe will not render a decision on an application unlawful and the Crown will not be liable for any loss suffered by the applicants; and
 - e requiring the regulator to report on compliance with statutory timeframes.
4. In T2020/228 you agreed some additional design features for statutory timeframes, as well as the objectives for setting timeframes which include that:²
 - a Timeframes provide a meaningful improvement over existing processing times, with the goal of improving New Zealand's attractiveness to high quality foreign investment, taking into account international best practice; and
 - b Timeframes should be reasonable and achievable for investors and their advisors, the OIO and decision-makers alike.

¹ Note in T2020/544 after further consideration, you agreed that the QA period would form part of the overall statutory timeframe and would not be a separate initial timeframe.

² Refer to Annex 2 for the full list of objectives.

5. Ahead of timeframes taking effect, however, there are some final design features to be decided including: the structure and maximum length of timeframes, how the extension power can be used, how timeframes will operate when an application is subject to the national interest test, and a mechanism to ensure that the OIO does not bear the cost of potential applicant delays. **Section 1** of this report seeks your agreement to these matters.
6. With respect to the final timeframes themselves, we will seek your decisions later in 2021, around two months before statutory timeframes are due to commence. This will allow the regulations to be drafted and published ahead of timeframes coming into force six months after the No 3 Bill receives Royal Assent. The exception to this is the statutory timeframes associated with the updated benefit to New Zealand test, which will come into force at the same time as that test (which is at most 12 months after the No 3 Bill receives Royal Assent so possibly April 2022).
7. Recognising the significance of this change to the regime for the regulator and for applicants, we and the OIO consider it necessary for the OIO to operate for a period of at least three to four months as if these statutory timeframes were already in place. While this period is relatively short and may not enable testing of the all relevant pathways (depending on how quickly the No 3 Bill receives Royal Assent), it will allow the OIO and Treasury to monitor performance before we provide our final advice. **Section 2** of this report therefore seeks your agreement to provisional timeframes for the OIO to work to during the trial period.

Section 1: Design features

8. This section seeks your decisions on the design final features for statutory timeframes. For an illustration of the process for decisions within statutory timeframes, see Annex 1.

Length and structure

9. Timeframes should be clear for users to engage with, internationally competitive and provide a meaningful improvement over existing processing times (while being achievable). Your decisions on how timeframes are presented to investors as well as on a maximum timeframe under the regime will help deliver on this goal.
10. On how timeframes are presented, we recommend that there will be a single timeframe for all parts of the assessment process, including time with Ministers. That is, each application type (for example, the acquisition of sensitive land) will have a single timeframe that applies to it.
11. While we did consider the alternative approach of specifying a separate timeframe for each component test that may apply to an application (that is, a separate time to complete the investor test and the benefit to New Zealand test), we ultimately concluded that this would have added unnecessary complexity, undermining the objective of providing clear, certain timeframes for investors.

12. We also recommend that no single timeframe will be over [33] (apart from fishing quota), including the QA period.³ While this maximum is longer than most other international investment regimes,⁴ it would offer a significant improvement on the status quo and send a clear signal that the Government is committed to delivering on the reform's objectives.
13. Critically, this maximum time period (and the statutory time period for each application type) includes time for Ministerial decision making. It will be important for Ministers, like other affected parties, to work within the overall statutory timeframe and this expectation should be reinforced by Cabinet for all decision making Ministers. Regular reporting to Cabinet on performance against timeframes could usefully reinforce this expectation.

Extensions

14. As outlined in paragraph 3(c), Cabinet has agreed that the OIO will be empowered to unilaterally extend the statutory timeframe by up to a period prescribed in regulations, or a different period with the applicants' agreement. This power is to be used only where necessary (currently expected to be around 20 to 25 percent for consent applications) and to manage complex applications, extensive third party (including agency) consultation⁵ and other exceptional circumstances (for example, the discovery of significant new information late in the assessment process, or a delegated decision that is called up for decision by Ministers).⁶
15. Since this decision was made, however, the OIO have expressed concerns that there may be situations where they need to use the extension power more than once. For example, when significant information is uncovered during the initial extension period. They were concerned that the previously agreed structure would inappropriately result in them breaching timeframes, even where they had no control of the factors that led to that outcome.
16. To manage this concern, we recommend a minor change to how the extension power can be used so that in certain situations (such as where the OIO discovers that extensive third party consultation is required during the fixed extension period), applications may be able to be further extended by a period agreed with the applicant.
17. To ensure that this change could not be used by the regulator to extend timeframes where such extenuating circumstances did not exist (for example, to improve their compliance rates), the Government would set expectations about the use of this power through a directive letter, which the OIO would embed through the use of Key Performance Indicators (KPIs) and public reporting. Ultimately, if these constraints still

³ [34]

⁴ In Australia, a decision is required on an application within 30 days, in Canada this is 45 days and in France decision-makers have two months. While these regimes are materially different to New Zealand's regime, and those regulators do not always meet the timeframes, they do provide a benchmark for investors.

⁵ The OIO will give relevant agencies a deadline in which to provide feedback on consent applications. Agencies may seek an extension of this time where necessary and to manage complex applications, extensive third-party consultation and other exceptional circumstances.

⁶ Using the extension power in this way is consistent with the criteria for the use of the extension for the emergency notification regime, which were included in the Supplementary Ministerial Directive Letter (8 June 2020) as well as discussed in T2020/228.

proved insufficient to prevent overuse, the Government could revisit the Regulations and remove the power for additional extensions.

18. We recognise that in rare cases, for example, where the applicant does not agree to a further extension, timeframes may not be able to be met. To manage this risk, we considered an unlimited extension power to manage the OIO's concerns, however, we found that this undermined the objectives for timeframes, including certainty for applicants about the timeframes in which their application will be assessed.
19. With respect to the duration of the statutory extension to be set in the Regulations, we recommend this is up to [33] . For clarity, this means that the OIO could extend timeframes by fewer than [33] where appropriate.

National interest test

20. In 2020, the national interest test was introduced. This allows Ministers to block any investment that may be contrary to the national interest. The assessment takes up to [33] and is consistent with the timeframe we recommended for the call-in power in T2020/3749.
21. Because the assessment is completed by the OIO in parallel to the other consent requirements, for most applications requiring a national interest assessment the statutory timeframe to process the application will be sufficient. However, for applications that have a statutory timeframe shorter than [33] , without specific provision for the national interest test within the statutory timeframes the OIO would regularly end up in breach.
22. To ensure that the OIO does not end up breaching statutory timeframes due to the time required to complete national interest assessments, we recommend that where the ordinary timeframe is fewer than [33] , the timeframe will become [33] when a national interest assessment is required.

Applicant delays

23. Throughout the development of timeframes, it has been important to create incentives to improve timeliness across the system – on the part of both the regulator and applicants. One of the OIO's concerns about bringing in timeframes is applicants being slow to provide the necessary information and the OIO being held publicly accountable for that in its compliance reporting. Currently, more than half the time spent to process an application can be the time spent waiting for applicants to respond to the OIO.
24. This concern will be partially managed through the introduction, as part of the new timeframes, of a QA period. If the OIO seeks further information during this period, to ensure that the application can be considered 'complete', then the clock 'stops' until the applicant responds with the required information. The clock does not stop after the QA period has passed.
25. However, even when an application is technically complete the OIO often needs to collect additional information before consent can be granted and it is important that the OIO is not unfairly penalised for any undue delays on behalf of the applicant. To manage this concern, we recommend that the overall timeframe is automatically extended by any additional time taken by the applicant to respond to the OIO's request for further necessary information, beyond a reasonable deadline. For example, if the OIO gives the applicant five working days to respond to their request, but the applicant takes 10 working days to respond, then five working days would be added to the OIO's due date.

26. Note that the OIO will continue to decline applications where the applicant does not respond to requests for information at all or within an appropriate period. That is, referring to the above example, if an applicant had not responded to the OIO's request in [33], the application would be declined, rather than the due date being extended by an additional [33].
27. We considered alternative approaches to manage this risk, such as the clock stopping anytime the OIO requests further information from an applicant. However, we considered that this did not create the right incentives for the OIO and applicants to improve their timeliness and that it could also undermine the objective that timeframes be simple and clear to applicants.
28. Similarly, we also recommend that where the applicant does not pay a fee within the reasonable deadline provided by the OIO, the additional time taken can be added to the total timeframe.
29. Current business practice by the OIO is to proceed with assessing applications without waiting to receive payment of the assessment fee. However, the OIO will cease work on an application if the fee has not been paid by the requested deadline.
30. We consider that the OIO should not be unfairly penalised for undue delays on behalf of the applicant. While the OIO will review business practices around fees when implementing statutory timeframes, we consider that this is likely to be a useful and necessary tool.

Section 2: Provisional timeframes

31. As outlined above, timeframes are a significant change for the OIO. Therefore, providing a trial period in which to build internal capability and test the viability of certain timeframes will help ensure that Ministers receive more informed advice on what final timeframes should be.
32. In addition to testing the timeframes themselves, the trial period will provide the OIO with an opportunity to test how often the extension powers will need to be used, whether the criteria for their use are appropriate in practice, and whether the fixed period is long enough for applications to be processed within the deadlines even when the OIO has 'right-sized' its analysis.
33. The proposed provisional timeframes (see Table 1) are set at about the average time it took the OIO to process that type of application over last two years. Where relevant, the timeframes also build-in a [33] period for the OIO to provide a report to the Minister and for the Minister to make a decision. They reflect:
 - a the anticipated efficiencies resulting from the reforms, with up to [34]
 - and
 - b a 'right -sizing' of the OIO's analysis to ensure that it is proportionate to the actual risks to be managed. That is, the OIO will generally do less work per application.

34. The provisional timeframes may differ significantly to timeframes we recommend later this year because they have been determined before the OIO has any experience working with the changes in the No 3 Bill. In addition, meeting the timeframes is dependent on the OIO’s resourcing, the volume of applications, and the actual efficiencies that result from the No 3 Bill. This monitoring period could also be relatively short (depending on when the No 3 Bill receives Royal assent) and will not enable testing of all types of applications against the provisional timeframes.

Table 1: Proposed provisional timeframes

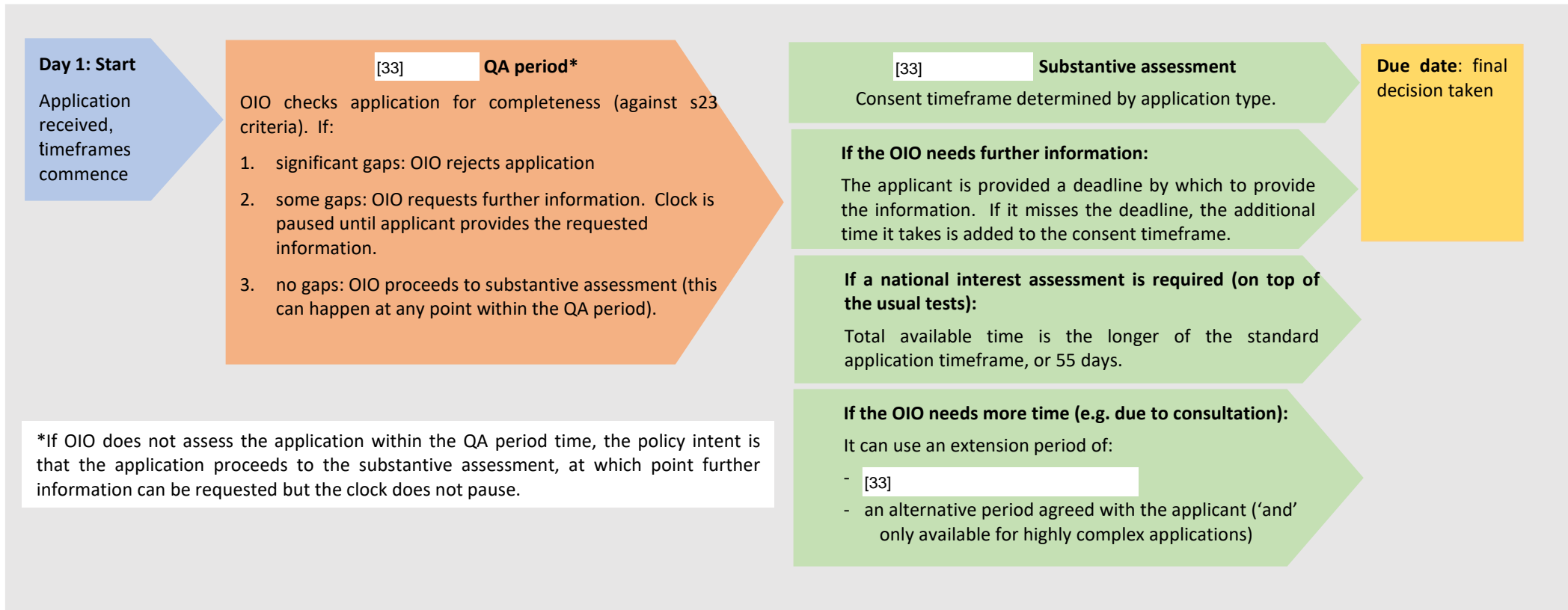
| Total working days | Type of application |
|--------------------|--|
| [33] | Fishing quota |
| | Benefit to NZ: modified test for farm land Standing consents for residential and forestry land |
| | Benefit to NZ: benefits only Variations of consent conditions (excluding variations seeking an extension of time to fulfil one or more of the conditions of consent) |
| | Residential land development One-off consent under the special forestry test National interest test, where the overall timeframe is shorter (than 55 days) Exemptions (except farmland advertising) Non-residential land – intention to reside |
| | Significant business assets Farmland advertising exemption Residential and otherwise sensitive land – one home to live in Variations of consent conditions - extension of time to fulfil one or more of the conditions of consent |
| | One home to live in |

Next Steps

35. Around two months before statutory timeframes are due to commence, after the OIO has had time to monitor its performance against the provisional timeframes⁷ and test the proposed settings, we will provide further advice on what we consider the appropriate statutory timeframes should be.
36. It may be appropriate for you to review the statutory timeframes after they have been in force for 12 to 18 months if it becomes apparent that they are not achievable or that they are not creating the right incentives for improvements from the regulator, investors or their representatives.

⁷ Apart from the pathways that are associated with the new benefits test, which may not come into force until up to one year after the No 3 Bill receives Royal assent (though the OIO is expecting this to occur earlier).

Annex 1: Decisions within statutory timeframes



Annex 2: Policy objectives in setting timeframes

The policy objectives in setting timeframes, as agreed in T2020/228, are:

- a Timeframes provide a meaningful improvement over existing processing times, with the goal of improving New Zealand's attractiveness to high quality foreign investment, taking into account international best practice;
- b Timeframes should be reasonable and achievable for investors and their advisors, the OIO and decision-makers alike;
- c Timeframes should be simple and clear to applicants;
- d Timeframes should provide greater certainty for investors about when they will get a decision;
- e Timeframes will promote efficiency and effectiveness from all parties involved, including investors, the OIO, third parties and Ministers;
- f Timeframes should reflect efficiency gains from the broader reform package; and
- g Timeframes will need to ensure that the OIO can appropriately manage risk.