

The Treasury

Phase two Overseas Investment Act reform (April - September) Information Release

November 2021

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Treasury Report: Overseas Investment Amendment Act 2021: Ministerial directive and delegation letters

Date:	17 June 2021	Report No:	T2021/1206
		File Number:	IM-5-3-8

Action sought

	Action sought	Deadline
Minister of Finance (Hon Grant Robertson)	Sign the attached letters: <ul style="list-style-type: none"> delegating some low-risk ministerial decisions to the Overseas Investment Office, and providing guidance to the regulator regarding the exercise of certain new powers introduced under the Overseas Investment Amendment Act. 	24 June 2021, prior to the commencement of the Overseas Investment Amendment Act 2021 on 5 July 2021.
Minister for Oceans and Fisheries (Hon David Parker)	Sign the attached delegation letter.	24 June 2021
Minister for Land Information (Hon Damien O'Connor)	Sign the attached delegation letter.	24 June 2021
Associate Minister of Finance (Hon Megan Woods)	Note the contents of this briefing.	N/A

Contact for telephone discussion (if required)

Name	Position	Telephone	1st Contact
Maisie Thursfield	Analyst, International	[39]	[35]
Thomas Parry	Manager, International		✓

Minister's Office actions (if required)

Return the signed report to Treasury.

Sign and return the two letters addressed to Gaye Searancke, for dispatch to LINZ (Annex One and Two).

Note any feedback on the quality of the report

Enclosure: Yes (Annex One, Delegation Letter; Annex Two, Directive Letter)

Treasury Report: Overseas Investment Amendment Act 2021: Ministerial directive and delegation letters

Executive Summary

The Overseas Investment Amendment Act 2021 (the Amendment Act) comes into force on 5 July 2021. This report seeks Ministers approval to:

- delegate certain low-risk ministerial powers and functions to the regulator under section 32 of the Overseas Investment Act 2005 (the Act) (Ministers Robertson, Parker and O'Connor), and
- direct the regulator on how to make certain decisions which have been delegated to them, under section 34 of the Act (Minister Robertson).

This report seeks joint Ministers approval to delegate some low risk ministerial decisions to the regulator...

The Amendment Act made changes to the **investor test** (essentially a good character test), which allows investors that have previously satisfied the test to not have to re-satisfy it for future investments as long as there have been no material changes to their character. Consistent with existing practice where the regulator can determine whether the investor test is met, we recommend that Ministers similarly delegate the power to determine whether investors qualify for the repeat investor process to the regulator.

We also seek Ministers' approval to delegate decisions related to **revoking conditions of consent** where the investor is no longer considered an overseas investor under the Act because of changes made through the Amendment Act. We consider this low risk because it aligns with the delegated powers to revoke and vary conditions of consent in the Supplementary Ministerial Directive Letter dated 8 June 2020.

... and Minister Robertson's approval to direct the regulator on how to make certain decisions under the Act

To give effect to previous Cabinet decisions [DEV-19-MIN-0306 and CAB-21-MIN-0007 refers], this report also seeks your (Minister Robertson) approval to direct the regulator to:

- **Grant exemptions** from requiring consent under the Act to entities where they are majority owned and substantively controlled by New Zealanders using the criteria outlined in the attached Supplementary Ministerial Directive Letter (Annex Two).
- **Revoke conditions of consent**, unless good reason exists not to, in situations where a person ceases to be an overseas person under the Act with the commencement of new section 7 of the Act and where they have applied for a variation of consent, granted to them while they were an overseas person.
- When assisting with future fee reviews, to not use the new **fee provisions** to recover losses on expenditure that cannot be reasonably ascribed to processing to processing current investors' applications.

We seek Ministers' signatures to the attached Ministerial Directive and Ministerial Delegation Letters

In order to operationalise Ministerial approval to the above Ministerial delegation and direction decisions, please sign the attached letters at Annex One and Two before the Amendment Act comes into force on 5 July 2021.

Recommended Action

We recommend that you:

- a **note** that the Overseas Investment Amendment Act 2021 (Amendment Act) will come into force on 5 July 2021, and Ministers can support its efficient operation by delegating certain powers and functions, and issuing decision-making guidance to the Overseas Investment Office
- b **note** that under section 32 of the Overseas Investment Act (the Act) relevant Ministers, that is, the Minister of Finance, Minister for Oceans and Fisheries, and Minister of Land Information, may delegate to the regulator any of their powers or functions under the Act or related regulations, except for some such as those related to the national interest test
- c **note** that the Minister of Finance previously designated Land Information New Zealand as the regulating department and the Chief Executive of Land Information New Zealand as the regulator (the regulator) in accordance with section 30 of the Act [Designation and Delegation Letter dated 17 October 2018 refers]
- d **agree** to delegate the low-risk ministerial powers and functions to the regulator as outlined in the Supplementary Delegation Letter attached at Annex One

Agree/disagree

- e **sign** the attached delegation letter to reflect your (Ministers Robertson, Parker and O'Connor) agreement to delegate some low-risk ministerial functions and powers to the regulator, to support speedy decision-making and exercise of administrative powers

Signed/not signed

- f **note** that section 34 of the Act allows you (Minister of Finance) to direct the regulator on such things as the Government's general policy approach to overseas investment, conditions of consent, level of monitoring and any general matters relating to the regulator's functions, powers or duties
- g **agree** to direct the regulator in line with the attached Supplementary Ministerial Directive Letter attached at Annex Two

Agree/disagree

- h **sign** the attached directive letter to the regulator on certain matters

Signed/not signed

Thomas Parry
Manager, International

Hon Grant Robertson
Minister of Finance

Hon David Parker
Minister for Oceans and Fisheries

Hon Damien O'Connor
Minister for Land Information

Treasury Report: Overseas Investment Amendment Bill Amendment: Ministerial directive and delegation letter

Purpose of Report

1. This report seeks joint Ministers' (Minister of Finance, Minister for Oceans and Fisheries, and Minister for Land Information) approval to delegate some low-risk ministerial powers and functions to the regulator (Land Information New Zealand).
2. We also seek the Minister of Finance's approval to provide direction to the regulator regarding the exercising of certain new powers in order to operationalise the Overseas Investment Amendment Act 2021 (the Amendment Act), which comes into force on 5 July.
3. In order to reflect your approval to the above delegation, we seek your signatures (Ministers Robertson, Parker and O'Connor) to the Supplementary Delegation Letter (**Annex One**), and Minister Robertson's signature to the Supplementary Ministerial Directive Letter (**Annex Two**), by 2 July 2021.

Background

4. The Amendment Act received Royal Assent on 24 May 2021. This is the final piece of primary legislation related to the Government's Phase Two reform of the Overseas Investment Act 2005 (the Act). The Amendment Act builds on other changes introduced through the Overseas Investment (Urgent Measures) Amendment Act 2020 (the Urgent Measures Act), which was passed under urgency in May 2020 to respond to the COVID-19 pandemic.
5. These two pieces of legislation amend the Act to better ensure New Zealand's foreign investment screening regime:
 - a grants the government sufficient powers to effectively manage risks that may be posed by foreign investment, and
 - b reduces unnecessary regulatory costs on investors, recognising that such costs diminish New Zealand's attractiveness to investment necessary to support a productive and sustainable economy.
6. Reflecting this, the legislation includes provisions to strengthen the government's powers to manage risks posed by foreign investment while reducing the burden of the Act on investors and the regulator. These changes include:
 - a no longer requiring a large range of low-risk transactions to get consent, such as transactions involving fundamentally New Zealand listed entities
 - b allowing investors that have already been screened and approved, to access a streamlined consent process for future investments, and
 - c streamlining the process for determining whether an investment in sensitive land will benefit New Zealand.

Delegations are required to operationalise the Amendment Act

7. You (as Minister of Finance) previously designated Land Information New Zealand as the regulating department and the Chief Executive of Land Information New Zealand as the regulator (the regulator) in accordance with section 30 of the Act in the Designation and Delegation Letter dated 17 October 2018 (consistent with the previous delegations).
8. Section 32 of the Act provides that you (as the relevant Ministers) may delegate to the regulator any of your powers or functions under the Act or regulations except for certain powers such as those related to the national interest test.
9. We recommend you (Ministers Robertson, Parker and O'Connor) delegate some low-risk ministerial functions and powers under the Overseas Investment Act 2005 (the Act) to the regulator, to support efficient decision making, outlined below. These will accompany previous delegations in the letters dated 17 October 2018 and 8 June 2020.

We recommend delegating decisions about the new investor tests to the regulator

10. The Amendment Act introduced new ways for investors to satisfy the 'investor test' (essentially a good character test),¹ including:
 - a a new standalone investor test (section 29A(1)), which allows an investor to apply to complete the investor test separately from an application, and
 - b a repeat investor test (section 29A(2)-(5)), which allows investors that have previously met the investor test to not have to re-satisfy the test as long as their character has not materially changed.
11. These new provisions require the relevant Minister(s) to determine whether a person qualifies for, and meets, these investor tests, and then to notify the applicant.
12. Consistent with existing delegations to the regulator for determining whether the investor test is met (as part of a broader delegation for deciding on significant business asset applications) and to support efficient decision-making, we recommend that these low-risk assessments be delegated to the regulator. Under the delegation, the regulator will need to apply objective statutory criteria to determine if an applicant meets the investor tests and then notify the applicant.

We recommend delegating decisions related to revoking conditions of consent for persons who are no longer overseas persons under the Act

13. Changes that will be introduced by the Amendment Act will result in some entities no longer being considered overseas persons for the purpose of the Act [DEV-19-MIN-0306 refers]. To respond to these changes, new section 37(2) of schedule 1AA of the Act requires the relevant Minister(s) to revoke conditions of consent that the Act required to be imposed for persons who are no longer considered overseas persons under the Act.
14. We recommend these decisions are delegated to the regulator as they are based on a low-risk objective assessment. The delegation will allow the regulator to revoke or vary the conditions of consent for persons who are no longer considered overseas persons under the Act on commencement of new section 7 of the Act, as introduced by the Amendment Act.

¹ See sections 29A(1)-(5) of the Act.

Additional delegation amendments

15. The delegation letter also amends the previous delegation letter dated 17 October 2018 where the Amendment Act has resulted in some delegations being outdated, for example, investments under the previous section 23(1)(c) of the Act, which no longer exists with the commencement of the Amendment Act.
16. If you agree to these delegations, we seek your signatures to the attached letter in **Annex One**.

Directive letter to support the regulator's decision making

17. The Act allows the Minister responsible for the Act to direct the regulator on the performance of its role.² Under this power, we recommend that you (that is, the Minister of Finance) issue the attached directive letter (**Annex Two**) to give direction to the OIO on three matters related to the commencement of the Amendment Act:
 - a Giving effect to Cabinet's decision to exempt New Zealand entities that are majority owned and substantively controlled by New Zealanders from consent requirements
 - b removal of conditions on completed transactions that would not require consent if entered into under the new regime, as delegated under the proposed delegation letter (see paragraph 13), and
 - c conducting regular fees reviews.

Exempting New Zealand entities that are majority owned and substantively controlled by New Zealanders

18. The proposed letter directs the regulator on the new exemption for entities that the Minister considers to be majority owned and substantively controlled by New Zealanders from requiring consent to invest in sensitive New Zealand assets.³ The proposed direction sets out criteria for the exemption that have previously been agreed by Cabinet [DEV-19-MIN-0306 refers].
19. Consistent with Cabinet's decision [DEV-19-MIN-0306 refers], we recommend these exemptions be granted to non-listed bodies corporate, managed investment schemes and limited partnerships where they are not owned or controlled by overseas persons and not open to access or control by a foreign government, according to the criteria outlined in the directive letter at **Annex Two**.

Revocation or variation of conditions of consent for persons who are no longer overseas persons

20. As outlined in paragraph 13, the Amendment Act will remove some investors who have previously obtained consent for investments under the Act from the definition of overseas persons and provides that the relevant Ministers may revoke a condition of consent that the Act imposed on persons who are no longer considered overseas persons under the Act.⁴

² Section 34 of the Act.

³ New section 61B(c)(viii) of the Act, as introduced by the Amendment Act

⁴ This expands existing powers in section 27 of the Act, which provide that existing conditions may be varied or revoked except where the conditions are mandatory.

21. In accordance with decisions by Cabinet [DEV-19-MIN-0306 refers] and consistent with the previous Supplementary Ministerial Directive Letter (dated 8 June 2020), the proposed letter directs the regulator to revoke the conditions of consents, unless good reason exists not to, in situations where:
 - a a person ceases to be an overseas person on commencement of new section 7 of the Act, and
 - b they have applied under section 27 of the Act for a variation of consent granted to them while they were an overseas person.
22. The regulator should exercise their discretion in making these decisions whilst having regard for the Act's purpose and the Government's view that investors that are no longer considered overseas persons under the Act (that is, are New Zealand persons) are unlikely to pose risks to New Zealand by owning sensitive New Zealand assets.

Conducting regular fees reviews

23. The regulator's operational funding is intended to be recovered from applicants through fees. However, the regulator has accumulated a significant deficit, with fees not keeping pace with costs as regulatory functions have expanded. This has resulted in inequities, with future fee payers or taxpayers now liable to meet this shortfall.
24. These issues were at least partly attributable to the Act's fee provisions, which did not:
 - a require regular fee reviews, which would help ensure fees remain aligned with costs,
 - b allow fees to smooth reasonably under/over recovery over time, which is necessary given inevitable uncertainty about transaction volumes in any year, or
 - c clearly allow the regulator to recover deficit funded capital and capital-like (for example, investments in process improvements) expenditure, despite those investments benefitting investors – and therefore attributable to those investors – for many years.
25. The Amendment Act resolved these issues by:
 - a requiring the Minister to commence a fees review at least once every four years,
 - b clarifying the government can set fees that can be distributed among fee payers on a rolling four year basis, and
 - c confirming that any deficit incurred in the previous four years can be recouped through fees.
26. These changes will better ensure that the regulator's fiscal position is sustainable into the future, and allow recent investments made to operationalise the Urgent Measures and Amendment Acts to be rightly recouped from those investors that benefit from them. However, they were not intended to allow the regulator to recoup deficit that could not be attributed to future investors (for example, deficit attributable to long-term under recovery) [CAB-21-MIN-0007 refers]. To provide additional clarity on the government's position, the attached letter directs the regulator in this way.
27. This approach is consistent with the Government's Cost Recovery Policy, Legislation Design and Advisory Committee guidelines, and the views of the Finance and Expenditure Committee. While the regulator would have to follow these guidelines in setting any future fees, we consider that it is still useful to specify these expectations in the directive letter because it is the only place that collates these distinct legislative and policy requirements together coherently.

Annex One: Supplementary delegation letter

(Attached as separate document)

Annex Two: Ministerial directive letter

(Attached as separate document)