The Treasury

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

November 2021

This document has been proactively released by the Treasury on the Treasury website at

https://www.treasury.govt.nz/publications/information-release/phase-2-overseas-investment-act-reform.

Information Withheld

Some parts of this information release would not be appropriate to release and, if requested, would be withheld under the Official Information Act 1982 (the Act).

Where this is the case, the relevant sections of the Act that would apply have been identified.

Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Key to sections of the Act under which information has been withheld:

[1] 6(a) - to avoid prejudice to the security or defence of New Zealand or the international relations of the government

[25] 9(2)(b)(ii) - to protect the commercial position of the person who supplied the information or who is the subject of the information

[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;

[36] 9(2)(h) - to maintain legal professional privilege

[39] 9(2)(k) - to prevent the disclosure of official information for improper gain or improper advantage

Where information has been withheld, a numbered reference to the applicable section of the Act has been made, as listed above. For example, a [1] appearing where information has been withheld in a release document refers to section 6(a).

Copyright and Licensing

Accessibility

The Treasury can provide an alternate HTML version of this material if requested. Please cite this document's title or PDF file name when you email a request to information@treasury.govt.nz.

TE TAI ŌHANGA
THE TREASURY

Treasury Report: Overseas Investment Reform: Fresh and Seawater Areas Regulations

Date:	12 May 2021	**Report No:**	T2021/237
		File Number:	IM-5-3-8-5

Action sought

	Action sought	Deadline
Minister of Finance (Hon Grant Robertson)	**Note** the contents of this report.	
Associate Minister of Finance (Hon David Parker)	**Agree** to amend the Overseas Investment Regulations to prescribe the proposed process for the acquisition of fresh and seawater areas by the Crown. **Refer** this report to the Ministers for Land Information and Conservation.	25 May 2021

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.

Refer this report to the Minister for Land Information and the Minister of Conservation.

Note any feedback on the quality of the report	

Enclosure: No

Treasury Report: Overseas Investment Reform: Fresh and Seawater Area Regulations

Executive Summary

As part of the reform of the Overseas Investment Act 2005 (the Act), Cabinet agreed to clarify and streamline the process by which the Crown acquires fresh and seawater areas (FSA)[1] included in investments in sensitive land [DEV-19-MIN-0306 refers].

The Overseas Investment Amendment Bill (No 3) (the No 3 Bill) provides a framework for the new process and allows for the detail to be provided in in the Overseas Investment Regulations (Regulations).

This report seeks your (Minister Parker's) agreement to the aspects of the new process that will be prescribed in the Regulations. Cabinet has delegated you authority to make such decisions [DEV-20-MIN-0066 refers]. Decisions are required now to allow the Parliamentary Counsel Office (PCO) to complete drafting before the FSA provisions come into force (which they will do six months after the No 3 Bill receives Royal Assent, something that could happen in the coming weeks).

This report seeks your decision on a number of minor and technical design details that relate to each stage of the acquisition process:

i. *Notification:* We recommend that as part of their consent application, the overseas investor notifies the Overseas Investment Office (OIO) that the land they wish to invest in contains FSA, and provides details of that FSA. We consider this is the minimum amount of information required to begin the FSA acquisition process, and therefore does not place unnecessary burden on investors.

ii. *Registration:* We recommend that upon settlement, the overseas investor registers a 'water areas acquisition notice' (effectively a covenant) on the title of the land. This records the Crown's right to acquire the land at any point within the subsequent ten years and binds the overseas investor to the standard terms of acquisition. This is essential to ensuring that the Crown can acquire the FSA from the current, or any future, owner.

iii. *Initial Crown decision:* While the presumption is the Crown will acquire the FSA, we recommend that the Crown may waive its right to do so where the potential risks, liability, and costs of acquisition and ownership outweigh the FSA amenity and conservation value. We recommend that the Crown has six months from the point of registration to make this decision, balancing the need to provide the investor with certainty against ensuring that the Crown has adequate time to make an informed decision.

iv. *Compensation assessment:* We recommend that the FSA owner and affected third parties can claim compensation from the Crown for the FSA. Also, that compensation for the land owner is determined by a formula based on a small proportion of the average rateable value of the land in the vicinity, while for third parties the compensation amount is determined via negotiation. This is discussed in more detail below.

[1] Fresh and Seawater Areas are eligible riverbed, lakebed, marine or coastal areas.

v. *Final Crown decision:* Again, while the presumption is the Crown will acquire the FSA, we recommend it may waive its right do so where it is not satisfied with the amount of compensation to be paid. We recommend that the Crown has 30 working days to make this decision, again balancing the need to provide investors with certainty while ensuring the Crown has adequate time to make an informed decision.

vi. *Crown acquisition:* If the Crown acquires the FSA, we recommend it does so in line with a set of standard terms of acquisition and for the amount of compensation decided in step iv. The land would then generally be surveyed and vested in the Crown (with special rules for *usque ad medium filum aquae* rights, reflecting that the land covered by such rights is changeable). A new title would be created for the overseas investor's remaining land to ensure that there is clear accountability.

There are two more substantive policy choices for your consideration:

- **The approach to assessing the compensation provided to overseas investors for their loss of land**, where we propose using a formula based on a proportion (5%) of the rateable value of the land surrounding the FSA.

  We considered a range of figures, from less than 1% up to 10%. However, on the basis of expert advice from Land Information New Zealand (LINZ) and the Valuer General, we consider that a 5% loss factor (that is, in general terms, compensation will equal 5% of the rateable value of adjacent similar land) fairly reflects the nature and generally minimal extent of the loss that will be suffered by the majority of owners due to the Crown's acquisition of the FSA. However, in recognition of the uncertainty in setting this figure and the potential for outliers where this amount may be insufficient, we think this is an important area to monitor and potentially revisit in the future.

  In contrast, we recommend that third parties' compensation be determined via negotiation. This reflects that the nature of these interests will differ in all circumstances and it is therefore not possible to develop a formulaic approach.

- **The approach to resolving disputes about the sum of compensation.** We consider that mediation is the most suitable initial process as it is relatively low cost, timely and has been used in other situations where compensation is disputed (e.g. the Weathertight Homes Resolution Services Act 2006). It also does not extinguish the opportunity for arbitration or litigation in rare cases where this is still required.

  We considered prescribing other initial dispute resolution mechanisms, such as arbitration, the Land Valuation Tribunal, and giving the Commissioner of Crown Lands a role. However, these were rejected on the basis of high cost relative to the value of the FSA (relating to arbitration and the Land Valuation Tribunal), the risk of broader system impacts (in the case of the Land Valuation Tribunal), and conflict of interest (regarding the Commissioner of Crown Lands, given the Commissioner's responsibility for administering FSA acquired by the Crown).

If you agree to the proposed amendments, we will provide a draft Cabinet Legislation Committee (LEG) paper and Regulations later in 2021, ahead of the FSA provisions coming into effect six months after the No 3 Bill commences (expected December 2021/January 2022).

Recommended Action

We recommend that you:

Notification

a **Agree** to require the overseas investor to provide detailed information about the FSA as part of their application for consent.

Agree/disagree

b **Agree** to require LINZ to develop a process to determine, on a case by case basis, whether any third party interests registered on the title of the land should be retained, guidance on which will be provided through the Ministerial directive letter.

Agree/disagree

Registration

c **Agree** to require the overseas investor (through their lawyer) to register with LINZ, at the time of settlement, a 'water areas acquisition notice' (the notice) on the title of the land containing an FSA.

Agree/disagree

d **Agree** that in order to vary the notice, the lawyer for the overseas investor will lodge an instrument of variation with LINZ.

Agree/disagree

e **Agree** that in order to cancel the notice, the lawyer for the overseas investor will lodge an instrument of cancellation with LINZ.

Agree/disagree

f **Agree** that the standard terms of acquisition, signed at the point of registering the notice, will include those listed in Annex One of this report.

Agree/disagree

g **Agree** that following registration of the notice, LINZ will invite the overseas investor and any registered third parties whose interests are being extinguished to indicate whether they intend to claim compensation from the Crown.

Agree/disagree

Initial Crown decision

h **Agree** to require the Crown to notify the overseas investor if it decides against acquiring the FSA within six months of the notice being registered.

Agree/disagree

i **Agree** that this six-month period can be extended by an additional six months where the process to assess the FSA may be more complex, and that guidance on the use of such extensions is provided in the Ministerial directive letter.

Agree/disagree

Compensation assessment

j **Agree** compensation for FSA owners will be determined using a formula that will result in compensation of 5 per cent of the rateable value of land in the vicinity of the FSA.

Agree/disagree

k **Agree** compensation for registered third parties will be determined by negotiation.

Agree/disagree

l **Agree** that a mediation process will be used to resolve disputes over compensation, with:

i. either party able to seek mediation, but it being voluntary for the investor to participate, and

ii. the costs of mediation being shared between the investor and the Crown.

Agree/disagree

Final Crown decision

m **Agree** to require the Crown to notify the overseas investor if it decides against acquiring the FSA within 30 working days of the compensation assessment being provided to the Minister for Land Information.

Agree/disagree

Crown acquisition

n **Agree** that any survey required to vest the FSA in the Crown will be carried out in accordance with Part 5 of the Cadastral Survey Act 2002 and that, consistent with current practice, the Crown bears the cost of the survey.

Agree/disagree

o **Agree** that for the avoidance of doubt that *ad medium filum aquae* (AMF) riverbeds will be managed as Crown Land under the Land Act 1948.

Agree/disagree

Next steps

p **Note** that if you agree to the amendments above, we will provide a draft Cabinet Legislation Committee (LEG) paper later in the year seeking approval for those amendments, ahead of their commencement six months after the Overseas Investment Amendment Bill (No 3) (expected December 2021/January 2022).

Noted

q **Refer** a copy of this report to the Minister for Land Information and the Minister of Conservation, for their information.

Referred/not referred

Thomas Parry
Manager, International

Hon David Parker
Associate Minister of Finance

Treasury Report: Overseas Investment Reform: Fresh and Seawater Area Regulations

Purpose of Report

1. This report seeks your (Minister Parker's) agreement to amend the Overseas Investment Regulations (Regulations) to prescribe aspects of the acquisition process for riverbed, lakebed, marine or coastal areas (Fresh and Seawater Area(s) - FSA) by the Crown, as provided for by Schedule 5 of the Overseas Investment Amendment Bill (No 3) (the No 3 Bill).

2. This report also seeks your agreement to the aspects of the new process that will be prescribed in the Regulations. Cabinet has delegated you authority to make such decisions [DEV-20-MIN-0066 refers]. Decisions are required now to allow the Parliamentary Counsel Office (PCO) to complete drafting before the FSA provisions come into force (which they will do six months after the No 3 Bill receives Royal Assent, something that could happen in the coming weeks).

Background

3. As part of the reform of the Overseas Investment Act (the Act), Cabinet agreed to clarify and streamline the process by which the Crown acquires FSA contained in sensitive land [DEV-19-MIN-0306 refers].

4. The No 3 Bill provides a framework for the new process and allows for the detail to be provided in in the Regulations. The box below provides a general overview of the process.

i. Notification: As part of their consent application, the overseas investor notifies the OIO that the land they wish to invest in contains FSA, and provides details of that FSA.

ii. Registration: Upon settlement, the overseas investor registers a 'water areas acquisition notice' on the land's title. This records the Crown's right to acquire the land at any point within ten years and binds the overseas investor to the standard terms of acquisition.

iii. Initial Crown decision: While the presumption is the Crown will acquire the FSA, it may waive its right to do so where the potential risks, liability, and costs of acquisition and ownership outweigh the FSA amenity and conservation value. The Crown has six months from the point of registration to make this decision.

iv. Compensation assessment: The FSA owner and affected third parties can claim compensation from the Crown for the FSA. Compensation for the FSA owner is determined by a formula based on a proportion of the average rateable value of land in the vicinity and may be subject to mediation to manage any disputes.

v. Final Crown decision: Again, while the presumption is the Crown will acquire the FSA, it may waive its right do so where it is not satisfied with the amount of compensation to be paid. The Crown has 30 working days to make this decision.

vi. Crown Acquisition: If the Crown acquires the FSA, it does so in line with a set of standard terms of acquisition and for the amount of compensation decided in step iv. The land is then generally surveyed and vested in the Crown (except where the FSA is held under a *usque ad medium filum aquae* right, where different rules regarding surveying apply). New titles are created for both the FSA and the overseas investor's remaining land.

Advice

5. This section recommends Regulations to give effect to the process outlined above.

Step one: Notification

6. Under the new acquisition process, the overseas investor will, as part of their application for consent notify LINZ that the land they wish to invest in includes an FSA and provide details of the FSA.

7. While the current Regulations prescribe information that must be provided to the OIO about an FSA, this information is limited to a legal description of the land, its postal address, and whether it needs to be surveyed. In order for LINZ to advise the Crown on whether to waive its right to acquire the FSA, it would be helpful for it to receive more detailed information and for this to be provided at the time of applying for consent. This will allow LINZ to begin assessing the potential risks, liability, and costs of acquisition and ownership of the land at this early stage of the consent process, which will help ensure the Crown is able to meet the six month deadline for making this initial waiver decision.

8. Therefore, we recommend amending the Regulations to require the overseas investor to provide detailed information about the FSA as part of their application for consent, including information about the location, extent and type of FSA (riverbed, lakebed, marine or coastal area), whether it has any structures or biosecurity issues, and whether any third party interests over the land should be retained (see paragraph 10) below). This information is the minimum necessary to allow LINZ to assess the potential risks, liability and costs of acquisition and ownership of the land, without unduly burdening the prospective investor.

Retention of third party interests

9. Third party interests include rights such as easements and covenants which are registered on the title of the land. The No 3 Bill provides that FSA will vest in the Crown free from all such interests, but does allow for the retention of:

    a. any estate or interest in land that is prescribed in the Regulations, or

    b. any estate or interest that is specified in the water areas acquisition notice.

10. We have discussed the points at paragraph 9.a. with LINZ experts and have not, at this time, identified any estates or interests in the land that should be automatically retained. We therefore do not recommend prescribing any interests at this point (noting it will be possible to amend the Regulations at a later date to do so).

11. With regard to 9.b, we recommend LINZ develops a process to determine, on a case by case basis, whether any third party interests registered on the title of the land should be retained, guidance on which will be provided in the Ministerial directive letter.

Step two: Registration

Water areas acquisition notice

12. Under the new acquisition process, the overseas investor's lawyer will register a 'water areas acquisition notice' (the notice, in substance a covenant) on the title of the land upon settlement (with LINZ responsible for approving the format and content of the notice). This will record the Crown's right to acquire the land at any point within the subsequent ten years and binds the overseas investor to the standardised terms of acquisition.

13. The No 3 Bill provides that Regulations can prescribe the terms and form of the notice, as well as the processes for its registration, variation, expiration, and cancellation. We recommend the following approach:

    a. *Content:* The notice would contain the investor's name; the core information required for an instrument to be registrable as set out in the Land Transfer Act Regulations 2018, a statement noting the Crown's right to acquire the FSA, and a statement noting that the water areas acquisition notice is binding on current and future owners.

    b. *Registration*: The lawyer for the overseas investor lodges the notice (and the relevant transfer instrument) upon settlement of the overseas investment transaction.

    c. *Variation*: The lawyer for the overseas investor lodges an instrument varying the notice, alongside any certifications required by the Registrar-General of Land.

    d. *Cancellation*: LINZ notifies the overseas investor that the notice is to be removed, and the lawyer for the overseas investor lodges an instrument to remove the notice, alongside any certifications required by the Registrar-General of Land.

    e. *Expiration*: In line with Cabinet's original decision, the notice will run for ten years from the date of registration, unless an extension is agreed upon by the Crown and the owner [DEV-19-MIN-0306 refers].

14. The No 3 Bill also provides for the Regulations to specify events which may lead to the cancellation of the notice (beyond those already provided for, which are the Crown deciding not to acquire the land, the notice expiring, or the land not actually containing FSA). We have discussed this with LINZ experts and cannot, at this time, think of any such events and therefore do not recommend specifying any at this point (noting it will be possible to amend the Regulations at a later date to do so).

Standard terms of acquisition

15. The No 3 Bill provides for terms of acquisition to be prescribed in the Regulations, the purpose of which is to ensure that the owner maintains the FSA before it is vested in

the Crown and to allow the owner to continue to use the surrounding land as intended. These terms may be amended upon agreement by the Crown and owner.

16. We recommend that the terms of acquisition cover matters that are standard in sale and purchase agreements (e.g., definition of parties, dispute resolution, and apportionment of costs), as well as key aspects of the offer and acquisition process, referring back to the provisions in Schedule 5 of the Act. Annex One provides an overview of what is intended to be covered in the terms of acquisition.

Intention to claim compensation

17. The No 3 Bill provides for FSA owners and third parties whose interests will be extinguished by the Crown's acquisition of the FSA to claim compensation from the Crown.

18. As the likely cost of compensation is a factor the Crown can consider when deciding whether to acquire the FSA in steps three and five of the new process, we recommend that after the notice is registered, LINZ invites FSA owners and registered third parties to indicate whether they intend to claim compensation from the Crown.

Step three: Initial Crown decision

19. The No 3 Bill states the Crown must acquire FSA but may decide not to acquire an FSA where the potential risks, liability, and costs of acquisition and ownership outweigh the FSA's amenity and conservation value. This decision must be notified in writing and the notice must be given no later than a date prescribed in Regulations.

20. Based on consultation with LINZ, we recommend the Crown must notify the investor within six months of the notice being registered. We think this period will, in most cases, provide sufficient time for LINZ and other agencies to assess and make a recommendation on the FSA, and for the Minister for Land Information to make a decision.

21. However, in some cases the assessment process may be more complex, for example where the land is difficult to access, contains multiple FSA, requires complex consultation with mana whenua, or where new and material information is uncovered late in the assessment process. In such cases, we recommend allowing for an extension of six months, and recommend guidance on the use of such extensions is provided in the Ministerial directive letter.

22. This initial six month period balances the need to provide overseas investors certainty about the future of their investment, with the need to give the Crown time to do due diligence. The extension provides a backstop for use in what we would expect to be a small minority of cases.

Step four: Compensation assessment

23. The No 3 Bill entitles FSA owners and third parties with registered interests over the land to seek compensation from the Crown, with the amount of compensation to be determined in the manner prescribed in the Regulations.

24. The intent of the provision is to provide compensation for material losses incurred by the owner/third party due to the Crown's acquisition of the FSA. We consider these losses stem primarily from any decrease in enjoyment or use of the FSA or surrounding land.

25. Reflecting that the nature of the losses incurred by owners and third parties differ, we recommend the Regulations prescribe separate compensation approaches for compensating FSA owners and third parties, as set out below.

Compensating FSA owners

26. We considered two options for assessing the amount of compensation to be provided to FSA owners:

    a. **Option 1:** A formula based on the rateable value of the land in the vicinity of the FSA and a 'loss factor' to reflect the FSA owner's loss.

    b. **Option 2:** A case by case assessment against a set of criteria that would characterise the owner's loss (e.g. size and type of FSA, use and access of FSA).

27. Option 1, a formula, would provide an approximation of loss. It would be simple to administer, objective, and would provide certainty and transparency for those claiming compensation. However, it would inevitably result in some outlier cases receiving too much or too little compensation, which may result in complaints.

28. Option 2, as a case by case assessment, would more accurately reflect individual losses. However, it would be more complex to administer, more subjective, take longer, and would offer claimants and the Crown less certainty and transparency.

29. On balance, we recommend Option 1, with a dispute resolution mechanism established (discussed further below) to provide a means to address any complaints that may arise.

30. The formula we propose creates a proxy for the value of FSA which is then multiplied by a 'loss factor' reflecting the nature and extent of the owner's loss (see Annex Two). This is because FSA are not sold on the open market, so there is no reliable sales evidence to use as a basis for their valuation.

31. We recommend setting a loss factor of 5% — meaning the value of the compensation will be 5% of the proxy value of the FSA. For example:

    - (5 ha of riverbed * average pastoral land rating value per hectare in 10-kilometre radius $15,000) * loss factor of 5% = compensation of **$3,750**

    - (5ha marine and coastal area * average conservation rating land value per hectare $2,000) * loss factor of 5% = compensation of **$500.**

32. We consider that a 5% loss factor fairly reflects the nature and extent of the loss that will be suffered by the majority of owners. However, in recognition of the uncertainty in setting this figure and the potential for outliers, we think this is an important area to monitor and potentially revisit in the future.

33. See Annex Two for our recommended approaches to the other components of the proposed formula (determining the FSA's area and the average rateable value of land in the vicinity of FSA), as well as more detail on the proposed loss factor.

Compensating third parties

34. For third parties whose registered interests will be lost due to the Crown's acquisition of the FSA, we recommend using a negotiation process to determine compensation for their loss. This is because the nature and frequency of the third party interests which will be extinguished on the acquisition of FSA by the Crown are unclear. A formal process may be prescribed at a later date, if it is deemed necessary.

Resolving disputes

35. In order to ensure the compensation process is fair, we recommend the Regulations prescribe the use of mediation for resolving disputes over compensation. Either party would be able to refer a dispute to mediation, however it would be voluntary for the investor as to whether to participate. To help ensure that mediation is only pursued in cases with just cause, we recommend that costs would be shared between the Crown and the applicant. In contrast:

    a. a model that placed all costs on the Crown could create incentives for investors to pursue mediation as a matter of course, contrary to the objective of streamlining the acquisition of FSA; and

    b. a model that placed all costs on investors would be inconsistent with our view that the proposed compensation formula will not be suitable in all cases.

36. We consider mediation to be the most suitable process for dispute resolution as it is proportionate, relatively low-cost and timely. Mediation is also used in other situations where compensation is disputed, for example in the Weathertight Homes Resolution Services Act 2006 and the Canterbury Earthquake Insurance Tribunal Act 2019.

37. Where mediation fails, owners/third parties would still be able to bring proceedings should they wish to do so, though we would expect this to be unlikely given the costs of doing so would likely be disproportionate to the compensation involved.

38. While we did consider other options for resolving disputes over compensation, we discounted these for a range of reasons:

    a. *Arbitration*: This is often used where sums of money are significant, where the impact on the livelihood or financial status of not settling the matter is particularly serious, or where the dispute has become intractable. Arbitration may also be used where mediation has failed. While this process does provide certainty, we discounted it due to the high financial and time costs involved, which would likely be disproportionate to the FSA compensation offered.

    b. *The Land Valuation Tribunal:* The Tribunal has jurisdiction to deal with objections relating to property valuation, the taking of lands under the Public Works Act 1981, and valuations under the Rating Valuations Act 1998. This option was discounted because it would require a broadening of the Tribunal's jurisdiction. Moreover, the costs for owners to take the matter to the Tribunal are likely to be disproportionate to the amount of compensation involved.[2]

    c. *Commissioner of Crown Lands*: Giving the Commissioner a role in dispute resolution over FSA compensation was also discounted. This was due to the conflict of interest resulting from the Commissioner's role as statutory officer responsible for the administration of FSA acquired by the Crown, and LINZ's responsibility for the vote allocation for the acquisition of FSA.

Step five: Final Crown decision

39. The No 3 Bill provides that the Crown may decide not to acquire an FSA where it is not satisfied with the amount of compensation to be paid or likely to be paid. This decision must be notified in writing and the notice must be given no later than a date prescribed in Regulations.

40. We recommend the Crown must notify the investor within 30 working days from the point at which the compensation assessment is provided to the Minister for Land Information. This is the same as the timeframe for decision-making in the current Regulations and balances the need to give Ministers with sufficient decision-making time with that to give certainty to owners.

[2] The Land Valuation Tribunal has a $50 filing fee and $900 court fee if it proceeds to a hearing.

Step six: Crown acquisition

41. If the Crown proceeds with acquiring the FSA, it does so in line with the set of standard terms of acquisition agreed in step two and for the compensation agreed in step four. The land is then surveyed and vested in the Crown, with new titles issued for both the FSA and the overseas investor's remaining land.

42. The No 3 Bill provides that the Registrar-General of Land can require a survey in order to issue titles. We recommend that the Regulations provide that the survey will be carried out in accordance with rules made under Part 5 of the Cadastral Survey Act 2002. This legislation enables the Surveyor-General to specify different standards of survey for different classes of land. For example, the current Rules for Cadastral Survey require the value of the land and its intensity of use to be assessed when considering the appropriate level of accuracy for a water boundary.

43. This legislation provides sufficient flexibility as to how a survey is carried out and prescribes different rules for different classes of land, in line with Cabinet's direction for the Surveyor General of Lands to create "light touch" survey standards for the purpose of FSA [DEV-19-MIN-0306 refers].

44. Consistent with current practice, we recommend that the Crown be responsible for meeting the cost of any survey required to issue titles.

Management of ad medium filum aquae rights

45. The *ad medium filum aquae* (AMF) principle is that under common law, ownership of land adjoining a watercourse which is not owned by the Crown, is presumed to extend to the middle line.[3] AMF fresh and seawater areas arise where land being purchased by an overseas investor contains a waterway that bounds a property owned by someone else.

46. The beds of navigable rivers are vested in the Crown by statue and are held as Crown land under the Land Act 1948. Where there is no other interest in a non-navigable river, the bed would also be held by presumption as Crown land under the Land Act 1948.

47. Officials recommend clarifying, for the avoidance of doubt, in the Regulations that AMF riverbeds will also be managed as Crown Land under the Land Act 1948. This aligns the management of AMF riverbeds with interior lakebeds and riverbeds under the No 3 Bill and other riverbeds already held by the Crown.

Next Steps

48. If you agree to the recommended amendments, we will provide you with a draft Cabinet Legislation Committee (LEG) paper later in 2021, for consideration by LEG ahead of the provisions taking effect six months after the No 3 Bill receives Royal Assent (expected December 2021/January 2022).

[3] The *ad medium filum* principle is that by the common law, ownership of land adjoining a watercourse which is not owned by the Crown, gives rise to the presumption that title extends to the middle line. However, this is a rebuttable presumption – that is, evidence to rebut (disprove) the presumption is always admissible.

Annex One: Standard terms of acquisition

1. We recommend that the standardised terms include the following:

    a. Confirm how the acquisition will be completed and what legislation the FSA will be administered under once acquired (this will vary depending on the type of FSA).

    b. State that, where vesting via Gazette notice is required, the FSA will be surveyed prior to the notice being issued, and set out the requirements and responsibilities of the parties with regard to lodging of the cadastral survey dataset with LINZ.

    c. Specify who pays the cost of survey.

    d. Set out conditions under which the agreement may be varied or terminated.

    e. Cover the following obligations:

        - obligation on owner not to wilfully or negligently damage the FSA
        - access to the FSA by the owner and the Crown
        - liability for fencing between the FSA and the adjoining land
        - responsibility for payment of rates, levies, charges, etc. imposed by local or other authorities.

    f. Set out how legal costs in relation to the negotiation, preparation, and execution of this agreement will be apportioned between the parties.

    g. Set out the health and safety obligations of the parties.

    h. Include provisions for resolving any dispute which may arise between the parties concerning the interpretation of the agreement or relating to any other matter arising under this agreement.

    i. Any other relevant terms and conditions.

Annex Two: Proposed FSA compensation formula

The recommended formula creates a proxy for the value of FSA (see Box One). This is because FSA are not sold on the open market, so there is no reliable sales data to use as a basis for their valuation. The proxy value is then multiplied by a 'loss factor', which is intended to reflect the nature and extent of the owner's loss.

Box One: FSA compensation formula

Proxy FSA value (Area (in hectares) of FSA * average rateable value (per hectare)) of land in vicinity of FSA)

* **% loss factor**

= **compensation amount.**

Below we make recommendations for each of the components of this formula, which includes:

- Determining the FSA's area;
- average rateable value of land in vicinity of FSA, and
- loss factor.

Area of FSA:

To balance the accuracy of the assessment against the costs and delays associated with more intensive survey processes, we recommend the Regulations allow for the use of computer desktop assessment methods (e.g. using existing survey data, aerial photographs and other visual and documentary sources). These may be supplemented by inspection by a licensed cadastral surveyor, but only where necessary. In such cases, all costs associated with the inspection and reporting of the results will be met by the Crown.

Average rateable value of land in vicinity of FSA:

To ensure that compensation is fair and defensible we recommend the Regulations allow for the Valuer-General to, at the unconditional sale and purchase date of the land in question, use the following methods to calculate the rateable value (per hectare) of the land in the vicinity of the FSA:

- For riverbed and lakebed: using a dollar per hectare analysis of comparable rating values for pastoral properties in the Territorial Authority Area.[4] If there are no pastoral properties in the Territorial Authority Area, then the rateable value of those in the adjacent Territorial Authority Area will be considered.
- For marine and coastal areas: using a dollar per hectare analysis of comparable rateable values for conservation land in the vicinity of the property (to minimise the skewing effect of high market value residential coastal properties).

[4] A territorial authority is defined under the Local Government Act 2002 as a city or district council.

Loss factor:

To reflect the loss suffered by the owner, we recommend incorporating a 5% 'loss factor' into the formula. The level at which this factor is set will influence the level of compensation provided:

- A high loss factor (e.g. of 90%) would imply significant loss as it would compensate the owner with the full proxy value of the FSA.

- A low loss factor (e.g. of 1%) would imply negligible loss as it would compensate the owner with a tiny proportion of proxy value of the FSA.

Given the lack of data available to help us determine the loss factor, the 'loss factor' to be adopted is ultimately a judgement call. Informing our recommendation was advice from LINZ and the Valuer-General on the extent to which the Crown's acquisition of the riverbed, lakebed, marine or coastal area would reduce, in practice, the owner's ability to use and enjoy the FSA or surrounding land. As part of our analysis, we considered issues such as access, operations (e.g. farming, forestry), privacy, exclusivity and amenity values.

Based on this consultation, we concluded that in most cases, the loss of the FSA would not have a significant impact on the owner's ability to use and enjoy the FSA or surrounding land. Crown ownership will not ordinarily prevent the owner from accessing the FSA, or from undertaking farming, forestry, or other operations on it or on the surrounding land (though it may require the owner to apply for an easement e.g. to secure access). Nor would it undermine the FSA's amenity value. In fact, Crown ownership of the FSA may offer amenity and operational benefits to the owner of the surrounding land, as the Crown (rather than the owner) will be responsible for the management of the FSA.

However, we also recognise that in a small minority of cases, owners may experience a more significant impact. For example, where a private beach becomes Crown-owned, owners may suffer from a loss of privacy and/or exclusivity. While the available data is insufficient to enable us to predict how frequently such outlier cases may arise, we do know that since 2017, only 4.8% of FSA offered to the Crown have involved marine and coastal area, while 65.1% have involved rivers.