

The Treasury

Overseas Investment Act Phase Two - Tranche Three Information Release

June 2022

This document has been proactively released by the Treasury and the Associate Minister of Finance (Hon David Parker) 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:

- [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 [35] appearing where information has been withheld in a release document refers to section 9(2)(g)(ii).

Copyright and Licensing

Cabinet material and advice to Ministers from the Treasury and other public service departments are © **Crown copyright** but are licensed for re-use under **Creative Commons Attribution 4.0 International (CC BY 4.0)** [<https://creativecommons.org/licenses/by/4.0/>].

For material created by other parties, copyright is held by them and they must be consulted on the licensing terms that they apply to their material.

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.

Treasury Report: Draft Cabinet paper: “Overseas Investment (Fresh or Seawater Areas and Time Frames) Amendment Regulations 2021”

Date:	28 September 2021	Report No:	T2021/2311
		File Number:	IM-5-3-8-12

Action sought

	Action sought	Deadline
Minister of Finance (Hon Grant Robertson)	Note the contents of this report.	N/A
Associate Minister of Finance (Hon David Parker)	<p>Provide feedback, if any, on the draft Cabinet Legislation Committee (LEG) paper, regulations and Order in Council.</p> <p>Agree to technical changes to the regulations that were raised during the drafting process</p> <p>Agree to consult your colleagues on the draft Cabinet paper and regulations before lodging with LEG on 14 October for consideration by that Committee on 21 October.</p>	4 October 2021

Contact for telephone discussion (if required)

Name	Position	Telephone	1st Contact
Sarah Key	Senior Analyst, International [39]	N/A (mob)	✓
Thomas Parry	Manager, International	[35]	

Minister’s Office actions (if required)

Return the signed report to Treasury.

Note any feedback on the quality of the report

Enclosure: Yes (attached)

Treasury Report: Draft Cabinet paper: “Overseas Investment Amendment Regulations 2021 (No 3)”

Purpose of Report

1. This report provides you with the draft Cabinet paper “Overseas Investment (Fresh or Seawater Areas and Time Frames) Amendment Regulations 2021” and associated regulations, for consideration by the Cabinet Legislation Committee (LEG). These amendments to the Overseas Investment Regulations 2005 (the Regulations) are necessary to operationalise final elements of the Overseas Investment Amendment Act 2021 (the Amendment Act) when these commence on 24 November 2021, specifically:
 - a statutory timeframes
 - b the acquisition of fresh and seawater areas, and
 - c a technical change to delete a redundant fee amount in the principal regulations.
2. In addition, the draft Cabinet paper seeks agreement to submit the Overseas Investment Amendment Act 2021 Commencement Order (Benefit Test and Fisheries) 2021 to the Executive Council to bring the new Benefit to New Zealand test into force on 24 November 2021.
3. This report seeks your (Minister Parker’s):
 - a agreement to recommend that the new Benefit to New Zealand test come into force on 24 November 2021
 - b agreement to technical changes that were raised during the drafting process
 - c feedback on the draft Cabinet paper, regulations and Order in Council
 - d agreement to consult with your colleagues on the draft Cabinet paper, and
 - e agreement to lodge the paper, subject to any requested changes, on 14 October ahead of consideration by LEG on 21 October 2021.
4. Suggested talking points and additional background information to support the introduction of the paper at LEG are attached at **Annex 1**.

Background

Statutory timeframes

5. As part of the Phase Two reform of the Overseas Investment Act 2005 (the Act), Cabinet agreed to introduce timeframes that will apply to consent applications made under the Act [DEV-19-MIN-0306 refers] and set the framework for statutory timeframes.
6. On 26 March 2021 [T2021/238 refers], under delegation from Cabinet [DEV-19-MIN-0306 refers], you agreed to the remaining design features for statutory timeframes, which will apply to consent applications made under the Overseas Investment Act 2005 (the Act). On 13 September 2021 [T2021/1907 refers], you agreed to recommended statutory timeframes and modifications to associated design features.

Fresh and seawater areas

7. As part of the Phase Two reform, Cabinet also 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]. On 21 May 2021 [T2021/237 refers], under delegation from Cabinet [DEV-19-MIN-0306 refers] you agreed the aspects of the new process that will be prescribed in the Regulations.

Extension powers under the regulations

8. [36]

9. [36]

This relates to the proposed extension powers for statutory timeframes and fresh and seawater areas:

Statutory timeframes

- As part of the Phase Two reform, Cabinet had agreed [DEV-19-MIN-0306 refers] that the decision-maker would be enabled to unilaterally extend the statutory timeframe by up to a period prescribed in regulations, or a different period with the applicants' agreement. You subsequently agreed additional design features for this extension power [T2020/228 and T2021/238 refers].²

- [36] we recommend that the regulations instead prescribe all the circumstances under which a time frame will be extended in certain situations, such as where a significant amount of new information is received late in the application process. Cabinet approval is needed for this change as it differs from Cabinet's 2019 decision, though the practical effect for applicants will be largely the same.

Fresh and seawater areas

- You previously agreed that the Crown must notify an overseas investor, if it decides against acquiring a fresh or seawater area, within six months of the memorial being registered on the title, which could be extended by an additional six months where the process was complex.³ [36] we recommend that the regulations instead prescribe the full 12 month period for the Crown notifying an overseas investor, and implement the six month standard time frame and extension process through the directive letter.

¹ Fresh and seawater areas are eligible riverbed, lakebed, marine or coastal areas.

² You agreed that the Overseas Investment Office (OIO) would have the ability to unilaterally extend timeframes by up to 30 days, 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) [T2020/228 and T2021/238 refers].

³ The intention was to include guidance on these extensions in the upcoming updated Ministerial Directive Letter [T2021/237 refers].

Fresh and seawater areas – technical clarifications

10. A number of technical issues relating to fresh and seawater areas were raised during the regulation drafting process. Our recommended approach to addressing these issues is provided in **Annex 2**.

Further upcoming changes to the regulations

11. The prescribed terms of acquisition, and terms of the water areas covenant are not included in this version of the regulations as officials are still working through these matters.

Timing of the Benefits to New Zealand Test

12. The revised Benefit to New Zealand test is to come into force on a date appointed by the Governor-General by Order in Council or, if not earlier brought into force, 24 May 2022 (one year after the date on which the Amendment Act received the Royal assent).
13. We recommend that the revised Benefit to New Zealand test come into force on 24 November 2021, at the same time as the other remaining Phase Two changes. The draft Cabinet paper seeks approval for an Order in Council for this. The Order in Council includes corresponding amendments to the Fisheries Act 1996 to align the overseas investment fishing provisions with the changes made to the Overseas Investment Act 2005.
14. This timing will put some pressure on the Overseas Investment Office (OIO) by requiring them to implement the policy in a shorter period of time, while balancing other significant policy and operational changes. However, on balance, the Treasury and the OIO both consider that the following benefits of having the test come into force on 24 November outweigh those potential costs:
 - a the coherence of having all remaining Phase Two reform changes come into force at the same time (rather than, for example, timeframes for transactions involving the revised benefits test coming into force later than other timeframes)
 - b the revised benefits test simplifies the existing test for applicants and is intended to generate efficiencies (though they may not be seen immediately). Having the test come into effect earlier will result in any savings being realised earlier, and
 - c the Legal Reference Group supports this timing.

Next Steps

15. We will reflect your feedback, if any, in an updated version of the LEG paper and provide it to you in early October for Ministerial consultation.
16. To ensure that these amendments are in place in time for the entry into force of the Act, we recommend that you agree to lodge the paper to LEG (subject to your feedback being incorporated) on 14 October 2021, for consideration by LEG on 21 October 2021.

Recommended Action

We recommend that you:

a [36]

b **agree** that the regulations prescribe that the Crown must notify an overseas investor if it decides against acquiring a fresh or seawater area, within twelve months of the memorial being registered on the title, and implement the six month standard time frame and extension process through the upcoming updated Ministerial Directive Letter.

Agree/disagree.

c **agree** that the regulations relating to statutory timeframes prescribing the circumstances under which a time frame will be extended in certain situations, such as where a significant amount of new information is received late in the application process.

Agree/disagree.

d **agree** to clarify a number of technical issues that were raised during the regulation drafting process, discussed at paragraph 13 above.

Agree/disagree.

e **agree** to recommend that the new Benefit to New Zealand test come into force on 24 November 2021.

Agree/disagree.

f **provide feedback**, if any, on the attached draft Cabinet paper “Overseas Investment (Fresh or Seawater Areas and Time Frames) Amendment Regulations 2021”, regulations and Order in Council.

g **agree** to consult on the draft Cabinet paper with your colleagues.

Agree/disagree

- h **agree** to lodge the paper to LEG (subject to your feedback being incorporated) on 14 October, for consideration by that Committee on 21 October 2021.

Agree/disagree

Thomas Parry
Manager, International

Hon Grant Robertson
Minister of Finance

Hon David Parker
Associate Minister of Finance

Annex 1: Suggested talking points and additional detail

Suggested talking points

- On 24 May, the Overseas Investment Amendment Act 2021 (the Amendment Act) received Royal assent and commenced on 5 July 2021.
- The Amendment Act's passage marks the substantive conclusion of our Government's work to reform New Zealand's investment screening regime. The Amendment Act significantly streamlines the regime to better facilitate productive, sustainable investment, while introducing new protections for important assets like farmland.
- I am seeking LEG's agreement to regulations that reflect decisions I have made under delegation to implement:
 - statutory timeframes, and
 - the acquisition of fresh and seawater areas.
- The amendments are necessary to operationalise final elements of the Act when these commence on 24 November 2021.

Additional detail on the regulations relating to statutory timeframes

Recommended timeframes

- The statutory timeframes are informed by the Overseas Investment Office (OIO)'s work to meet a set of provisional timeframes during a four-month trial period. The recommended timeframes best balance the need to be realistic yet ambitious. The timeframes represent a significant improvement for applicants.

Supporting the OIO to meet the statutory timeframes

- The recommended timeframes are, consistent with the broader objectives of the Phase Two reform of the Act, ambitious and will be challenging for the OIO to meet. They are a powerful tool to further facilitate the cultural change that has been underway within the organisation for several years, with the goal of focussing the OIO's resources on higher-risk transactions, with lower risk transactions subject to comparatively lower scrutiny.
- The Government could further support the OIO to achieve ambitious timeframes by clearly articulating what it sees as the higher and lower risk areas. The upcoming updated Ministerial Directive Letter will outline in general terms that the Government presumes that without extraordinary evidence to the contrary, all transactions other than those involving farmland, strategically important businesses or investment by non-New Zealand government investors are lower risk and should not have excessive resources dedicated to processing them.
- It may be difficult for the OIO to consistently meet these timeframes during the transitional bedding-in period of 12 months. This is due to the OIO operationalising significant changes to the Act at the same time as timeframes commence.

- I intend to publicly communicate these barriers to consistently meeting these timeframes during the 12-month bedding-in period through the Ministerial Directive Letter, as well as my expectation that, beyond that time, performance will improve.

Additional detail on the regulations relating to the acquisition of fresh and seawater areas

- 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 fresh and seawater areas (FSAs) – currently known as ‘special land’ – contained in sensitive land. The Act provides a framework for the new process and allows for the detail to be provided in in the Regulations.

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.

Compensation assessment

- Compensation to overseas investors for their loss of land will be assessed using a formula based on a proportion (5%) of the average rateable value of land in the vicinity of the fresh or seawater area.
- A 5% loss factor (that is, in general terms, compensation will equal 5% of the average rateable value of land in the vicinity of the fresh or seawater area) 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, this is an important area to monitor and potentially revisit in the future to ensure the loss factor is appropriate.
- In contrast, third parties’ compensation will 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.

- Mediation is the most suitable initial process to resolving disputes about the sum of compensation, 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.

Annex 2: Fresh and seawater areas – technical clarifications

1. A number of technical issues relating to fresh and seawater areas were raised during the regulation drafting process. We recommend these be addressed as follows:
 - a Claims for compensation be available for 2 years after the Crown gives notice to the potential claimant about their entitlement to claim. This is in line with the period for claims under the Public Works Act.
 - b The Crown be required to notify the overseas investor if it decides against acquisition the fresh or seawater area, within 30 working days of notifying the owner of the amount of compensation to be paid. This is framed slightly differently to officials' advice in T2021/237 [rec m refers], although the timing should be effectively the same.
 - c Mediation be available for 20 working days after the last day the Minister can make the decision on whether or not to acquire the fresh or seawater area.