

The Treasury

Overseas Investment Act Phase Two - Tranche Three Information Release

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Cabinet Document Details

Title: **Cabinet Paper: LEG-21-SUB-0166: Overseas Investment (Fresh or Seawater Areas and Time Frames) Amendment Regulations 2021]**

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Chair

Cabinet Legislation Committee

Overseas Investment (Fresh or Seawater Areas and Time Frames) Amendment Regulations 2021

Proposal

- 1** This paper seeks authorisation for submission to the Executive Council of the:
 - 1.1** Overseas Investment (Fresh or Seawater Areas and Time Frames) Amendment Regulations 2021 (the 'Amendment Regulations'), which amend the Overseas Investment Regulations 2005 ('the Regulations'), and
 - 1.2** the Overseas Investment Amendment Act 2021 Commencement Order (Benefit Test and Fisheries) 2021 to bring the new Benefit to New Zealand test into force on 24 November 2021.

Policy

- 2** The Amendment Regulations give effect to Cabinet's policy decisions and implement further decisions I have made under delegated authority [DEV-19-MIN-0306 refers]. The amendments are necessary to operationalise final elements of the Overseas Investment Amendment Act 2021 (the Amendment Act) when these commence on 24 November 2021 and fall into two categories:
 - 2.1** statutory timeframes, and
 - 2.2** the acquisition of fresh and seawater areas. These are areas of riverbed, lakebed, seabed or marine area that would otherwise pass into overseas ownership as part of a transaction where an overseas entity is acquiring adjacent land.
- 3** In addition, this paper seeks authorisation to submit an Order in Council to the Executive Council to bring the new Benefit to New Zealand test into force on 24 November 2021.

Background

- 4** The Government's 'Phase Two' reform sought to strengthen how the Overseas Investment Act 2005 (the OI Act) manages foreign investment risks and simplify the screening process for sustainable and productive investment. The review resulted in two Amendment Acts:

- 4.1 the Overseas Investment (Urgent Measures) Amendment Act 2020, which received Royal assent on 2 June 2020, and
- 4.2 the Overseas Investment Amendment Act 2021, which received Royal assent on 24 May 2021, and commenced on 5 July 2021.

Statutory timeframes

- 5 As part of the Phase Two reform of the OI 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 I propose amending the Regulations to give effect to these statutory timeframes and associated design features.
- 7 The proposed statutory timeframes outlined are informed by the Overseas Investment Office (OIO)'s work to meet a set of provisional timeframes during a four-month trial period. The proposed timeframes best balance the need to be realistic yet ambitious. The timeframes represent a significant improvement for applicants.
- 8 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.

Technical change

- 9 As part of the Phase Two reform, Cabinet 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. [36]
- 10 [36] I propose that the regulations prescribe the circumstances under which a time frame will be extended, such as where a significant amount of new information is received late in the application process, [36]

Fresh and seawater areas

- 11 As part of the Phase Two reform, Cabinet agreed to clarify and streamline the process by which the Crown acquires fresh and seawater areas (FSA)¹ – currently known as 'special land' – included in investments in sensitive land [DEV-19-MIN-0306 and DEV-20-MIN-0066 refers].
- 12 The current process for offering special land to the Crown is complex, costly and time-consuming, and for this reason, the Crown has not yet been able to gain ownership of any special land it has been offered. The OI Act now clarifies that offering FSAs to the Crown will be mandatory for all sensitive land and I propose that the Regulations be amended to prescribe aspects of the new streamlined process.

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

Technical change

- 13** Since Cabinet agreed to clarify and streamline the process, I have agreed to a technical change to make transactions in FSAs less costly and time-consuming. Rather than the Crown placing a memorial on the title of the fresh or seawater area to protect its ability to acquire the land, as originally proposed, this process will now be undertaken by the consent holder in accordance with the provisions in Schedule 5 of the Act and the associated Regulations.

Timing of the Benefit to New Zealand Test

- 14** 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).
- 15** The revised Benefit to New Zealand test simplifies the current benefit to New Zealand test, reducing the 21 narrowly framed factors to 7 less prescriptive factors, and removes the theoretical elements of the test which reduce investor certainty and can slow application processing.
- 16** I propose 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 and consequently seek 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.
- 17** This timing will put some pressure on the 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, I consider that the following benefits of having the test come into force on 24 November outweigh those potential costs:
- 17.1** 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)
- 17.2** 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
- 17.3** the OIO's Legal Reference Group, made up of practitioners that regularly engage with the Act, supports this timing.

Timing and 28-day rules

- 18** A waiver of the 28-day rule is not sought for these regulations.

Compliance

- 19** On the basis that the Amendment Regulations do not materially differ in intention from the Amendment Act which gives effect to Cabinet's decisions in relation to the Phase 2 reform of the OI Act [DEV-19-MIN-0306 refers; CAB-19-MIN-0593 confirms], I consider the Amendment Regulations comply with:

- 19.1** the principles of the Treaty of Waitangi;
 - 19.2** the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
 - 19.3** the principles and guidelines set out in the Privacy Act 1993,
 - 19.4** relevant international standards and obligations, and
 - 19.5** the Legislation Guidelines (2018 edition), which are maintained by the Legislation Design and Advisory Committee.
- 20** The Amendment Regulations are made pursuant to sections 37B and 61 and clause 22 of Schedule 5 of the OI Act.

Consultation

- 21** This paper was developed in consultation with Toitū Te Whenua Land Information New Zealand (Policy and Overseas Investment Office).

Regulations Review Committee

- 22** We do not consider that there will be grounds for the Regulations Review Committee to draw the Regulations to the attention of the House under Standing Order 327.

Certification by Parliamentary Counsel

- 23** Parliamentary Counsel Office has certified the Amendment Regulations as being in order for submission to Cabinet.

Impact Analysis

- 24** A Regulatory Impact Statement (RIS) was prepared in accordance with the necessary requirements and was submitted at the time approval was sought for the policy relating to the Bill [CAB-19-MIN-0593 refers]. The RIS was then updated to reflect policy decisions made by the Associate Minister of Finance (Hon David Parker) under authorisation from DEV.
- 25** The Regulatory Quality Team at the Treasury found that the both the original and updated RIS partially meets the quality assurance criteria. The key reason for the panel's assessment is that the proposal regarding moving the rural land directive to primary legislation do not meet the consultation requirements. This proposal had not been consulted on publicly, or with key non-Crown stakeholders, including Māori. The proposals regarding special land acquisition also contained some features that had not been subject to public consultation.
- 26** A technical change was made to make transactions in special land (to be known in future as fresh and seawater areas) less costly and time-consuming. Rather than the Crown placing a memorial on the title of the fresh or seawater area to protect its ability to acquire the land, as originally proposed, this process will now be undertaken by the consent holder in accordance with the provisions in Schedule 5 of the Act and the associated Regulations. This change diverges from the Cabinet decision but had not been included in the updated RIS because it is technical and will have a minor impact on regulated parties.

Proactive Release

- 27 I propose to release this paper proactively in whole, subject to redaction as appropriate under the Official Information Act 1982, within 30 business days.

Recommendations

I recommend that the Cabinet Legislation Committee:

- 1 **Note** that Cabinet delegated authority to me, as Associate Minister of Finance to make decisions on additional policy or drafting issues [DEV-20-MIN-0066 refers; CAB-20-MIN-0212 confirms].
- 2 **Note** that pursuant to that delegated authority, I propose to make the following amendments to give effect to:
 - 2.1 statutory timeframes, by setting the timeframes and associated design features, and
 - 2.2 fresh and seawater areas acquisitions, by clarifying and streamlining the process by which the Crown acquires fresh and seawater areas.
- 3 **Authorise** the submission of the Overseas Investment (Fresh or Seawater Areas and Time Frames) Amendment Regulations 2021.
- 4 **Authorise** the submission of the Overseas Investment Amendment Act 2021 Commencement Order (Benefit Test and Fisheries) 2021.

Authorised for lodgement

Hon David Parker

Associate Minister of Finance