

The Treasury

Overseas Investment Act 2005 – Phase One Review Policy Advice (2017/18) Information Release

March 2019

This document has been proactively released by the Treasury on the Treasury website at <https://treasury.govt.nz/publications/information-release/overseas-investment-act-review-phase-one>

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
- [2] 9(2)(a) - to protect the privacy of natural persons, including deceased people
- [3] 9(2)(f)(iv) - to maintain the current constitutional conventions protecting the confidentiality of advice tendered by ministers and officials
- [4] 9(2)(g)(i) - to maintain the effective conduct of public affairs through the free and frank expression of opinions
- [5] 9(2)(h) - to maintain legal professional privilege
- [6] 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

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.

Treasury Report: Overseas Investment Amendment Bill - Residential land - Departmental Report

Date:	5 April 2018	Report No:	T2018/931
		File Number:	IM-5-1-1-1

Action Sought

	Action Sought	Deadline
Minister of Finance (Hon Grant Robertson)	Note contents of this report.	Wednesday 11 April 2018
Associate Minister of Finance (Hon David Parker)	Agree the recommendations in this report. Provide feedback on the Departmental Report.	10:00am Monday 9 April 2018.

Contact for Telephone Discussion (if required)

Name	Position	Telephone		1st Contact
Robbie Taylor	Senior Analyst	[6]	N/A (mob)	✓
Thomas Parry	Team Leader, Overseas Investment	[6]	[6]	

Actions for the Minister's Office Staff (if required)

Return the signed report to Treasury.

Note any feedback on the quality of the report

Enclosure: Yes (attached)

Treasury Report: Overseas Investment Amendment Bill - Residential land - Departmental Report

Executive Summary

We provide a draft of the Treasury's Departmental Report on the Overseas Investment Amendment Bill (Bill) for your comment. The written Departmental Report needs to be provided to the Finance and Expenditure Committee (Committee) on 9 April and will be presented in person to the Committee by officials at 10:00am on 11 April.

The Departmental Report recommends changes to the Bill consistent with Cabinet's recent decisions in CAB-18-MIN-0118. It also recommends a range of drafting and technical changes intended to enhance the Bill's delivery of the Government's objectives.

Minority and indirect interests

One outstanding substantive issue is the treatment of minority and indirect interests in residential land.

Transactions requiring consent include the acquisition of direct and indirect interests in companies that own sensitive land (as opposed to direct investments in land itself). Acquisitions can require consent regardless of the size of shareholding acquired, where the specific acquisition takes the company that owns sensitive land over the 25% overseas ownership threshold.

The benefit to New Zealand consent pathway will often be most appropriate for investors in these circumstances, and the on-sell mandatory condition will then often apply. That condition being mandatory may give rise unintended impacts on investment flows into New Zealand, result in undesirable impacts on New Zealand's image overseas, and prevent normal commercial activity that does not affect the residential housing market.

Examples of normal commercial activity that does not affect the residential housing market that may not be able to take place under the Bill as drafted are:

- a ^[1] company taking over a ^[1] listed company, where the ^[1] listed company had an indirect interest in a company that owns residential land in NZ. The NZ interest may be a negligible portion of the international takeover. This upstream change of control, if consented under the benefit to NZ pathway, would likely trigger the on-sell requirement requiring disposal of all residential land in NZ or else disposal of the ^[1] company's interest in the company owning residential land in NZ; and
- a listed company that owns residential land in NZ and is 24% foreign owned, where a share transfer results in further 2% foreign ownership. The investor in the 2% interest would need consent, possibly triggering the on-sell requirement, despite that the acquirer would have a minor interest in the company and would be unable to compel the company to sell all residential land. If the residential land wasn't sold, the 2% interest-holder would need to dispose of its shareholding. In this scenario, the on-sell requirement may disrupt the ordinary transfer of shares and discourage or even prevent direct foreign investment.

Officials recommend allowing the Minister/OIO (as delegated) discretion to waive the on-sell condition for consents granted under the benefit to NZ pathway to mitigate against the potential negative impacts described above. We recommend a discretion for certain acquisitions of indirect and minority direct interests in companies that own residential land, which could be subsequently clarified through the Ministerial Directive Letter.

Alternatives would be to limit the discretion further by specifying that the discretion would apply only where the overseas person takes an interest up to a maximum threshold (which would not address the issue with all upstream changes of ownership) or to take no action.

Other issues

We also provide commentary on changes proposed to the standing consents regime and information gathering powers in this report.

We have not proposed changes to the exemption making powers^[1]

We could add this to the Departmental Report, if requested.

Recommended Action

We recommend that you:

- a **note** that the attached Departmental Report on the Overseas Investment Amendment Bill (Bill) recommends changes to the Bill in response to concerns raised by submitters and additional issues raised by officials;
- b **note** that substantive recommendations are consistent with recent decisions of Cabinet in CAB-18-MIN-0118, except as described below;

Indirect and minority direct interests

- c **note** that officials have identified a further policy design issue with the way the Bill impacts on indirect and minority direct overseas interests in companies that own residential land, which result from the mandatory on-sell condition under the benefits test;
- d **note** officials recommend amending the Bill to address this issue as a failure to do so could give rise to unintended impacts on investment flows into New Zealand, result in undesirable impacts on New Zealand's image overseas, and prevent normal commercial activity that does not affect the residential housing market;
- e **note** that Cabinet authorised you to take decisions on minor policy changes to the Bill to be made through the Treasury's Departmental Report (CAB-18-MIN-0118);
- f **note** that since our initial advice was provided to your office on 4 April 2018, we have developed our thinking on this issue and now recommend a broader discretion than identified in earlier options, which could be subsequently clarified through the Ministerial Directive Letter;
- g **agree** to amend the Bill to introduce discretion for Ministers to relax the mandatory on-sell condition in respect of applications for consent under the benefit to New Zealand pathway where the transaction involves overseas persons:
 - a. taking an indirect or minority direct interest in a company that owns residential land;
 - b. where they are unlikely to exercise a substantial degree of control over the company that owns residential land; and
 - c. on the condition that they will not (or if a company, its relevant individuals with control will not) occupy any of the relevant residential land.

Agree/disagree.

- h **note** that further guidance on when the discretion may be used could be given at a later date via a Ministerial Directive Letter to the OIO;

Other issues

- i **note** that the Departmental Report recommends a number of other changes that are technical in nature;
- j **note** the Departmental Report recommends changes to the standing consent regime in the Bill to simplify and improve the usability of these for residential land;

- k **agree** to make standing consents available under the new non-residential use of residential land and residential uses of residential land incidental to a core business purpose pathways in order to ensure these pathways are effective, while not changing the circumstances in which they can be used;

Agree/disagree.

- l **note** that the Departmental Report recommends limiting the information gathering powers in the Bill in way that differs from the approach outlined in advice provided in T2018/441, in it recommends limiting the threshold for use of the information gathering powers rather than the type of information that can be collected;
- m **agree** to amend the information gathering powers in the Bill in response to concerns raised by the Office of the Privacy Commissioner by limiting the purposes for which information can be gathered under new section 41 to monitoring compliance with, investigating conduct that constitutes or may constitute a contravention or an involvement in a contravention of, and enforce the OIA and the regulations;

Agree/disagree.

- n **note** the Departmental Report does not recommend changes to the exemption making power ^[1]
- o **agree** to consider this Treasury Report and the attached Departmental Report, and provide feedback by 10:00am on Monday 9 April 2018.

Agree/disagree.

Thomas Parry
Team Leader, Overseas Investment

Hon Grant Robertson
Minister of Finance

Hon David Parker
Associate Minister of Finance

Treasury Report: Overseas Investment Amendment Bill - Residential land - Departmental Report

Purpose of Report

1. The purpose of this Treasury Report is to provide you with a final draft of the Treasury's Departmental Report on the Overseas Investment Amendment Bill (Bill). In addition, we provide advice on an outstanding issue that you may wish to resolve through the Departmental Report and provide an overview of other non-substantive changes to the Bill that you may be interested in.
2. Our deadline for finalising the Departmental Report and providing it to the Finance and Expenditure Committee (the Committee) is Monday 9 April 2018. We would be grateful for any comments from you in the Departmental Report by early Monday 9 April 2018. We have been asked to provide an oral presentation on the Departmental Report to the Committee at 10:00am on Wednesday 11 April 2018.

Analysis

3. The Departmental Report recommends changes to the Bill in line with Cabinet's decisions in CAB-18-MIN-0118. It also covers a number of other changes that broadly fall into the following categories:
 - Substantive changes not covered by earlier advice, desired in detail below;
 - Technical enhancements to sharpen the Bill's delivery of the Government's objectives in line with Cabinet's decisions in CAB-17-MIN-0489, CBC-17-MIN-0537 and CAB-18-MIN-0118; and
 - Purely drafting changes.
4. We provide explanation below of the changes recommended in the Departmental Report that you may be interested in but which were not addressed in recent advice to you.

Indirect and minority interests

5. Through conversations with the OIO, we have identified a further substantive issue that you may wish to address through the Departmental Report. The issue is explained below.

Issue

Context and Problem

6. The OIA covers the acquisition of interests (direct and indirect) in companies that own sensitive land, as well as direct acquisitions of sensitive land. Those interests in companies that own sensitive land may be small; consent is required:
 - for an overseas person to acquire or increase an interest of 25% or more; but also
 - for acquisitions of smaller interests where the particular investment, however small, takes the company over the 25% foreign ownership threshold.

7. Overseas persons seeking to acquire smaller or indirect interests in companies that own sensitive land will typically apply for consent under the benefit to NZ pathway in section 16E.

How do mandatory conditions apply in those cases?

8. Consents (if granted) will be held by the relevant investor, not the company that owns residential land. Conditions apply to that investor's consent.
9. The Bill introduces mandatory conditions to attach to benefit to NZ consents related to residential land. One of the mandatory conditions is a requirement that the relevant residential land be on-sold within a specified time. The Minister (or OIO, as delegated) must apply the on-sell condition to all consents except where, for the duration of the interest:
 - the residential land is used to construct/extend and operate a long-term accommodation facility; or
 - the residential land will not be used for residential dwellings or long-term accommodation facilities.
10. This means the on-sell condition will be mandatory for certain benefit to NZ consents, including all consents where the residential land held is used for residential dwellings.

Problem description

11. Summarising the position above: a mandatory requirement to sell all residential land will apply to certain consents granted to investors in companies that own residential land, regardless of the size of those investments and whether they are direct or indirect.
12. To satisfy the on-sell mandatory condition, either a) the company would have to sell all residential land (which may not be desirable, and which the investor may not be able to control), or b) the investor would have to sell its interest in the company within a specified period.
13. This state of affairs may prevent desirable capital investment in New Zealand and have other unintended and undesirable consequences. Possible other consequences relate to New Zealand's image overseas and preventing normal commercial activity to continue when the activity will not affect the residential housing market.
14. Examples of normal commercial activity that does not affect the residential housing market that may not be able to take place under the Bill as drafted are:
 - a ^[1] company taking over a ^[1] listed company, where the ^[1] listed company had an indirect interest in a company that owned residential land in NZ. The NZ interest may be a negligible portion of the international takeover. This upstream change of control, if consented under the benefit to NZ pathway, would likely trigger the on-sell requirement requiring disposal of all residential land in NZ or else disposal of the ^[1] company's interest in the company owning residential land in NZ; and
 - a listed company that owns residential land in NZ and is 24% foreign owned, where a share transfer results in further 2% foreign ownership. The acquirer of the 2% interest would need consent, possibly triggering the on-sell requirement, despite that the acquirer would have a minor interest in the company and would be unable to compel the company to sell all residential land. If the residential land wasn't sold,

the 2% interest-holder would need to dispose of its shareholding. In this scenario, the on-sell requirement may disrupt the ordinary transfer of shares and discourage or even prevent direct foreign investment.

Options

15. Below we consider options to give the Minister/OIO discretion to waive the on-sell condition for consents granted under the benefit to NZ pathway, to fix the issue raised above. To be clear, the discretion would only apply to benefit to NZ consents over residential land and the specific on-sell condition for those consents.
16. We had previously considered options for two reasonably narrow grounds for discretion. We have developed our thinking on this issue, taking into account agency feedback, and now recommend a broader discretion than identified in earlier options, which could be subsequently clarified through the Ministerial Directive Letter.

Option 1 – status quo

17. The status quo in the Bill may risk undermining international investment in New Zealand companies, plus the other concerns identified above.

Option 2 – wider discretion (preferred option)

18. Option 2 is a wider discretion for the Minister/OIO to waive the on-sell condition for consents granted under the benefit to NZ pathway. Limits to the discretion would include:
 - a The Minister/OIO could only exercise discretion to make the on-sell requirement non-mandatory where the investor applying for consent:
 - i is taking an indirect or minority direct interest in a company that owns residential land;
 - ii is unlikely to exercise a substantial degree of control over the company that owns residential land; and
 - iii will not occupy any of the relevant residential land. If the investor is a company, disposal of the investment would be required if relevant individuals with control of the investor occupied the land.
 - b Further guidance on when the discretion may be used could be given at a later date via a Ministerial Directive Letter to the OIO, if the Minister so wished.

Option 3 – narrow discretion

19. Option 3 is the same as option 2 but with the Minister/OIO's discretion further narrowed to only be available in "exceptional circumstances".
20. Officials do not favour option 3 because the scenarios described in the problem description above are unlikely to be "exceptional", and so this limitation would prevent discretion in many such scenarios. These scenarios are reasonably normal commercial activities but are unlikely to affect the residential housing market or engage the objectives of the Bill.

Additional work to define terms and ensure the intended level of discretion is implemented

21. We will work with PCO to ensure the approved option is implemented as intended and offers no more discretion than intended, or possible avenues for avoidance.

22. The definitions of “direct” and “indirect” interests will be given particular focus. Those terms will be important to the availability of discretion and investors may try to use their definitions to avoid the intention of the OIA (e.g. by structuring companies in an attempt to achieve an indirect rather than direct interest). We will continue to think about options for these definitions, and take into account definitions and mechanisms in similar legislative regimes.

Standing consents

23. There are a number of changes proposed through the Departmental Report to the standing consents regime established through clause 14 of the Bill. These are as follows:
- Drafting changes to separate standing consents available under the increased housing on residential land pathway from standing consents available under the commitment to reside in New Zealand pathway – these operate in different ways and separating them is intended to simplify the provisions.
 - Amendments to clarify that Ministers can amend and revoke standing consents after they have been issued to ensure that the rights to purchase residential land under standing consents are not abused.
 - Amendments to clarify the circumstances in which standing consents under the increased housing on residential land pathway are available to better reflect earlier advice and decisions by Ministers that these be available for developers that have the required skills and experience to complete residential developments.
 - Amendments to clarify that standing consents under the commitment to reside in New Zealand pathway are available in all circumstances in which normal consents are available under that pathway. This would extend the availability of standing consents available under this pathway to residential land that is already sensitive land under the OIA (provided the investor test is met), in addition to residential land. This is consistent with Cabinet’s decision to make commitment to reside in New Zealand consents available for these types of land (CBC-17-MIN-0537).
24. In addition, we have proposed that standing consents are made available under the new pathways agreed by Cabinet for non-residential uses of residential land and residential uses of residential land that are incidental to core business purposes (CAB-18-MIN-0118). This would not change the circumstances in which those new pathways could be used, or the basis for obtaining consent. However, they would improve the operability of those pathways by allowing investors to seek consent in advance and make unconditional offers on residential land.

Information gathering

25. In our Treasury Report on 2 March 2018 (T2018/441), we recommended changes to the new information gathering powers granted to the OIO in the Bill (clause 24) in response to concerns raised by the Office of the Privacy Commissioner that the new powers were too broad.
26. Specifically, we recommended amending the Bill provisions on information gathering powers by providing specificity of the types or nature of the information the OIO could collect and clarify information sharing powers.
27. As a result of subsequent discussions with the Parliamentary Counsel Office and the OIO, we have come to the view that there are risks of narrowing the information gathering powers in the Bill too far. Narrowing the type of the information that can be

gathered too far could make the power less enduring over time and risks the OIO's ability to effectively enforce the OIA.

28. We now recommend changing the threshold for requiring information, rather than the type or nature of the information that could be collected. This would be achieved by amending section 41(1) so that the OIO can require persons to provide information only for the purposes of monitoring compliance with, investigating conduct that constitutes or may constitute a contravention or an involvement in a contravention of, and enforce the OIA and the regulations. This is in contrast with the Bill, which allows information gathering for the purposes of "administering or enforcing" the OIA generally.

[1]

29. [1]

30. Your comments on T2018/587 indicated that you were keen to discuss this with MFAT. As a result, we have not recommended changes to the exemption making powers in the Bill in the Departmental Report.