

The Treasury

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

March 2019

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Treasury Report: Treasury Report: Statement of Reasons - Exemptions to be made under the Overseas Investment Act 2005

Date:	7 August 2018	Report No:	T2018/2212
		File Number:	IM-5-1-1

Action Sought

	Action Sought	Deadline
Minister of Finance (Hon Grant Robertson)	Note this report.	
Associate Minister of Finance (Hon David Parker)	<p>Agree to amend the technical Supplementary Order Paper lodged last week to allow class and individual exemptions to be granted in respect of the acquisition of residential land, where this required as a condition of consent under the Resource Management Act.</p> <p>Agree to the Statement of Reasons outlining your reasons for recommending the exemption regulations.</p>	<p>For the technical SOP: By tomorrow, Wednesday 8 August, so that an amended SOP can be lodged with the Clerk by the end of tomorrow, ahead of Committee of the Whole's consideration of the Bill on Thursday, 9 August.</p> <p>For the Statement of Reasons: By Wednesday 14 August, prior to LEG's consideration of the proposed exemptions to be made in the Overseas Investment Amendment Regulations 2018.</p>

Contact for Telephone Discussion (if required)

Name	Position	Telephone	1st Contact
Ryan Walsh	Senior Analyst	[6] n/a (mob)	✓
Thomas Parry	Team Leader International	[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 (iManage) ([Statement of Reasons - OIA Regulations \(Treasury:3979865v3\)](#))

Treasury Report: Treasury Report: Statement of Reasons - Exemptions to be made under the Overseas Investment Act 2005

Executive Summary

Technical Supplementary Order Paper to amend the exemption making power

Following further analysis on changes to the exemption-making power in the Overseas Investment Act Amendment Bill 2018 (the Bill) that were proposed in the technical Supplementary Order Paper (SOP) lodged last week, we have identified a potential issue to bring to your attention.

Under the Bill, as reported back by the Finance and Expenditure Committee (FEC), businesses that are required to purchase residential (but not otherwise sensitive) land to meet conditions imposed on them under a Resource Management Act 1991 (RMA) consent (for example, to purchase buffer land to reduce the impact of noise and/or vibrations on their neighbours), could apply for an exemption from the need to obtain consent to make such purchases under the Overseas Investment Act 2005 (the OIA). This would have been true whether the RMA conditions had been imposed before or after the Bill had commenced. This change to the Bill as introduced responded to submissions by stakeholders, including Oceana Gold (the owner of Waihi mining interests).

There is a transitional exemption in the Bill in respect of the acquisition of residential (but not otherwise sensitive) land required under RMA conditions imposed before the Bill commences. This means that overseas persons that are required to buy residential land as a condition of their pre-existing RMA consent can do so without consent.

However, as a result of your desired changes to the Bill's exemption making power, this will no longer be possible in respect of future RMA consent requirements. This outcome would be inconsistent with:

- the Bill as reported back; and
- advice provided in the Departmental Report to the FEC.

Further, while the 'incidental use' pathway included in the Bill would be available to applicants to facilitate the purchase of such land in most cases after the Bill commences, this would still impose costs on operators. Where the 'incidental use' pathway is not available (because, for example, the operator has significant interests in residential land that it rents to its staff), these costs could be significant.

In light of the above, we judge that removing businesses' ability to gain an exemption from the need to obtain OIA consent to make acquisitions required under RMA conditions imposed after the Bill commences is likely to raise significant concerns among industry – particularly members of the mining sector.

We also believe that an exemption making power to rectify this issue could be appropriately scoped to ensure that it cannot be used to undermine your policy objectives – for example, exemptions could not be made where RMA conditions have been applied with the intention of circumventing the regime. This could be achieved by limiting the exemption to residential land required to be purchased as a condition of RMA consent by a non-residential business.

As such, we recommend that an amendment to the technical SOP be made to:

- ensure that the exemption making powers are broad enough to allow overseas persons to apply for an exemption from the need to obtain consent under the OIA for acquisitions of residential (but not otherwise sensitive) land necessary to comply with RMA conditions imposed after the Bill commences; but
- not so broad that it can be used to grant class or individual exemptions that undermine the policy intent of the regime.

Statement of Reasons

In T2018/1838, we explained the framework in the to-be amended Act for recommending that exemptions be made in regulations, and invited you to consider the reasons for recommending each proposed exemption under the that framework. Following the lodgement of the amended technical SOP and your agreement to the inclusion of additional exemptions in the regulations (for example, to allow the holder of a freehold interest in land to obtain a lesser interest in land without consent), we have subsequently updated the Statement of Reasons (Attachment A) and seek your approval for these to be lodged.

Recommended Action

We recommend that you:

Technical Supplementary Order Paper to amend the exemption making power

- Note** that as a result of changes you sought to the exemption making powers in the Overseas Investment Act Amendment Bill 2018 (the Bill), acquisitions of residential (but not otherwise sensitive) land required to meet the conditions of a consent issued under the Resource Management Act 1991 (RMA) after the Bill has commenced will generally require consent.
- Note** that this outcome is inconsistent with that proposed in the Departmental Report to the Finance and Expenditure Committee on the Bill and what would have been possible under the exemption making power in the Bill as reported back.
- Agree** to instruct the Parliamentary Counsel's Office to prepare an amendment to the technical Supplementary Order Paper (SOP) to allow the Minister to make individual exemptions, or recommend the granting of a class exemption, in respect of the acquisitions of residential (but not otherwise sensitive) land necessary to comply with the requirements under the RMA to support a non-residential business.

Agree/disagree.

Statement of Reasons

- d **note** that the Overseas Investment Act 2005's (the Act) purpose is to acknowledge that it is a privilege for overseas persons to own or control sensitive New Zealand assets by:
- i. requiring overseas investments in those assets, before being made, to meet criteria for consent; and
 - ii. imposing conditions on those overseas investments.
- e **note** that under proposed section 61D of the to-be amended Act, the Minister can only recommend any exemption regulations under proposed section 61B of the Act if the Minister considers that:
- i. there are circumstances that mean that it is necessary, appropriate, or desirable to provide an exemption for any of the matters referred to in section 61BA(a) to (c) - this element has been slightly amended by the technical SOP; and
 - ii. the extent of the exemption is not broader than is reasonably necessary to address those circumstances.
- f **note** that when considering whether to recommend that an exemption be made, the Minister must have regard to the Act's purpose (as described at recommendation a) and may have regard to a number of other factors (outlined in proposed subsection 61D(2)(b)), including – for example – the extent to which a sensitive asset is already held in overseas ownership, as well as any other factors that seem to the Minister to be relevant to the circumstances.
- g **note** that under section 61E(4) of the to-be amended Act, the Minister's reasons for recommending the regulations (including why the exemption is necessary, appropriate, or desirable) must be published together with the regulations.
- h **note** that an exemption for replacement forestry rights has been moved from the Bill into the exemption regulations (as agreed in T2018/1941).
- i **note** that in T2018/1838 you agreed to an exemption for replacement regulated profits à prendre but not for replacement forestry rights.
- j **agree** that, having regard to the purpose of the Act, an exemption to allow an overseas person to acquire a forestry right/s to replace a forestry right/s that was/were on the same key terms and that the overseas person was able to hold (as it had consent, relied on an exemption or acquired it at a time when consent was not required) without consent:
- i. is appropriate and desirable; and
 - ii. is not broader than is reasonably necessary.

Agree/disagree.

- k **agree** to
- a. EITHER confirm the enclosed Statement of Reasons;

Agree/disagree.

- b. OR invite officials to make amendments to the enclosed Statement of Reasons outlining your reasons for recommending the exemption regulations in the Overseas Investment Amendment Regulations 2018 and why you considered each exemption to be appropriate.

Agree/disagree.

Thomas Parry
Team Leader International

Hon David Parker
Associate Minister for Finance

Treasury Report: Treasury Report: Statement of Reasons - Exemptions to be made under the Overseas Investment Act 2005

Purpose of Report

1. The purpose of this report is to:
 - provide further advice on the effect of changes to the exemption-making power that you sought to be made through the technical Supplementary Order Paper (SOP) tabled last week (30 July 2018), and provide options to address these; and
 - seek your agreement to a final set of reasons for making regulations under the new exemption-making power in the Bill, which have now been updated following changes in the technical SOP.

Analysis

Impacts of changes to exemption-making power

2. Following further reflection by officials on changes to the exemption-making power in the Bill that you sought and were proposed in the technical SOP last week, we have identified a potential issue for your attention.
3. The Finance and Expenditure Committee (FEC) received a number of submissions on the Overseas Investment Act Amendment Bill 2018 (the Bill) seeking exemptions from the requirement to obtain consent for the purchase of inhabited “buffer land”. That is, land adjacent to a business’s core operations that a business acquires to protect the neighbouring community from the business’s disruptive effects - for example, noise or vibrations.
4. One prominent submitter on this point was the mining company Oceana Gold – the operator of large gold mines, including the Correnso underground mine in Waihi. Oceana Gold submitted that it was required to purchase residential land under conditions imposed on it under the Resource Management Act 1991 (RMA). It also submitted that it regularly purchased residential land as buffer land to help address its neighbours’ concerns, even where this is not required under its RMA consent. It usually rented these properties out after it had purchased them.
5. Following advice to you in [T2018/441] and decisions by Cabinet [CAB-18-MIN-0118], the Departmental Report to the FEC on the Bill recommended that the submitters’ concerns on these issues be addressed by:
 - a creating a new consent pathway to allow overseas persons to apply for consent to purchase residential land incidental to a core business purpose. This would include, for example, tenanted buffer land;
 - b creating a transitional exemption to allow overseas persons that are required to acquire specified residential (but not otherwise sensitive) land under conditions imposed under the RMA (before the Bill commences) to purchase that land without requiring consent under the Overseas Investment Act 2005 (OIA); and

- c clarify the circumstances in which individual and class exemptions can be made, which would have allowed exemptions to be made for compliance with future RMA conditions.
- 6. The Bill, as reported back, would have implemented all three recommendations summarised above. However, changes made to the Bill's exemption making provisions last week through the technical SOP would prevent future exemptions of the nature desired in (c) above.
- 7. Without change, this limitation in the Bill is likely to be quickly identified. Officials understand from a supplementary submission made by Oceana Gold to FEC and media reporting that Oceana Gold is seeking to extend the lifecycle of its mines in Waihi and will seek new consents, including to mine in new underground tunnels under the Waihi township. There is a good chance that any new consents granted to Oceana Gold (that is, after the Bill commences) would be subject to conditions similar to those contained in its existing consents, including the requirement to purchase some residential land, and these purchases would now likely require consent.

Options

- 8. There are two options to address this situation:
 - a Option 1: Introduce a new SOP amending the technical SOP to allow overseas persons to apply for an exemption from the need to obtain consent to purchase residential (but not otherwise sensitive) land where required to do so under requirements imposed by the RMA to support a non-residential business. This would be a narrowly cast exemption-making power and Ministers (or the Overseas Investment Office, if delegated) would retain the ability to exempt individual overseas persons on a case-by-case basis (or make class exemptions) – that is, Ministers could decline to issue such an exemption if they felt it was outside the intention of the power. For example, if it felt the RMA conditions were imposed to avoid the intention of the OIA (however, this particular scenario is thought to be unlikely).
 - i Achieving this would require an amendment to section 61BA(c) of the technical SOP to add a new matter for which regulations can be made – acquisitions of residential (but not otherwise sensitive) land necessary to comply with the requirements under the RMA to support a non-residential business.
 - b Option 2: Do nothing. This would mean that overseas persons seeking to acquire residential land where required under conditions imposed by the RMA would need to apply for consent under the new pathway created by the Bill, described in paragraph 5(a) above. Standing consents would be available under this pathway, which would mitigate the costs and inconvenience of this option on legitimate applicants.
- 9. Officials recommend Option 1. While amending the technical SOP during the Committee of the Whole House's consideration of the Bill is not best practice, not making an amendment to allow for overseas persons to apply for an exemption from the need for consent has two material risks.
 - a That while it will likely be possible for non-residential businesses buying a few houses as 'buffer land' to obtain consent under the incidental residential use test, it is not clear that this will be the case for businesses that own many houses as buffer land.

- i The incidental residential use test was designed for businesses that are not in the business of being a landlord. That is why under this test consent can only be obtained under this test if the relevant business is not – or is only exceptionally – in the business of using land for residential purposes. As a mining business, for example, grows to own tens or potentially hundreds of houses, and ends up (in some cases) managing a portfolio of rental properties, it may not be able to meet the test’s requirement of “only exceptionally” being in the business of using land for residential purposes. In such scenarios the business would therefore need to receive consent to acquire relevant land under one of the other, more onerous, consent pathways.
- b That, if required to obtain consent under another consent pathway, companies may – due to the conditions attached to those consents – be unable to have houses on buffer land occupied. Given that companies often use such houses to lodge staff, this could negatively affect such companies’ ability to continue to operate and provide jobs in certain regions.

Next steps

- 10. If you agree with our recommended approach (that is, Option 1), this would need to be confirmed by early tomorrow, Wednesday 8 August 2018.
- 11. We would then work with the Parliamentary Counsel’s Office (PCO) to draft a new SOP amending section 61BA of the technical SOP and seek your approval for this to be lodged before the end of tomorrow, in advance of the next sitting of the Committee of the Whole House proposed for Thursday 9 August.
- 12. If you agree with our non-recommended approach (that is, Option 2), no further action is required.

Confirmation of reasons for exemptions

- 13. In T2018/1838 we explained the framework in the to-be amended Act for recommending that exemptions be made in regulations and invited you to consider the reasons for recommending each proposed exemption under that framework.
- 14. Since then, the technical SOP has narrowed the scope of the exemption-making power (to narrow the range of possible exemptions that can be made). However, while the types of exemptions that can be made has been significantly narrowed, the technical SOP only made a small change to the framework for deciding to recommend that exemptions be made. The change is that:
 - a previously you needed to consider that there were circumstances that meant that it is necessary, appropriate, or desirable to provide an exemption from the provisions of this Act;
 - b whereas now the standard is whether it is necessary, appropriate, or desirable to provide an exemption for any of the matters referred to in section 61BA(a) to (c).
- 15. Section 61BA is the new section setting out the purpose of making exemptions, which is:
 - a to provide flexibility where compliance with the Act is impractical, inefficient, or unduly burdensome but where the purpose of the Act can still be substantially achieved through the exemption’s terms and conditions;
 - b to allow for exemptions that are minor or technical; or

- c to allow for exemptions in respect of all certain listed matters.
16. The enclosed Statement of Reasons (Attachment A) has been updated to:
- a reflect the changes made to the exemption-making power by the technical SOP;
 - b modified reasoning regarding the exemption for diplomatic premises, so that the published reasoning does not disclose legal advice about the risk of breaching international obligations and refers more clearly to the new section 61BA;
 - c include reasoning for regulations 54 (exemption for replacement forestry rights) – this exemption has been moved from the Bill into the exemption regulations (as agreed in T2018/1941) and, while reasoning for the similar exemption for replacement regulated profits à prendre was included in T2018/1838, we did not provide the similar reasoning for the exemption for replacement forestry rights;
 - d update reasoning for regulations 55 and 56 (replacement profits à prendre, and freeholder acquiring a lesser interest in land); and
 - e make other minor edits.

Next Steps

17. If you agree with the Statement of Reasons enclosed at Attachment A, we will provide this to PCO so that it can be considered by LEG at the same time as the proposed regulations.
18. Alternatively, if you desire that amendments be made to the Statement of Reasons, provide these to officials in either writing or verbally so that the Statement of Reasons can be updated. This advice must be provided by 14 August 2018, to ensure that it can be lodged with LEG by 16 August 2018.