

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: Treasury Report: Lodgement of Supplementary Order Paper

Date:	10 August 2018	Report No:	T2018/2249
		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)	Agree that the Parliamentary Counsel Office can print the final Supplementary Order Paper (SOP) and that your Office can confirm to the Office of the Clerk of the House that the SOP can be released.	By midday (12pm) on Monday, 13 August , to allow the SOP to be lodged 24 hours before the Committee of the whole House next considers the Bill on Tuesday, 14 August.

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]	[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 (Supplementary Order Paper - attached)

Treasury Report: Treasury Report: Lodgement of Supplementary Order Paper

Executive Summary

This briefing attaches a proposed Supplementary Order Paper (SOP) that gives effect to your decision on 8 August 2018 (T2018/2212 refers) to change the exemption-making power in the Overseas Investment Amendment Bill (the Bill). The change will allow the Minister to make individual exemptions, or recommend the granting of a class exemption, where a non-residential business acquires residential (but not otherwise sensitive) land because it is necessary to comply with requirements imposed under the Resource Management Act 1991. This is targeted at the issue of 'buffer land'.

The SOP also gives effect to the decision you made, via your office, on 9 August 2018 to provide the developers of large apartment complexes (as defined in the Bill with the ability to apply for an exemption from the Overseas Investment Act (for sales from the developer to an overseas person, but no subsequent sales). This exemption will be available if construction has already begun or a significant number of pre-sales have already been made at the date of Royal assent.

Once you have agreed to this SOP, it will be printed by the Parliamentary Counsel Office and provided to the Office of the Clerk of the House, ahead of the next session of the Committee of the whole House's consideration of the Bill. This is currently scheduled for Tuesday, 14 August 2018. The SOP ideally should be lodged at least twenty-four hours in advance of the next session of the Committee, therefore we require your approval to lodge the SOP by 4pm Monday, 13 August 2018.

Recommended Action

We recommend that you:

- a **note** that the attached Supplementary Order Paper (SOP) incorporates your decision to amend the exemption-making power in the Act in accordance with decisions taken in T2018/2212 as well as advice you provided, via your office, on 8 and 9 August 2018 regarding a transitional exemption for large apartment developments.
- b **note** that, as previously advised, there are a number of significant risks associated with extending a transitional exemption to the developers of large apartment complexes at this stage, due both to the limited timeframes available for developing the exemption, and the use of existing fees
- c **agree** that:
 - a. a transitional exemption is created that can only be accessed by developers building a large apartment complex (that is, a multi-storey building with at least 20 dwellings) on residential (but not otherwise sensitive) land where they can satisfy Minister's (or the OIO under delegation) that, prior to the date of Royal assent:
 - i. at least 40 per cent of the units in the apartment complex have been sold off-the-plans (that is, a transaction has been entered into, including conditional agreements); or

- ii. all requirements imposed by or under the RMA necessary to enable the construction of the development have been met and that development works have commenced; and
- b. the exemption will only apply to units over a land area specified as part of the exemption and sold by the developer within five years;
- c. there will be no power for Ministers (or the OIO under delegation) to impose any further conditions on either the developer covered by the exemption or overseas persons that purchase qualifying units; and
- d. the exemption will only apply to the first sale of the unit.

Agree/disagree

- d **agree** that developers will be able to apply for the transitional exemption in recommendation c from two weeks following the date of Royal assent until six months after the date of Royal assent;

Agree/disagree.

- e **agree** that the Parliamentary Counsel Office can print the final SOP.

Agree/disagree

- f **agree** that your Office can confirm to the Office of the Clerk of the House that the SOP can be released.

Agree/disagree

Thomas Parry
Team Leader International

Hon David Parker
Associate Minister of Finance

Treasury Report: Treasury Report: Lodgement of Supplementary Order Paper

Purpose of Report

1. We are seeking your approval to print and lodge a Supplementary Order Paper (SOP) to the Overseas Investment Act Amendment Bill 2018 (the Bill), that:
 - a will allow the Minister to make individual exemptions, or recommend the granting of a class exemption, where a non-residential business acquires residential (but not otherwise sensitive) land because it is necessary to comply with requirements imposed under the Resource Management Act (RMA); and
 - b will allow developers of large apartment complexes (that is, multi-storey buildings of at least 20 units) on residential (but not otherwise sensitive) land to apply for an exemption from the requirements of the Overseas Investment Act 2005.

Analysis

Exemption where made to comply with RMA conditions

2. On 8 August 2018 (T2018/2212 refers), you indicated that the exemption-making power in the Bill should be amended to allow the Minister to make individual exemptions, or recommend the granting of a class exemption, where a non-residential business acquires residential (but not otherwise sensitive) land because it is necessary to comply with requirements imposed under the RMA.
3. This change was deemed necessary because, as a result of the narrowing of the Bill's exemption making power in an earlier SOP, it was not clear that such exemptions would be able to be made – despite the Bill as reported back and advice to the Finance and Expenditure Committee in the Departmental Report on the Bill – indicating otherwise.
4. We consider the attached SOP gives effect to your earlier decisions. We judge that it achieves your objectives, while still remaining narrow enough that it cannot be used to undermine the broader screening regime.

The transitional large apartment complex exemption

5. On 8 and 9 August 2018, you – via your Office – requested officials develop a transitional exemption for large apartment developments, which would be available where either a “significant” number of pre-sales have already occurred or construction of the development is already underway.
6. In designing this transitional exemption, we have assumed that a key driver underpinning the proposal is to provide developers that have committed significant costs to the construction of a large apartment complex prior to the regime commencing an ability to obtain an exemption. This may help to avoid the risk that such projects face serious difficulties as a result of the screening regime for residential land coming into force. To achieve this, the exemption will need to provide developers with as much certainty as possible, from the earliest date possible.
7. On this basis the proposed exemption would be available to developers where the relevant project will result in either a new complex with at least 20 units or the

expansion of an existing complex by at least 20 units and can satisfy Ministers (or the OIO under delegation) that either:

- a at the date of Royal assent at least 40 per cent of the units in the apartment complex have been sold off-the-plans (that is, a transaction has been entered into, including conditional agreements); or
 - b all requirements imposed by or under the RMA necessary to enable the construction of the development are met and that “development works” had commenced (which, in line with definitions in the Bill, could include siteworks or earthworks).
8. Requiring developers to make an application to the OIO, rather than undertaking a self-assessment, increases the costs associated with the exemption but reduces the risk of avoidance behaviour.
9. In addition to meeting these requirements to obtain an exemption, we consider that the exemption should be subject to a number of restrictions to avoid the risk of it being used as an opportunity to circumvent the regime. We recommend that:
- a the exemption will only cover units in large apartment complexes that are on a land area specified at the time that the exemption is granted;
 - b relevant developers will have six months after Royal assent to apply for the exemption; and
 - c relevant developers will have five years after Royal assent to sell the units covered by the exemption to overseas persons without them needing to obtain consent. This is recommended to mitigate against the risks of developers increasing the number of units that they will construct and then make available to be sold under the exemption.
10. The exemption should also be limited to the first sale of the unit from the developer to the first holder of the unit (whether off-the-plans or following the development’s completion). That is, any subsequent sales of a unit would be subject to the requirements of the Overseas Investment Act 2005.
11. Finally, to keep costs associated with processing the exemption applications relatively low and create certainty around the exemption’s operation, we recommend that:
- a developers can apply for the exemption from two-weeks following the date of Royal assent;
 - b the exemption can, at the Minister’s (or the OIO’s, under delegation) discretion, be transferred between the original applicant (A) and a different company (or other entity) (B), to ensure that if there was to be – for example – a takeover of the consent holder or a corporate amalgamation, that the exemption would remain in place for the sale of units from B to the first holder of the unit; and
 - c no additional conditions can be imposed on developments that qualify for the exemption by the Minister (or the OIO under delegation).
12. Not having the power to impose ongoing conditions on the development itself means there is some risk that developers qualify for an exemption on existing plans and, for a range of reasons, end up developing either:
- a fewer than 20 units, meaning that they do not meet the definition of a large apartment complex and should not qualify for an exemption (and would not qualify for an exemption certificate once the regime has commenced); or

- b more units than initially planned, allowing them to sell additional units to overseas buyers (within the five-year period of the exemption) without those buyers requiring consent or being subject to ongoing conditions.
- 13. Despite this, given the limited number of developments likely to qualify for the exemption and the importance of creating certainty for applicants, we judge that these risks are outweighed by the benefits of a simple exemption with limited ongoing requirements.
- 14. There are also risks associated with allowing developers to apply for an exemption from two-weeks following the date of Royal assent (which is expected to occur in September 2018), rather than when the regime commences two-months subsequent.
- 15. While, on balance, we believe that it is desirable to be able to quickly provide developers with the certainty they need to market and sell their units to overseas persons after the Bill has passed, it will place significant pressure on the OIO. The Bill currently provides the OIO with two months from Royal assent to prepare for commencement. The OIO has been relying on that two-month period to finalise work to establish the regime and bring new staff on board. Some of these resources will now need to be redirected towards rapidly designing new forms and processes to accommodate this exemption. This may negatively impact on implementation more broadly.
- 16. Also, as the new staff to process applications will not have started at Royal assent, there is also a significant risk that existing applications staff will need to be redirected. If this were the case, current applications may be delayed while these exemptions are dealt with.
- 17. For these reasons, we would not support allowing developers to apply for the exemption from the date of Royal assent. Doing so would introduce considerable risks for both the operation of this exemption and the implementation of the broader regime that we do not believe are outweighed by the slight benefit that developers may receive from being able to apply for the exemption earlier.
- 18. The OIO also notes that, even with a two-week window post Royal Assent, there is also likely to be a risk to the implementation programme by needing to redirect resource, and a risk to current application timeframes if applications staff need to be redeployed.

Fees associated with the exemption

- 19. As communicated to your office on 9 August 2018, a consequence of requiring developers to have to apply to receive an exemption is that they will also be required to pay a fee.
- 20. This is because the OIO operates under a cost-recovery model. Therefore, applicants for an exemption from the requirement for consent will need to pay a fee which reflects, as much as possible, the OIO's costs (including overheads) in processing applications.
- 21. Officials have, under constrained timeframes, considered the range of current pathways for consent applications, as well as the new pathways agreed by joint Ministers, to assess whether the process for assessing this exemption resembles existing (or new) application processes. Officials have also considered whether it might be appropriate to develop a new fee, which would be informed by the level of effort required to process applications as well as volumes.
- 22. We have decided not to attempt to develop a new fee due to the complexities in the calculations and the constrained timeframes. In addition, the number of parties applying under this exemption is likely to be small, with high-level estimates that there will be fewer than 100 developments with the ability to access this exemption.

23. We judge that the expected level of effort required to process applications is broadly equivalent to that required for an exemption under existing Regulation 37/new section 61C (that is, a general application to exempt any transaction, person, interest, right, or assets from the requirement for consent or from the definition of overseas person or associate or associated land) for which a \$25,500 fee is charged.
24. While we recommend that the fee for this new exemption be the same as the fee for those granted under Regulation 37/new section 61C, we acknowledge that there are some differences between those two types of exemptions.
25. In particular, it is proposed that the new exemptions will not be issued with detailed descriptions of the exemption's scope (because that is contained in the Act), or with a range of conditions tailored to the specific project (beyond the land area to be covered and what entity can sell units in the development subject to the exemption).
26. This means that there will likely only be limited ongoing monitoring and enforcement associated with the new exemptions, relative to a more general Regulation 37/new section 61C exemption where a range of additional matters may be addressed. This may mean that the fee to be attached to the new exemption is too high.

Risks

27. Consistent with our advice on 9 August 2018, we do not support the extension of the transitional exemption for large apartment complexes at this stage. We judge that there are significant risks. In particular, because the Parliamentary Counsel Office (PCO) and Treasury have been severely constrained in their ability to deliver a workable SOP in the timeframes:
 - a there may be unintended consequences that undermine the Bill's intent;
 - b there may be arbitrary outcomes that result in the inconsistent treatment of objectively similar projects; and
 - c the transitional exemption may not meet your objectives.
28. Finally, as a result of the judgement that it would not be possible to design a new fee and limited ability to assess the resourcing consequences of the exemption for the OIO with the time available, there is a risk that the OIO will under or over recover costs. This could have two negative consequences:
 - a it would impact on the memorandum account, but this remains a risk for all of the new residential pathways; and
 - b [5]
29. These risks are only somewhat mitigated by the Government's commitment to a complete review of the OIO's fee structure within two years.

Next Steps

30. If approved, PCO will print the final SOP and your Office will confirm with the Office of the Clerk of the House that it can be lodged.
31. This should be completed by 4pm on Monday 13 August, ahead of the Committee of the Whole House's next scheduled consideration of the Overseas Investment Amendment Bill on Tuesday, 14 August 2018.