

The Treasury

Reform of the Overseas Investment Act Information Release

July 2020

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- [2] 6(b)(i) - to avoid prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the Government of any other country or any agency of such a Government
- [4] 6(c) - to avoid prejudice to the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial
- [23] 9(2)(a) - to protect the privacy of natural persons, including deceased people
- [29] 9(2)(d) - to avoid prejudice to the substantial economic interests of New Zealand
- [31] 9(2)(f)(ii) - to maintain the current constitutional conventions protecting collective and individual ministerial responsibility
- [33] 9(2)(f)(iv) - to maintain the current constitutional conventions protecting the confidentiality of advice tendered by ministers and officials
- [34] 9(2)(g)(i) - to maintain the effective conduct of public affairs through the free and frank expression of opinions
- [36] 9(2)(h) - to maintain legal professional privilege
- [37] 9(2)(i) - to enable the Crown to carry out commercial activities without disadvantage or prejudice
- [39] 9(2)(k) - to prevent the disclosure of official information for improper gain or improper advantage

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Treasury Report: Overseas Investment Act Review Phase Two — revised Cabinet paper

Date:	16 October 2019	Report No:	T2019/3229
		File Number:	IM-5-3-8 (Overseas Investment Act Phase Two)

Action sought

	Action sought	Deadline
Hon David Parker Associate Minister of Finance	<p>Note the changes made to the attached Cabinet paper and Regulatory Impact Assessment (RIA).</p> <p>Agree to the attached Cabinet paper and RIA being lodged.</p> <p>Agree to the recommendations made on outstanding issues.</p>	16 October 2019
Hon Grant Robertson Minister of Finance	Note the attached Cabinet paper and RIA	23 October 2019

Contact for telephone discussion (if required)

Name	Position	Telephone	1st Contact
Harry Nicholls	Senior Analyst, International	[39]	N/A (mob) ✓
Megan Noyce	Principal Advisor, International	[39]	N/A (mob)

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: Overseas Investment Act Review Phase Two — revised Cabinet paper

Executive Summary

This report attaches an updated Cabinet paper and Regulatory Impact Assessment (RIA), seeking approval for the second phase of reform to the Overseas Investment Act 2005 (the Act), following ministerial and coalition consultation. It seeks your agreement for the attached Cabinet paper to be lodged with Cabinet Office on Thursday 17 October, in order to be considered by the Cabinet Economic Development Committee (DEV) on Wednesday 23 October.

Changes to the Cabinet paper

In accordance with your feedback, the updated paper includes:

- multiple options for the treatment of special land;

[1]

- the inclusion of land adjoining regional parks exceeding 80 hectares in area in the definition of sensitive land.

Other changes to the Cabinet paper

Treaty of Waitangi implications

Feedback from ministerial consultation requested amendments to this text to better reflect the Crown's Article Two obligations, which have been reflected in the attached Cabinet paper.

[1,36]

[1]

Correction to the investor test proposals

There was an error in one of the recommendations in the report provided to you on 23 September (TR2019/2834 refers). The draft Cabinet paper was corrected prior to being circulated for coalition consultation (as discussed with your office), but we are now seeking your formal agreement to this change to narrow the scope of civil contraventions considered by the investor test from those *punishable* by pecuniary penalties or enforceable undertakings, to those actually *punished* by pecuniary penalties or enforceable undertakings.

Statutory timeframes

In response to feedback from the Minister for Land Information, we have updated the Cabinet paper to note specifically that extensions could be used to deal with complex applications and where necessary to deal with workload pressures during peak periods. This is consistent with decisions you have made previously.

Further advice on special land, consultation concerns, financial implications and implementation timeframes

Special land and Crown pastoral leases

In response to our report of 18 September, you suggested that the special land provisions (including the proposal to include marginal strips) should apply to transactions where an overseas investor is taking an interest in the lease of Crown pastoral land under the Crown Pastoral Land Act. We understand your intention is to facilitate public access to waterways on Crown pastoral land.

While we have reflected your suggestion in the attached draft Cabinet paper, we do not think it is necessary. This is because Part 4A of the Conservation Act already facilitates public access to waterways on Crown pastoral land. Since 1990, the Conservation Act has provided for land alongside special land ('marginal strips') to be excluded from Crown pastoral leases when they are renewed. As these leases are on a 33-year cycle, marginal strips have already been excluded from the majority of pastoral leases.

Consultation concerns

Feedback during ministerial and coalition consultation expressed concern about the lack of consultation with Māori on the changes to the special land provisions and enshrining the rural directive in legislation. This is consistent with our previous advice, but we do not consider it feasible to undertake consultation and report back to Cabinet ahead of the legislation going to Cabinet Legislation Committee (LEG - in late March). It would be possible for us to undertake consultation in February, but any changes resulting to proposed reforms would have to be reflected post-introduction of the Bill.

[31]

Financial implications

The financial implications section of the Cabinet paper has changed and now notes that Cabinet authorised joint Ministers to appropriate an estimated \$17.1 million capital and operating funding to deliver Phase One of the Overseas Investment Act 2005 reform [CAB-17-MIN-0489]. Phase One cost \$13.3m, which was \$3.7m less than estimated.

Rather than funding the first year of Phase Two through a pre-commitment against Budget 2020/21, the paper now seeks agreement to establish a tagged contingency in Vote Lands.

Implementation timeframes

LINZ have recommended a 12 month timeframe for implementation. Further advice on timeframes for implementation and likely phasing will be provided next year as the Bill is finalised for introduction.

Further advice on operationalising the call in power

[1]

[1,33]

Next steps

You may wish to discuss ministerial feedback on Treaty issues and consultation with Māori further with the Ministers for Treaty Settlements, Crown-Māori Relations, and Māori Development.

If agreed by Cabinet on 4 November, we understand the intention is for the Prime Minister to announce the reform package at a post-Cabinet press conference, likely on 11 November. We are working with your office to prepare communications material to support that announcement.

We have copied this advice to the Minister of Finance for his information and future discussion.

Recommended Action

We recommend that you:

- a **agree** to the attached Cabinet paper and Regulatory Impact Assessment (RIA) being lodged with Cabinet Office (with any final decisions made through this report reflected), for consideration at the Cabinet Economic Development Committee on 23 October 2019.

Agree/disagree.

Changes you requested to the Cabinet paper

- b **note** the attached Cabinet paper reflects the following changes you requested:
 - a. multiple options for the treatment of special land;
- [1]
- c. the inclusion of land adjoining regional parks exceeding 80 hectares in area in the definition of sensitive land.

Noted.

Other changes to the Cabinet paper

- c **note** we have reflected in the Cabinet paper feedback from ministerial consultation that the text in the Treaty of Waitangi section should better reflect the Crown's Article Two obligations.

Noted.

[1, 36]

Noted.

[1, 36]

Noted.

- f **note** that the recommendation I(b) agreed by you in the report provided on 23 September (TR2019/2834 refers) contained an error, and should have read "civil contraventions *punished* by pecuniary penalties or enforceable undertaking within the last ten year", rather than punishable. The attached Cabinet paper includes the correct wording.

Noted.

- g **agree** that to limit the scope of the investor test to relevant matters, decision makers should be required to consider “whether the investor has had any civil contraventions *punished* by pecuniary penalties or enforceable undertakings within the last ten years”.

Agree/disagree.

- h **note** that we have made a clarification in relation to statutory timeframes in response to feedback provided by the Minister for Land Information.

Noted.

Updates to the Regulatory Impact Assessment

- i **note** we have made updates to the Regulatory Impact Assessment, responding to your feedback on an earlier draft.

Noted.

Further advice on special land and Crown pastoral leases, consultation concerns, and financial implications

Special land and Crown pastoral leases

- j **agree** that the special land provisions in the Act should not apply to a Crown pastoral lease under the Crown Pastoral Lands Act.

Agree/disagree.

Consultation concerns

- k **note** that feedback during ministerial and coalition consultation expressed concern about the lack of consultation with Māori on the changes to the special land provisions and enshrining the rural directive in legislation.

Noted.

- l **note** officials do not consider it feasible to undertake consultation ahead of the legislation going to Cabinet Legislation Committee (LEG) (in late March). If consultation was to occur later, any changes would need to be made after the Bill has been introduced to Parliament.

Noted.

Potential for a wider review of the Act to prioritise Māori wellbeing

- m **note** that the Minister for Māori Development has provided you with feedback suggesting that a wider review of the Act should be undertaken in the future to prioritise Māori wellbeing.

- n **agree** to make no change to the Cabinet paper in response to this feedback, recognising that the Cabinet paper already notes that a review of the reforms will take place in five years.

Financial implications

- o **note** following consultation with the Minister of Finance, the Cabinet paper seeks agreement to fund the first year of Phase Two (implementation and capital costs), with

Crown funding for ongoing operating costs to be sought by agencies through the Budget process

Noted.

- p **note** that Cabinet authorised joint Ministers to appropriate an estimated \$17.1 million capital and operating funding to deliver Phase One of the Overseas Investment Act 2005 reform [CAB-17-MIN-0489];

Noted.

- q **note** that the design and implementation of Phase One of the Overseas Investment Act 2005 reform cost \$13.316 million, which was \$3.748 million less than estimated

Noted.

- r **note** that Treasury now recommends that the first year of Phase Two funding be sought from the remaining \$3.748 million from Phase One, through establishing tagged contingencies in Vote Lands, as opposed to seeking a pre-commitment against Budget 2020.

Noted.

- s **note** that drawing down on the tagged contingencies established in recommendation [r] will have a corresponding impact on the operating balance and net core Crown debt, which will be offset by the lower than estimated cost of Phase One reforms mentioned in recommendation [q] above

Noted.

- t **agree** that the Cabinet paper should seek to use the remaining \$3.784 million to establish a tagged operating and capital contingencies for the purposes of implementing the first year of Phase Two (estimated at \$2.059 million)

Agree/disagree.

- u **note** that officials will provide advice to joint Ministers on the draw downs to the tagged contingency

Noted.

[1]

[1]

Megan Noyce
Principal Advisor

Hon David Parker
Associate Minister of Finance

Treasury Report: Overseas Investment Act Review Phase Two – revised Cabinet paper

Purpose of Report

1. This report provides you with an updated Cabinet paper and Regulatory Impact Assessment (RIS) with your proposed package for the second phase of reforms to the Overseas Investment Act 2005 (the Act), following Coalition consultation. It seeks your agreement to lodge the updated paper and RIS with Cabinet Office on Thursday 17 October in order for the Cabinet Economic Development Committee (DEV) to consider it on Wednesday 23 October.
2. It outlines several changes you requested that have been incorporated in the updated Cabinet paper:
 - a multiple options for the treatment of special land (the Act's provision for foreshore, seabed, riverbed, lakebed and potentially marginal strips to be offered to the Crown before being sold to an overseas buyer);
 - [1]
 - c including land adjoining regional parks that exceed 80 hectares in area in the definition of sensitive land.
3. It also notes other minor changes made to the Cabinet paper reflecting coalition and ministerial feedback, and other developments, and notes changes made to the RIS.
4. Further advice is provided on special land, consultation concerns, financial implications, implementation timeframes and [1]

Background

5. On 23 September, we provided you with a draft Cabinet paper with your proposed package for the second phase of reforms to the Act (T2019/2834 refers), as well as further advice and decisions on a number of outstanding policy issues. We had reflected our recommended approach to those outstanding policy issues in the draft Cabinet paper.
6. Following your feedback, your office circulated a draft Cabinet paper for ministerial and coalition consultation on Tuesday 8 October, with comments requested by Tuesday 15 October.
7. Your office received feedback from the Green Party, the Minister for Land Information and Conservation (Hon. Eugenie Sage), the Minister of Justice (Hon. Andrew Little), the Minister for Crown-Māori relations (Hon. Kelvin Davis), Minister for Māori Development (Hon. Nanaia Mahuta) and the Minister for State Services (Hon. Chris Hipkins). The Minister of Primary Industries acknowledged receipt of the paper but had no comments.

Changes you requested to the Cabinet paper

Options for special land

8. On Friday 4 October, you directed Treasury officials to include two alternative options for the treatment of special land (foreshore, seabed, riverbed and lakebed) under the Act in the Cabinet paper, prior to coalition and ministerial consultation.

9. The updated paper includes three options for Cabinet to consider:

[1]

c that vendors be required to offer all special land to the Crown as a precondition of sale, [1]

10. As instructed by your office, we have not identified a preferred option in the Cabinet paper.

[1]

Continuing to screen land adjoining regional parks

15. On Tuesday 15 October you directed Treasury officials to include land adjoining regional parks that exceed 80 hectares in area in the definition of sensitive land. The updated Cabinet paper reflects this change.

Minor changes to the Cabinet paper

Treaty of Waitangi implications

References to Treaty of Waitangi implications

16. Feedback from ministerial consultation requested amendments to this text to better reflect the Crown's Article Two obligations. In particular, this feedback noted that when exercising its kāwanatanga/sovereignty, the Crown is required to balance this with other considerations including active protection of Māori rights and interest and participation by Māori in matters of concern to Māori.
17. We have updated the Cabinet paper to reflect this feedback (these changes are highlighted for your attention). If you wish we can make additional changes before the paper is lodged.

[1,36]

[1]

[36]

[1,36]

[1]

Correction of an error in the investor test proposals

25. There was an error in one of the recommendations you agreed to in the report accompanying the draft Cabinet paper (TR2019/2834 refers). The draft Cabinet paper was corrected prior to being circulated for coalition consultation (as agreed with your office), but we are now seeking your formal agreement to this change.
26. The error was in recommendation I(b), which sought to confirm a design detail of the proposals to simplify and streamline the investor test. The second part of this recommendation sought your agreement to require decision makers to consider “whether the investor has had any civil contraventions **punishable** by pecuniary penalties or enforceable undertakings within the last ten years”.
27. This wording would capture a far broader range of civil contraventions than could be considered relevant to an investor’s suitability to invest in New Zealand. The correct wording is, “whether the investor has had any civil contraventions **punished** by pecuniary penalties or enforceable undertakings within the last ten years”. This change will limit the scope of civil contraventions captured to those of the most relevance to an investor’s suitability to invest in New Zealand. This is consistent with the approach agreed for criminal offences.

Statutory timeframes

28. The Minister for Land Information requested a clarification to the language around the ability to extend statutory timeframes in the Cabinet paper. We have updated the Cabinet paper to note specifically that extensions could be used to deal with complex applications and where necessary to deal with workload pressures during peak periods. This is consistent with decisions you have made previously.

Updates to the Regulatory Impact Assessment

29. The updated RIA responds to your feedback on an earlier draft, in particular:
 - a it makes it clear that the policy options must work together as a coherent package of reforms; and
 - b better reflects that, in assessing the extent to which policy options manage the risk of overseas investment to New Zealand’s wellbeing, consideration should be given to the special ownership value many New Zealanders attach to certain types of land.
30. It also includes the assessment statement from the quality assurance panel, which states that the RIA partially meets the quality assurance criteria. The key reason for the panel’s overall assessment being “partially meets” is that some of the special land proposals do not meet the consultation requirements.

Further advice on special land, consultation concerns, [33] and implementation timeframes

Special land and Crown pastoral leases

[33]

32. [33]

You agreed, but also suggested that the special land provisions (including the proposal to include marginal strips) should apply to transactions where an overseas investor is taking an interest in the lease of Crown pastoral land under the Crown Pastoral Land Act. We understand your intention is to facilitate public access to waterways on Crown pastoral land.

33. We have reflected your suggestion in the attached draft Cabinet paper. However, we do not think it is necessary. This is because, since 1990, Part 4A of the Conservation Act has provided for this land (riverbeds, lakebeds, seabeds and the adjoining strips ('marginal strips')) to be excluded from Crown pastoral leases when they are renewed. As these leases are on a 33-year cycle, these types of land, with the associated public access benefits, have already been excluded from the majority of pastoral leases. The remainder of the leases (less than 20) are due for review in the next two years, and will have marginal strips excluded at that point, where applicable.
34. Moreover, LINZ has advised us that overseas investors only gain an interest in a very small number of pastoral leases. In the last five years, the Overseas Investment Office has granted consent in only two interests by overseas investors in pastoral leases.
35. If you agree with our assessment, we will reflect this change in the Cabinet paper prior to lodgement.

Consultation concerns

36. Feedback during ministerial and coalition consultation expressed concern about the lack of consultation with Māori on the changes to the special land provisions and enshrining the rural directive in legislation. Feedback suggested this would be inconsistent with expectations confirmed by Cabinet under the *Engagement with Māori* guidelines, noting that these issues are significant to Māori, and may disproportionately affect Māori due to the nature of Māori land-based assets. It was suggested that consultation should occur either before Cabinet makes policy decisions, or prior to the Bill being introduced to Parliament.
37. These views are consistent with our previous advice (T2019/2426), in which we noted that it would be desirable to consult both Māori and other affected stakeholders on these proposals.
38. However, we do not consider it feasible to undertake consultation ahead of the legislation going to LEG (in late March). Doing so would require Treasury to begin the consultation process next month, while we are at full capacity developing additional advice on the outstanding policy decisions required before we can complete instructing Parliamentary Counsel Office. While it would be possible for us to undertake consultation in February, this would be too late for any resulting changes (if needed) to be reflected in the legislation. Instead, they would need to be made after the Bill has been introduced to Parliament.

[31]

Financial implications

Replacing the pre-commitment against Budget 2020/21 with funding from Phase One tagged contingencies

43. The financial implications section of the Cabinet paper has changed and now notes that Cabinet authorised joint Ministers to appropriate an estimated \$17.1 million capital and operating funding to deliver Phase One of the Overseas Investment Act 2005 reform [CAB-17-MIN-0489]. Phase One cost \$13.3m, which was \$3.7m less than estimated.
44. Rather than funding the first year of Phase Two through a pre-commitment against Budget 2020/21, the paper now seeks agreement to establish a tagged contingency in Vote Lands.
45. The paper also notes that drawing down on the tagged contingency will impact the Crown's operating balance and net core Crown debt, which will be offset by the lower than estimated cost of Phase One reforms.
46. To fund ongoing operating costs of Phase Two, the paper is unchanged in stating that these may be sought through Budget processes and now notes that these may be partially offset by any residual underspent funding from Phase One.
47. Due to the changes to the approach to funding and the introduction of options to operationalise the call in power, the delegations sought in this part of the paper have been updated. A separate delegation is sought in relation to policy decisions on cost recovery relating to the call in power and national interest, and detailed design decisions on the light touch approach to operationalise the call in power (should Cabinet agree to this option).

Implementation timeframes

48. LINZ have recommended a 12 month implementation period before the changes come in to effect for the majority of the Phase 2 amendments, but with the potential for some of the changes to be implemented either earlier or later depending on complexity of those changes. Treasury agrees with this proposed timeframe.
49. The changes to the definition of an overseas person and to sensitive adjoining land and leases are examples of relatively simple changes that LINZ could implement quickly.

¹ With an earlier review after three years for the call in power
T2019/3229

The introduction of a national interest test is an example of a more complex change could take longer to implement.

50. Further advice on timeframes for implementation and likely phasing will provided next year as the Bill is finalised for introduction.

[1]

[1]

Next Steps

59. Once you advise your decisions relating to this report and any resulting final changes are made, we will lodge the Cabinet paper and RIA with the Cabinet Office on Thursday 17 October, in order for DEV to consider it on Wednesday 23 October. Cabinet will then consider the paper on Monday 4 November. We will provide you some talking points to support the discussion at DEV next week.
60. If agreed by Cabinet on 4 November, we understand the intention is to announce the reform package at a post-Cabinet press conference, likely on 11 November. We are working with your office to prepare communications material to support that announcement.
61. The table below outlines upcoming milestones:

23 October	Cabinet paper considered at DEV
4 November	Cabinet paper considered at Cabinet.

[1]

November	<ul style="list-style-type: none"> • Announcement of the reform package. • Advice on outstanding design issues, including tax, special land, cost recovery, and the detailed design of the legislation. • Advice on the proactive release of the Cabinet paper and submissions (for release in early December).
December-January	Advice on the detailed design of the regulations.
March 2020	Bill presented to the Cabinet Legislation Committee.
April 2020	Legislation introduced to the Parliament.

[1]