

The Treasury

Reform of the Overseas Investment Act Information Release

July 2020

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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] 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 Phase 2: detailed design decisions - legislation

Date:	19 November 2019	Report No:	T2019/3412
		File Number:	IM-5-3-8 (Overseas Investment Act Phase Two)

Action sought

	Action sought	Deadline
Associate Minister of Finance (Hon David Parker)	Agree to the recommendations in this report.	Friday 22 November 2019
Minister of Finance (Hon Grant Robertson)	Note the contents of this report.	Friday 29 November 2019

Contact for telephone discussion (if required)

Name	Position	Telephone	1st Contact
Megan Noyce	Principal Advisor, International	[39]	[23] ✓
Kate Yesberg	Senior Analyst, International	[39]	[23]

Minister's Office actions (if required)

Return the signed report to Treasury.

Note any feedback on the quality of the report

Treasury Report: Overseas Investment Act Phase 2: detailed design decisions - legislation

Executive Summary

Purpose

On 13 November 2019, the Cabinet Economic Development Committee¹ (DEV) authorised you to take decisions on additional policy issues that arise during the drafting of the Act and Regulations in the Phase 2 reform of the Overseas Investment Act [DEV-19-MIN-0306]. DEV decisions have been confirmed by Cabinet.²

This report seeks your decisions on detailed policy design issues, to inform drafting instructions to the Parliamentary Counsel Office (PCO).

We have copied this report to the Minister of Finance for his information.

Detailed design decisions for the call in power and national interest test

This report seeks decisions from you on:

- the use of classified security information (CSI) in court proceedings: we recommend adopting relevant provisions from the Telecommunication (Interception Capability and Security) Act 2013, with any necessary drafting modifications, [33]
[33]
- the call in power notification process: we recommend that transactions subject to mandatory notification are required to be notified before the transaction is entered into, and that voluntary notifications are required before or up to a certain period after the transaction is entered into, reflecting the different risk profile and regulatory burden associated with each type of transaction
- the design of enforcement tools to address risks to national security and public order, and in particular statutory management, including when a corporation can be placed in statutory management, the powers available to statutory managers, and safeguards to ensure the appropriate use of those powers, and
- information gathering: we recommend extending the Overseas Investment Office's information gathering powers to allow it to gather information in relation to non-notified voluntary transactions, where there are reasonable grounds to suspect that a transaction may pose national security or public order risks.

Additional policy decisions relating to drafting of the Act

This report also seeks decisions from you on:

- a minor change to the definition of farm land, in the context of the elevated farm land threshold, to resolve a point of ambiguity
- design options for a streamlined investor test process for "approved investors", including the process for acquiring and retaining approved investor status

¹ Under Power to Act from Cabinet [CAB-19-MIN-0562].

² [CAB-19-MIN-0593].

- amendments to exemption-making powers in the Act, to enable implementation of Cabinet decisions to create new exemptions
- the treatment of companies with existing exemptions under Regulation 49, which will be removed and replaced by new exemptions agreed to by Cabinet, and
- a range of technical amendments, including those arising from the Phase 1 reforms.

Next steps

We issued the first tranche of drafting instructions on amendments to the Act to PCO on Friday 15 November. We intend to issue the second tranche by the end of November, reflecting the policy decisions sought in this report, as well as your decisions on special land and any decisions taken in relation to tax. We may also seek further decisions to ensure agencies have the ability to share information in appropriate circumstances.

We intend to have the draft Bill to you for review in late-February, to enable submission to Cabinet Legislation Committee (LEG) in mid-March and introduction by the end of March 2020.

In terms of amendments to the Regulations, we will seek additional policy decisions from you in early 2020. We intend to proactively release information on the proposed content of the Regulations when the Bill is introduced in late-March 2020, so submitters on the Bill have complete information about the package of reform.

Recommended Action

We recommend that you:

Use of classified security information in court proceedings

[33]

- b **agree** to adopt the procedures for protecting classified security information contained in Telecommunication (Interception Capability and Security) Act 2013 (TICSA), with any necessary drafting modifications, for incorporation into the Act.

Agree / disagree

- c **note** the procedures outlined in TICSA only apply to information held by a surveillance agency (the intelligence and security agencies and Police), but not to other agencies (such as the Ministry of Business, Innovation and Employment).

- d **agree** that the Attorney-General can certify that information held by an agency other than a surveillance agency should be protected from disclosure, following the same process and with the same protections as outlined in TICSA.

Agree / disagree

[33]

Call in power notification process

- f **note** that Cabinet agreed that notification under the call in power should be mandatory for some types of transactions (investments in military and dual-use technologies, and critical direct suppliers to the New Zealand Defence Force and security services) and voluntary for other types of transactions (investments in critical national infrastructure, media entities and sensitive data).
- g **agree** for assets subject to mandatory notification, the investor is required to notify, and await confirmation from the regulator that no action is to be taken, before the transaction is completed.

Agree / disagree

- h **note** that statutory timeframes will apply to OIO decisions to act on notifications under the call in power.
- i **agree** for assets subject to voluntary notification, investors choosing to make a notification should make it before, or up to a certain time after, the transaction is completed.

Agree / disagree

- j **agree** that the time period for filing a voluntary notification be set in regulation.

Agree / disagree

Design of enforcement tools for the call in power and national interest test

- k **note** that Cabinet agreed to strengthen enforcement tools to address national security and public order risks, including empowering the Minister to seek an Order in Council for managed disposal of an asset or investment when considered necessary to protect New Zealand's national security or public order (referred to in this report as managed disposal or statutory management).
- l **agree** that enforcement tools (including, injunctive powers, court disposal and statutory management) for national security and public order risks will be available where:
 - a. the investor completes a transaction where consent is not obtained, or a required mandatory notification was not made
 - b. the investor has breached a condition imposed on the investment
 - c. the investor has breached an undertaking made in their application for consent or notification, or otherwise provided incomplete or inaccurate information, or
 - d. a voluntary notification was not made.

Agree / disagree

- m **note** that undertakings required to be provided under the call in power will focus on managing national security and public order risks arising from operation of the investment, and are not intended to provide for ongoing monitoring of ordinary business activities.

- n **agree** that, before seeking an Order in Council for managed disposal, the Minister must have reasonable grounds to believe that:
- a. in relation to the investment concerned, the overseas investor is acting in a way that has given, gives, or is likely to give rise to significant national security and / or public order risks, and
 - b. removal of the overseas person's control over or access to that investment will manage those risks.

Agree / disagree

- o **note** Cabinet's decision that in considering whether to unwind a transaction – including through statutory management – the Minister must also have regard to New Zealand's international obligations and the extent to which any risks can be mitigated by conditions of consent.
- p **agree** that any funds remaining from disposal of the investment should, after deducting reasonable costs and expenses, be returned to the investor (or a pro rata share if there are other investors).

Agree / disagree

- q **agree** that the statutory manager have the necessary powers to dispose of an investment, including powers to wind up or liquidate the corporation, or to sell all or part of its business.

Agree / disagree

- r **agree** that the statutory manager must comply with written directions from the OIO in relation to managing risks to national security and public order.

Agree / disagree

- s **agree** that, while the statutory manager's primary role is to manage national security and public order risks, they should be required to have regard to the corporation's and investor's interests in performing their role.

Agree / disagree

- t **note** that we intend to draw on the Corporations (Investigation and Management) Act 1989 to guide other technical issues that arise during drafting.

- u **agree** that the existing power to seek Court-ordered disposal should also be available to address national security and public order risks.

Agree / disagree

Information gathering and sharing power

- v **agree** that if the Overseas Investment Office (OIO) has reasonable grounds to suspect that an investment is a 'non-notified voluntary transaction', and may pose national security or public order risks, it can require a person to provide relevant information.

Agree / disagree

- w **note** that we will be providing additional advice on whether further statutory information sharing powers are necessary to operationalise the call in power and national interest test.

Definition of farm land

- x **note** that Cabinet has agreed that overseas investments in farm land must generally demonstrate a substantial point of difference in their likely level of economic benefit or oversight or participation by New Zealanders to receive consent (with some exceptions).
- y **note** that the current definition of farm land creates some ambiguity in relation to mixed and temporary land uses, and the scope of horticulture within that definition (which OIO interprets to exclude forestry).
- z **agree** to clarify the definition of farm land by explicitly excluding forestry land from the scope of horticulture.

Agree / disagree

Streamlined investor test for approved investors

- aa **note** that Cabinet decided that approved investors will not be required to satisfy the investor test again after they have already satisfied it, unless there have been relevant changes to their character or capability, and that this decision will require a process in the Act to support it.

Who can be approved investors

- bb **agree** that natural persons and bodies corporate who may be screened under the investor test ('relevant investors'), be eligible to receive an approved investor status.

Agree / disagree

- cc **note** that an approved investor status granted to a body corporate would only apply to the body corporate, not its officers or other natural persons connected to it.

How and when an investor becomes an approved investor

- dd **agree** that all relevant investors that are screened and satisfy the investor test as part of the OIO's assessment of an application to invest in sensitive New Zealand assets ('consent application') be automatically granted an approved investor status, except for those specified in recommendation ee.

Agree / disagree

- ee **note** that where a consent application fails on the new national interest test, for reasons connected to a particular investor or group of investors which would continue to be relevant for future applications to invest in New Zealand, those investors would not be able to receive an approved investor status.

- ff **agree** to introduce an opt-in 'pre-approval' mechanism, to grant an approved investor status to an investor who has not previously satisfied the investor test.

Agree / disagree

- gg **note** that the pre-approval mechanism would not be available to investors who have previously been declined on the investor test.

- hh **note** that the pre-approval mechanism would involve a stand-alone investor test carried out by the OIO on request by the investor.

- ii **note** that the OIO would notify investors who do not receive a decision on the investor test during a consent application that is declined or withdrawn, that the 'pre-approval' mechanism is available.

- jj **note** that prospective investors would be required to pay a fee as part of the 'pre-approval' mechanism.

How the streamlined investor test for approved investors will work

- kk **note** that a 'relevant change' to an investor's character and capability is a change leading to the investor no longer satisfying all the requirements of the investor test.

- ll **agree** that in lieu of the requirement to satisfy the investor test, approved and pre-approved investors be required to submit a statutory declaration stating whether any changes that may be a relevant change have occurred since they became an approved investor or since they last made a statutory declaration.

Agree / disagree

- mm **note** that where the OIO determines that a change disclosed in the statutory declaration is a relevant change, or where the OIO verifies a statutory declaration and deems that a relevant change was not disclosed, the approved investor status would be revoked and the previously approved investor would need to satisfy the investor test again.
- nn **note** that where no relevant change is disclosed by the approved investor, they would be deemed to have met the investor test unless the OIO identifies a relevant change that was not disclosed.
- oo **note** that in practice we would not expect that the OIO would verify most statutory declarations, except where the OIO has reasonable grounds to believe that a relevant change has occurred.
- pp **note** that enforcement measures are available to the OIO if an investor makes a false declaration, including where consent is granted on the basis of a false declaration.

What disclosure requirements should be on approved investors

- qq **agree** that the OIO be able to request information from an approved investor, where the OIO becomes aware of a change that it considers may be relevant.

Agree / disagree

- rr **agree** that where an approved investor does not respond to a request for information within a reasonable period, or where the OIO determines that a relevant change has occurred on the basis of information provided, the approved investor status is automatically revoked.

Agree / disagree

- ss **agree** that approved investors be able, but not required, to proactively disclose changes that may be relevant changes to the OIO when they occur (rather than wait until the statutory declaration accompanying their next consent application).

Agree / disagree

Amendments to exemption-making provisions to enable new exemptions

- tt **note** that the existing exemption-making provisions in the Act (in particular section 61B) will need to be amended to enable the new exemptions for non-listed New Zealand incorporated entities, managed investment schemes, and Residential Mortgage Obligations, approved by Cabinet.

[36]

- vv **agree** to introduce new purpose provisions in section 61B(c) to enable exemptions for entities that are fundamentally New Zealand owned and controlled, and for Residential Mortgage Obligations.

Agree / disagree

ww **agree** to either:

- a. amend section 61B(a) by removing the phrase “but where the purpose of this Act can still be substantially achieved through terms and conditions of the exemption” (our **recommended option**); OR

Agree / disagree

- b. **agree** to amend section 61B(a) by replacing the phrase “but where the purpose... the exemption” with words to the effect of: “and where any material risks associated with the investment can be adequately managed through conditions on the exemption” (an **alternative option**).

Agree / disagree

Treatment of entities with existing exemptions under Regulation 49

xx **note** that the new exemptions for non-listed New Zealand entities and managed investment schemes that are majority owned and controlled by New Zealanders will replace existing Regulations 48 and 49.

yy **agree** that the Treasury and LINZ should consult with the two companies that currently have exemptions under Regulation 49 to determine how they will be affected by the Phase 2 reforms, and whether any special transitional or savings provisions will be required.

Agree / disagree

Technical amendments

Amend the fee arrangements for residential standing consents

zz **agree** to amend the timing of fees paid under a standing consent to acquire residential land such that the fixed fee component must be paid at the time of lodging the application and variable fees are payable whenever a transaction to acquire residential land covered by the standing consent is completed.

Agree / disagree

Resolve minor and technical issues, including issues arising from the Phase 1 reform

aaa **note** the terms of reference for the Phase 2 reforms included considering any minor technical amendments required to resolve unintended consequences associated with the implementation of the Phase 1 reforms.

bbb **indicate** your decisions on the minor and technical amendments in the table set out in Appendix 1.

Next steps

ccc **note** the first tranche of drafting instructions for amendments to the Act is now with PCO, and we intend to provide the second tranche before the end of November.

ddd **note** that we intend to seek additional policy decisions on changes to the Regulations in early 2020, with a view to proactively releasing information on the proposed content of the Regulations on introduction of the Bill.

eee **note** that we are targeting submission of a LEG paper and Bill to the Cabinet Legislation Committee in mid-March, and introduction and first reading of the Bill in late March 2020.

Megan Noyce
Principal Advisor, International

Hon David Parker
Associate Minister of Finance

Hon Grant Robertson
Minister of Finance

Treasury Report: Overseas Investment Act Phase 2: detailed design decisions - legislation

Purpose of Report

1. On 13 November 2019, the Cabinet Economic Development Committee³ (DEV) authorised you to take decisions on additional policy issues that arise during the drafting of the Act and the Regulations [DEV-19-MIN-0306 refers]. DEV decisions have been confirmed by Cabinet.⁴
2. This report seeks decisions on several detailed policy issues, in order to finalise drafting instructions to the Parliamentary Counsel Office on the Phase 2 reform of the Overseas Investment Act.
3. We issued the first tranche of drafting instructions on amendments to the Act to PCO on Friday 15 November 2019. We intend to issue the second tranche by the end of November, reflecting the policy decisions sought in this report, as well as your decisions on special land and any decisions taken in relation to tax. We envisage seeking further decisions from you on drafting matters, and on one aspect of information sharing, before Christmas.
4. We intend to have the draft Bill to you for review in late-February, to enable submission to Cabinet Legislation Committee (LEG) in mid-March and introduction by the end of March 2020.
5. In terms of amendments to the Regulations, we will seek additional policy decisions from you in early 2020. We intend to proactively release information on the proposed content of the Regulations when the Bill is introduced in late-March 2020, so submitters on the Bill have complete information about the package of reform.
6. The report is arranged in two sections:
 - a Section 1: detailed design decisions relating to the call in power (use of classified security information, the notification process, enforcement tools and information sharing).
 - b Section 2: additional policy issues relating to the core Phase 2 reforms (definition of farm land, a streamlined investor test process for approved investors, enabling new exemptions, and several technical amendments).
7. We have copied this report to the Minister of Finance for his information.
8. We consulted with relevant agencies on this report including Land Information New Zealand and the Overseas Investment Office, Ministry of Foreign Affairs and Trade, Ministry for Business Innovation and Employment, Ministry for Primary Industries, the security and intelligence agencies, the Department of Conservation, Ministry for Culture and Heritage and Te Arawhiti. Te Puni Kokiri has also been informed on this report.

³ Under Power to Act from Cabinet [CAB-19-MIN-0562].

⁴ [CAB-19-MIN-0593].

Section 1: Detailed design decisions relating to the call in power and national interest test

1.1 Use of classified security information in court proceedings

9. Classified security information (CSI, sometimes called national security information) will be relevant to decisions made under the national interest test and the call in power and needs to be protected from unsafe disclosure in related court proceedings.
10. Cabinet agreed that CSI should be protected in line with existing legislation (such as the Telecommunications (Interception Capability and Security) Act 2013 – ‘TICSA’) [33]
11. We now seek detailed decisions on how the Act should protect CSI.

We recommend adopting the TICSA regime in its entirety

[33]

13. [33]

In line with your earlier decision to draw on existing legislation, we recommend adopting the procedures contained in TICSA, with any necessary drafting modifications, for incorporation into the Act.
14. The alternative option would be to develop a bespoke regime for protecting CSI in the Act. We do not consider this desirable because it is not feasible in the time available [33]
15. TICSA contains the following features to protect CSI from unsafe disclosure:
 - a the ability for the head of a surveillance agency to certify that certain information is CSI (in accordance with a set definition) and cannot be disclosed
 - b on the request of the Attorney-General, the Court can receive or hear the classified security information in the absence of the non-Crown party, their counsel, journalists, and members of public
 - c an obligation on the Court not to disclose the CSI except to the extent specifically provided for, and
 - d an obligation for the court to determine the proceedings on the basis of the information available to it (whether or not that information has been disclosed or responded to by all parties).
16. These protections infringe on the non-Crown parties’ normal natural justice rights. To preserve these to the extent possible, the following mitigations are included:
 - a an obligation on the Crown to provide the court with access to the CSI
 - b an ability for the court to approve a summary of the CSI for the non-Crown party, and

- c an ability for the Court to appoint a special advocate in specified circumstances to represent a non-Crown party's interests so they can prepare and commence proceedings, and to ensure that a fair hearing will occur.
17. 'Surveillance agencies' as defined in TICSA include the intelligence and security agencies, and New Zealand Police. Even so, one modification to TICSA's procedure is necessary to reflect that agencies other than 'surveillance agencies' are likely to hold classified information that needs to be protected in proceedings under the Act (eg, the Ministry of Business, Innovation and Employment, New Zealand Customs Service, and the New Zealand Defence Force). We recommend that the Attorney-General be able to certify that information held by an agency other than a security agency cannot be disclosed, following the same process and with the same protections as above.

Implications of adopting TICSA

18. The proposals engage the rights to justice affirmed in the New Zealand Bill of Rights Act 1990 (BORA). The Ministry of Justice's BORA vet for TICSA determined that the limitations to natural justice rights were justifiable. While TICSA's BORA vet provides a precedent, we cannot pre-empt the Ministry of Justice's BORA vet on the Overseas Investment Amendment Bill. Nevertheless, we consider these proposals are justified limitations given the safeguards available, and the need to keep CSI confidential.
19. These protections will only apply to civil court proceedings. Neither TICSA, nor any other existing statute, provides for closed court processes in criminal proceedings (and there are some offence provisions in the Act). This is because the Crown will generally be the prosecutor, and would be able to protect CSI through the decisions it makes about how to conduct proceedings (in contrast to civil cases, where the Crown would more commonly be the respondent e.g. judicial review).

[33]

1.2 Call in power notification process

22. Cabinet has agreed to introduce a call in power that would empower the Government to review transactions in a limited set of assets not ordinarily screened under the Act. In order to balance compliance costs with risk coverage, it will be:
- a mandatory to notify the OIO of investments in military and dual-use technologies, and critical direct suppliers to security and defence agencies (reflecting these assets pose high risks, but there will be few transactions in scope); and
 - b voluntary to notify the OIO of investments in sensitive data, media, and critical national infrastructure (reflecting these assets pose lower risks, while having more transactions in scope).
23. This section seeks design decisions related to how the notification process will work.

At what point during a transaction should a notification be made?

24. There are three options for when a notification (whether mandatory or voluntary) could be made to the OIO:
 - a *Before the transaction is completed.* This maximises the ability for the government to manage risks, while imposing the greatest compliance costs on and reducing flexibility for overseas investors.
 - b *Before and up to a certain period after the transaction is completed.* The time period would be set in regulations. This strikes a balance between compliance costs and risk mitigation.
 - c *At any time.* This reduces the ability for the government to manage risks, while spreading compliance costs on, and maximising flexibility for, overseas investors.

Mandatory notifications should be made before a transaction is completed

25. We recommend that an investor should be required to make a mandatory notification, and await confirmation from the regulator that no action is to be taken, before a transaction is completed. In the case of mandatory notifications, we place greater weight on the government's ability to manage risks (because the assets subject to mandatory notification are particularly sensitive) over reducing compliance costs for investors (because relatively few transactions are captured).
26. The other two options were not considered appropriate because the benefits for investors are not sufficient to outweigh the additional risks to national security or public order (which would arise from investors being able to access or control sensitive assets before being required to notify the OIO).
27. This reflects the approach in the United States for assets captured by its proposed mandatory declaration regime. It also aligns with the Act's wider consent framework for sensitive assets.

Voluntary notifications should be made before, or up to certain period after, a transaction is completed

28. We recommend that investors choosing to make a voluntary notification to obtain safe harbour should be required to do this before, or up to a certain period after, the transaction is completed (e.g. three to six months). The exact time-period is yet to be considered, and we will work with agencies to determine an appropriate period that balances the new regulatory burden on investors with the need to manage risks to national security or public order.
29. This approach provides investors with greater flexibility. An investor may choose to spread compliance costs by notifying after a transaction is completed, in order to focus on finalising the terms of the investment. Or, if they prefer regulatory certainty, the investor may choose to notify before the transaction is completed.
30. Retaining a time-limit, however, provides an incentive for investors to notify close to the point at which risks first arise. This provides the OIO the opportunity to take action to manage risks of notified transactions relatively swiftly.
31. The time-period should be set in regulations to provide the government flexibility to respond to changing circumstances. If the risk profile of the relevant assets increases (or decreases) substantially in the future, the period could be amended in response.

32. Compared to the other two options (discussed below), this option strikes the best balance between the government's ability to manage risks, and the compliance costs on investors. The other options do not, because:
- a requiring voluntary notifications to be made **before a transaction is completed** concentrates compliance costs and introduces uncertainty for investors (as they wait for the OIO's confirmation that the transaction can be completed) prior to transactions being finalised. This burden does not reflect the relatively lower risk of these transactions and the larger number of them in scope (compared to those subject to mandatory notification). There is a chance that this option could reduce incentives for investors to make a voluntary notification if the burden is considered onerous.
 - b allowing notification **at any point** after a transaction provides maximum flexibility for overseas investors to determine the best time for them to notify. However, the lack of any time limit to obtain safe harbour weakens the incentive for investors to file a notification relative to when the potential risks arise – meaning the OIO's ability to take preventative or swift action could be compromised.

1.3 Call in power and national interest test – enforcement issues

33. Cabinet has agreed to strengthen the OIO's enforcement tools to manage risks to national security and public order (NSPO risks), including introducing a power to place an investment under statutory management. This section seeks your decisions on when statutory managers can be appointed and how statutory managers should carry out their duties. It also recommends expanding the scope of the other enforcement powers in the Act – injunctive powers and Court disposal orders – to include management of NSPO risks.
34. Our recommendations are based on the Act's existing framework, which allows the government to screen investments, and to impose conditions on investments as part of granting consent for an investment. The Act does not allow the government to impose conditions retrospectively on investments that it has approved, or unwind them because of a change in regulatory approach. It can, however, act to enforce existing conditions as well as representations made in support of the application and notified by the OIO as having been taken into account when the consent is granted (section 25B). We do not recommend changing this underlying fundamental approach.

Enforcement tools should be available to manage NSPO risks

35. We recommend that enforcement tools – including statutory management, injunctions and Court-ordered disposal – be available to address significant NSPO risks where:
- a the investor was required to, but did not, obtain consent or complete a mandatory notification, prior to completing a transaction
 - b the investor has breached a condition the OIO imposed on the investment at the time of consent or notification
 - c the investor has breached an undertaking made in their notification (discussed further in paragraph 38), or otherwise provided incomplete or inaccurate information or
 - d a voluntary notification was not made.

36. For notified transactions, the regulator will only be able to take enforcement action if the investor has breached a condition or undertaking (or provided a false or misleading notification). This ensures that there is an incentive to notify (ie, the investor obtains a safe harbour if they notify the OIO and the transaction is either not called in, or is called in and subsequently proceeds). It is also consistent with the broader screening regime.
37. We are still considering whether the form of undertaking an applicant is required to provide when notifying a transaction will be set in regulations or in a form approved by the Minister, and will provide advice on this. In either case, the wording is important because undertakings required to be made in the notification may subsequently form the basis of enforcement action where information provided is false or misleading, or the undertaking is breached.
38. We recommend the undertaking focus on factors such as the following:
 - a the investor's identity, corporate parents, involvement of foreign governments, sources of funding, and so forth (we are considering whether this is already captured by existing provisions of the Act);
 - b what access and control the investment will offer to, for instance, sensitive databases; and
 - c the investor not operating the investment in a way that gives rise to NSPO risks to New Zealand.
39. The undertakings are not intended to shift the focus of the Act to ongoing monitoring of ordinary business activities. For that reason, we recommend against attempting to capture risks that emerge from, say, organic growth of a business, or other changes in circumstances that are not themselves captured by the Act.

Statutory management

40. Cabinet has agreed that statutory management will be available to manage significant NSPO risks arising from an overseas person's investment in a corporation, by allowing for (i) disposal of that investment, and (ii) the management of the corporation pending disposal of the investment. These powers will be available through an Order in Council, upon the Minister becoming aware of significant NSPO risks that arise from the overseas investment and being satisfied that the relevant tests are met.
41. As discussed above, statutory management will be available in the circumstances described in paragraph 35.
42. We now seek detailed decisions on design elements of the statutory management scheme, to ensure that it will provide the outcomes sought.
43. We use the term 'corporation' in the sense in which it is used in the Corporations (Investment and Management) Act 1989 (CIMA), which defines it to mean "a body of persons, whether incorporated or not, and whether incorporated or established in New Zealand or elsewhere."

Test for placing a corporation into statutory management

44. The test for placing a corporation into statutory management should balance New Zealand's interests in protecting its national security and/or public order, and the private property rights of the investor and the target entity. Accordingly, the test should focus on the actions of the investor that create NSPO risks (rather than, for example, actions of an employee acting independently of the investor).

45. We recommend that, before seeking an Order in Council, the Minister must consider the following matters (subject to drafting):
 - a whether, in relation to the investment concerned, the overseas investor is acting in a way that has given, gives, or is likely to give rise to significant NSPO risks, and
 - b whether removal of the overseas person's control over or access to that investment will mitigate those risks.
46. We recommend that the Minister must be "satisfied on reasonable grounds" that the proposed two limbs of the test are met, before placing an overseas investment into statutory management.
47. This is the standard used in CIMA. It ensures the Minister has the latitude to form judgements about the nature and level of NSPO risks, but that these judgements must be grounded in a reasonable interpretation of the available evidence.
48. We considered a lower threshold of "reasonable grounds to suspect". However, given the significance of a decision to engage statutory management, and the degree of interference in private property rights, we do not consider a lower threshold appropriate.
49. We also considered a higher threshold (for example, belief on the balance of probabilities), but given the risk of imperfect information and the need to act swiftly to address potential risks, our view is that this would create an inappropriate barrier to use of the statutory management power.
50. Consistent with Cabinet's previous decisions, in deciding whether to place a corporation into statutory management, the Minister must also have regard to New Zealand's international obligations and the extent to which any risks can be mitigated by conditions of consent.⁵

Statutory manager to return proceeds of disposal to investor, after deducting reasonable costs and expenses

51. One of the functions of a statutory manager is to dispose of an investment, to address significant NSPO risks. We recommend that the statutory manager have similar powers to a statutory manager under CIMA to assist in that disposal, including to wind up or liquidate the corporation, or to sell all or part of its business.
52. There may be funds remaining at the conclusion of the managed disposal. We recommend that the statutory manager be required to return those funds (or the relevant part of them, where the investor concerned is not the sole owner) to the investor (after deducting reasonable costs and expenses as in CIMA). We recommend the High Court should be able to resolve any disputes about the quantum of funds. It may be appropriate for the statutory manager to seek other directions from the High Court.

Oversight and direction from the OIO will help statutory managers to mitigate risks

53. While statutory managers will be appointed based on their skills and experience in managing businesses, they are unlikely to have the necessary skills and experience to analyse NSPO risks, or access to classified security information to allow them to effectively manage NSPO risks. We recommend that the OIO be empowered to oversee statutory managers, and provide written directions to statutory managers in relation to managing NSPO risks.

⁵ [DEV-19-MIN-0306] at paragraph 25.
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A statutory manager would be required to comply with a written direction. Statutory managers will also be required to report on the performance of their functions.

54. We considered whether another agency would be better placed to oversee statutory managers, but consider the OIO is best placed because it will:
- a develop its capacity and a cross-agency network for identifying and managing NSPO risks from overseas investments
 - b understand the specific context – the OIO will be involved in investment screening for NSPO risks on an ongoing basis, and it will lead the advice on the appointment of each statutory manager, and
 - c have information sharing arrangements and ongoing connections with relevant specialist agencies. The OIO will both be informed and able to inform other agencies about risks relating to any investment.
55. The other options we considered for providing oversight and direction included a Minister, the Registrar of Companies and an advisory committee.
56. If a Minister were to provide oversight and direction, the statutory manager may be perceived as subject to undue political influence, reducing investors' confidence in the impartiality of the process. As such, we consider the other agencies to be more appropriate for this role.
57. The Registrar of Companies works closely with statutory managers appointed under CIMA to deal with fraud or recklessness, as well as some company liquidators appointed under the Companies Act. However, the Registrar is not experienced in addressing NSPO risks, which will be the main area where a statutory manager will need support. It would be costly for the Registrar of Companies to develop and maintain the necessary networks and capability in this area, given that statutory managers will likely be appointed infrequently.
58. Alternatively, an advisory committee could be appointed by the relevant Minister at the same time as a statutory manager. The committee could provide effective support if the members are drawn from government agencies that are connected to the risks at hand. Unlike the OIO, an advisory committee would not have established networks and capabilities to rely on. Additionally, there would be a delay between the appointment of the committee and its ability to provide direction, making the committee less able to respond to urgent risks.
59. The OIO may need support appointing an appropriate statutory manager, because this is not a normal function of the OIO. The Registrar of Companies could provide this support, as the Registrar has good knowledge of people with the appropriate commercial skills. Support could also be provided by the Financial Markets Authority or an industry-specific regulator, if appropriate.

Statutory managers required to take into account interests of the investor and the corporation

60. While a statutory manager's primary role is to manage NSPO risks, we recommend that, in exercising their powers, statutory managers be required to have regard to:
- a the need to preserve the interests of members and creditors of the corporation, or, where appropriate, the need to protect the beneficiaries under any trust administered by the corporation, or the public interest, and
 - b as far as practicable, the need to preserve the business or undertaking of the corporation.

61. This is consistent with the considerations affecting the exercise of statutory management powers under CIMA. It recognises that statutory management will negatively affect the value of the corporation concerned – both in restricting its operation during the term of statutory management, and longer-term reputational impacts. It is appropriate that the statutory manager take into account and seek to preserve the value of the corporation. And in situations where the business or the business undertaking can be sold, we expect the statutory manager will make a genuine effort to do so, taking into account the nature of the asset, the market, and the need to preserve the interests outlined in paragraph 60.
62. This does not, however, require the statutory manager to undertake a balancing exercise between managing NSPO risks and preserving the corporation's value. The statutory manager's primary role is to manage NSPO risks, and statutory managers will be required to comply with written directions as to the management of NSPO risks, regardless of the impact on other interests. To the extent a statutory manager can manage NSPO risks in a way that minimises harm to the corporation, however, then it should do so.

Other technical issues

63. We intend to draw on CIMA to guide other technical issues that arise during drafting. For example, statutory managers will need to be indemnified for the good faith exercise of their duties, as in section 63 of CIMA.

Other enforcement tools for responding to NSPO risks

64. To ensure that the full suite of enforcement tools is available to the OIO when managing NSPO risks, we recommend that the existing power to seek a Court order for the disposal of property be extended to cover significant NSPO risks (in accordance with paragraph 35 above).⁶
65. The ability to seek a Court injunction is being added to the Act, to clarify that the power is available to the OIO, and will cover NSPO risks.

[36]

⁶ Currently, the OIO can only seek a Court order for the disposal of property where there has been a breach of a condition on the investment or a breach of the Act.

⁷ [1,36]

1.4 Ensuring the OIO has sufficient information gathering and sharing powers

68. The OIO will need appropriate and sufficient information gathering and sharing powers, to ensure it can operationalise these reforms, and in particular the call in power. It needs to be able to gather information from the investor and from other agencies. Equally, it needs to be able to share the information it has collected with other agencies.
69. The OIO has existing information-gathering powers in sections 23 and 41 of the Act. It can require an applicant, or any other person, to provide information relevant to an application. It can also require information to be provided for the purpose of monitoring compliance, investigating, and enforcing the Act and Regulations.
70. In many situations, the OIO can also rely on the investor's consent to obtain and share information. For instance, in all situations where consent is necessary, or notification is required or provided voluntarily, the investor can give consent to the sharing of personal information contained in the application or notification with other government agencies. Equally, the investor can give consent for other government agencies to share personal information with the OIO and other relevant agencies.
71. These existing tools are not sufficient, however, to support the identification and call in of non-notified voluntary transactions. In that situation, the investor has chosen not to notify and so has not given consent to sharing information. It is also outside the scope of the OIO's existing information gathering powers, as there is no compliance issue with the Act or Regulations (the investor is entitled not to notify).
72. Where an investor has chosen not to make a voluntary notification, the government is able to review the transaction at any point, and take action if it considers the transaction has given rise to significant NSPO risks. To ensure the OIO is able to review non-notified voluntary transactions effectively and lawfully, it will need powers to obtain relevant information to determine whether the transaction:
 - a meets the technical definition of the relevant asset class (eg, does the investment enable access or control over sensitive data?), and
 - b meets the investment threshold (eg, 25% in the case of media assets).
73. We propose an additional statutory information-gathering power, as described below. We are still working with the Ministry of Justice, the Office of the Privacy Commissioner, the OIO and other agencies to ensure the OIO can share information in the situation outlined in paragraph 71.

Expanding information gathering power is appropriate to support notification process

74. We have identified two options for framing a new information gathering power to support the review of non-notified voluntary transactions:
 - a *Option 1: a targeted information gathering power:* the OIO can require a person to provide relevant information (following the approach set out in section 41(1) of the Act) if the OIO has reasonable grounds to suspect that:
 - i an investment is a 'non-notified voluntary transaction', and
 - ii the transaction may pose national security or public order risks.

This option is consistent with the powers provided to the regulator in the United States related to non-notified voluntary transactions.

- b *Option 2: wide information gathering power:* the OIO can require a person to provide relevant information (again, following the approach set out in section 41(1) of the Act) if the OIO has reasonable grounds to suspect that an investment is a 'non-notified voluntary transaction'.
75. We recommend option 1: that the OIO be granted targeted information gathering powers related to 'non-notified voluntary transactions'. This will ensure the OIO is able to access the information it needs to determine whether further action, such as 'calling in' the transaction for more detailed review, is needed.
76. The threshold in option 1 – reasonable grounds to suspect the transaction may pose national security or public order risks – protects against over-use of this power (which would undermine the intent of a voluntary notification regime), provides transparency on when this power could be exercised, and signals to investors that the power will be used rarely and only when justified.

Section 2: Additional policy decisions on the core Phase 2 reforms

2.1 Elevated threshold for farm land – definition of farm land

77. Cabinet agreed that overseas investments in farm land must generally demonstrate a substantial point of difference in their likely level of economic benefit or oversight or participation by New Zealanders to receive consent. You agreed to consider options to define farm land more precisely, as there is some uncertainty with the current definition.
78. The Act currently defines farm land as land (other than residential (but not otherwise sensitive) land) used exclusively or principally for agricultural, horticultural, or pastoral purposes, or for the keeping of bees, poultry, or livestock.⁸
79. There is ambiguity in the current definition, particularly where the land is used for farming and non-farming land uses (eg, grazing and forestry), or temporarily being used as farmland (eg, where land is planned for residential development but currently used for grazing).
80. There is also some uncertainty around the definition of horticulture. [34]
81. The scale of the problem is, however, relatively small (the OIO estimate that there are around five instances per year requiring staff to spend a material amount of time determining whether an application involves farm land).

Recommended option: Refine the existing definition

82. Our recommended option is to refine the existing definition by explicitly excluding forestry land [34] This change will also ensure coherency between the elevated threshold for farm land and the streamlined pathways for forestry investments.

⁸ Section 6(1).
T2019/3412

83. We also considered a refinement to address the issue of temporary grazing on residential land – by excluding all residential land from the definition of farmland (rather than just residential (but not otherwise sensitive) land). However, this would exclude land categorised as ‘lifestyle’, which can apply to large properties that many would identify as farm land [34]

The impact of such a refinement is therefore uncertain and we do not recommend pursuing it.

Alternative option – New definition based on the land’s productive capacity (best use)

84. We considered but do not recommend an alternative option that would define farm land using councils’ classification of the land’s highest and best use (which can be different from its actual use), as recorded in the District Valuation Roll (DVR).⁹
85. The DVR categories closest to the current definition of farm land are: arable, dairy, horticulture, pastoral, or specialist livestock. The category ‘specialist livestock’ includes aquaculture, and would therefore bring this land use within the definition of farm land (unless the definition specifically excluded this land use).
86. This option would provide a bright line test for farm land, and uses the same reference point as the definition of residential land. However, there is a risk that the definition would capture land that would not currently fall within the definition of farm land, because it is used for a non-farming purpose – for example, where land has a farming-related DVR categorisation but is used for a non-farming purpose (eg, industrial or commercial uses).¹⁰
87. Sub-options that could address the risk of capturing land that is not currently used for farming include:
- a defining farm land as land that is both within a farming-related DVR category and is currently used principally or exclusively for farming, or
 - b establishing an exemption from the definition of farm land, where the land’s principal use is non-farming.
88. However, these sub-options would still require a definition of “farming” and require the OIO to determine the land’s “principal” use – and so do not address the uncertainty with the existing definition. Given the risk of unintended consequences, we do not recommend this alternative option.

2.2 Streamlined investor test process for approved investors

89. Cabinet has agreed that approved investors should not be required to satisfy the investor test again when making an application for consent to invest in sensitive New Zealand assets (**‘consent application’**), if they have previously satisfied the investor test and there have been no relevant changes to their character and capability. This decision seeks to address the inefficiency caused by the current “transaction-based” approach to the investor test, whereby investors must satisfy the test for each consent application. This approach is onerous and delivers limited risk-management benefits.

⁹ A property owner can object to how their property has been classified on the Roll – for example, if a property has been classified as lifestyle but would be better classified as pastoral. An objection does not mean that the classification will necessarily be changed, however; it means that the relevant councils’ valuation provider will consider what the classification should be. Each council’s ratings roll is audited periodically by the Valuer-General.

¹⁰ The OIO advise that, from a sample of recent applications, six out of 40 applications involved land used for industrial purposes that would be considered farm land under a ‘best use’ definition.

90. We are seeking your agreement to the following design elements to give effect to Cabinet’s decision:
- a Who can be an approved investor
 - b How and when an investor becomes an approved investor
 - c How the streamlined investor test for approved investors will work, and
 - d What disclosure requirements should be on approved investors.
91. Approved investors will still need to apply for consent to invest in sensitive New Zealand assets. This is because, while they would be exempt from the requirement to satisfy the investor test when making a subsequent consent application, they would still be subject to the new national interest test, and the benefits test if the application includes sensitive land or fishing quota. Furthermore, where a consent application involves a mix of approved investors and investors who have not yet been approved, only approved investors would be exempt from needing to satisfy the investor test again.
92. We also note that the approved investor status is conditional on no relevant changes occurring to the investor’s character and capability. We consider that a “relevant change” is one that leads to the investor no longer satisfying all the criteria in the investor test. Where a relevant change has occurred, the investor would lose their approved investor status. We discuss the disclosure requirements relating to relevant changes in paragraphs 109 – 113 below.

Who can be an approved investor

93. We recommend that an “approved investor” status be available to:
- a natural persons who are (or may in the future be) screened under the investor test – e.g. persons identified as Relevant Overseas Persons or Individuals with Control (ROP/IWCs), and
 - b bodies corporate that are (or may in the future be) screened under the expanded scope of the investor test.
94. In this section we refer to these natural persons and bodies corporate as “relevant investors”.
95. The granting of an “approved investor” status to a body corporate would only apply to the body corporate, and would not extend to its officers or other natural persons with which it is connected. For example, individuals with control of an approved body corporate would need to apply separately for approved investor status.

How and when an investor becomes an approved investor

Automatic approval where the investor test has been satisfied

96. We recommend that relevant investors who satisfy the investor test during an application to invest in New Zealand should automatically be granted an approved investor status. This would include investors party to an application that:
- a receives consent
 - b is declined because some but not all the investors failed to satisfy the investor test (i.e. the investors that do satisfy the investor test should automatically become approved investors)

- c is declined on grounds other than failure to meet the investor test,¹¹ or
- d is withdrawn before consent is granted, but after some or all the investors satisfied the investor test.

97. This approach is consistent with Cabinet's decision that investors who satisfy the investor test at least once should become approved investors. We do not consider that the status of a consent application should affect a relevant investor's ability to become an approved investor, so long as they satisfy the investor test – especially where fees have already been paid to the OIO.
98. However, we recommend that where an application fails on the new national interest test, for a reason connected to a particular investor or group of investors, those investors should not be able to receive an approved investor status. This is because, while they may have satisfied the investor test criteria, the investors would not be able to invest in New Zealand because future applications would continue to be declined under the national interest test. It does not seem appropriate to grant the approved investor test in these circumstances.
99. We also recommend that the OIO notify investors when they become approved investors and provide information about the benefits and requirements of an approved investor status.

Opt-in "pre-approval" mechanism for investors who have not yet met the investor test

100. We also recommend that an opt-in "pre-approval" mechanism be introduced for investors who have not yet satisfied the investor test. This mechanism would be useful for investors who intend to make a consent application in the future, and wish to opt for a faster investor test process despite not having previously met the investor test. Analogous mechanisms exist in Schedule 4 of the Act for residential land applications.
101. The pre-approval mechanism could be used by, for example:
- a investors who are party to an application described in paragraph 96(b)-(d) above, but for whom an investor test was not completed,¹² and
 - b prospective investors who are not yet party to any applications.
102. Under this mechanism, the OIO would carry out a stand-alone investor test on request by the investor (and upon the payment of a fee for prospective investors). An approved investor status would be granted if this stand-alone test were met.
103. We also recommend that where an application does not receive consent for the reasons described in paragraph 96(b)-(d) above, the OIO should advise relevant investors who have not already satisfied the investor test that the opt-in 'pre-approval' mechanism is available.

How the streamlined investor test for approved investors will work

104. Approved investors will not be required to satisfy the investor test again for future consent applications, unless there have been relevant changes to their character or capability (consistent with Cabinet's decision).

¹¹ For example, where an application is declined on the benefit to New Zealand test or the new national interest test. However, see paragraph 98.

¹² For example, this would include situations where a decision on the investor test is not reached for some investors before the application is withdrawn or declined on other grounds. However, this would not include investors who failed the investor test.

105. Instead, we recommend that approved investors be required to submit a statutory declaration stating whether any potentially relevant changes have occurred since they were granted the approved investor status. If the investor declares that no relevant changes have occurred, they would be deemed to have met the investor test. If they do declare any changes, the OIO would review those changes to determine whether the investor continues to satisfy the investor test:
- a If the investor test is satisfied, the investor would be re-confirmed as an approved investor and the consent application would proceed.
 - b If not, the investor would cease to be an approved investor and the consent application would fail.
106. We note that the OIO could take two different operational approaches to verifying statutory declarations:
- a either, the OIO would accept all statutory declarations on face value and not carry out any verification, or
 - b the OIO would verify some statutory declarations using a risk-based approach. Where the OIO considers that an investor may have failed to declare a relevant change, it would be able to seek additional information. We expect the OIO would take this approach.
107. If the OIO were to determine that an investor has not declared a relevant change, the approved investor status would end and the investor would be required to meet the investor test again. Further, the OIO would be able to take enforcement action against the investor for a false declaration, if appropriate. If an application receives consent on the basis of a false declaration, and the OIO later becomes aware of the false declaration, the OIO would also be able to take action against the investor or the investment.
108. We consider that a risk-based approach verification of statutory declarations is appropriate. This is because verifying all declarations would undermine Cabinet's decision to streamline the consent process for approved investors.

Disclosure requirements for approved investors

109. As discussed above, we recommend that approved investors be required to disclose any potentially relevant changes when making a new consent application, as part of the statutory declaration.
110. We also recommend that, where the OIO becomes aware of a change, they be able to request additional information from an approved investor. If, based on the information provided by the investor, the OIO determines that the approved investor no longer satisfies the investor test, or the approved investor does not respond within a reasonable period,¹³ the approved investor status would be revoked. This would provide a mechanism to manage any reputational risks from having an approved investor cease to be of good character.

¹³ The timeframe currently set by the OIO for disclosing changes under the standard conditions of a consent is 20 days. This could be used to determine the "reasonable period".

111. We also considered whether approved investors should have ongoing disclosure requirements. We recommend that approved investors have the option to disclose changes proactively to the OIO when they occur. This would allow investors to avoid delays in the processing of a later consent application where changes have occurred that would require additional screening by the OIO.
112. However, we do not recommend that investors be required to disclose relevant changes to the OIO when they occur, on an ongoing basis. Such ongoing disclosure requirements would be onerous and would undermine the efficiency benefits of the approved investor mechanism. However, approved investors that are party to an existing investment would continue to be bound by any disclosure conditions set by the OIO for that investment.
113. We note that the narrowed scope of the investor test means that it should be clear to investors whether changes are relevant or not.¹⁴ Further, investors would be free to disclose any changes that they are unsure about, if they wish to avoid the risk of making a false declaration.

2.3 Amendments to exemption-making provisions in the Act

114. Cabinet has agreed to new or amended exemptions from the Act's consent requirements for:¹⁵
- a non-listed New Zealand incorporated entities and managed investment schemes that are majority owned and controlled by New Zealanders (and do not have foreign government interests of 10% or more)
 - b retirement schemes where at least 75% of the assets of the scheme are invested on behalf of New Zealanders, and
 - c Residential Mortgage Obligations.
115. The exemption-making powers in the Act will need to be amended to enable these exemptions.¹⁶
116. The exemption-making provisions in the Act were amended in 2018 to provide more detailed guidance on the purposes for which exemptions can be made. The Act includes a power to make regulations exempting any transaction, person, interest, right, or assets, or any class thereof, from the requirement for consent or from the definition of overseas person (section 61C). The Minister can also grant individual exemptions under section 61D. The Minister can recommend regulations, or grant an individual exemption, only if the Minister considers that:
- a there are circumstances that mean it is necessary appropriate or desirable to provide an exemption for one of the purposes in section 61B, and
 - b the exemption is not broader than reasonably necessary to address those circumstances.

¹⁴ For example, it should be clear to an investor whether they have been convicted of an offence or are undergoing proceedings that are within scope of the revised investor test.

¹⁵ [DEV-19-MIN-0306] at paragraphs 60 and 66.

¹⁶ Cabinet Paper at paragraph 116.

117. The new exemptions agreed by Cabinet (and described in paragraph 114 above) are unlikely to meet the existing purpose provisions in s 61B.¹⁷ Specifically:
- a they are unlikely to be considered “minor or technical” for the purposes of section 61B(b), and do not fall within the specific categories for which exemptions can be made in section 61B(c);
 - b the exemptions would therefore need to be made under section 61B(a).
- [36]

118. Accordingly, we recommend amending section 61B(c) to reflect the purpose of each of the new exemptions (discussed below). We also recommend amending section 61B(a), to ensure this provision can be used in appropriate circumstances in the future where compliance with the Act is impractical, inefficient or unduly burdensome.

Recommended option 1: Purpose statement for each of the new exemptions

119. We recommend amending section 61B(c) to include two additional purposes:
- a where the Act applies to persons, transactions, rights, interests or assets that the Minister considers to be fundamentally New Zealand owned and controlled (enabling the exemptions in paragraph 114.a] and 114.b above); and
 - b that are necessary or desirable to support the issuance or management of Residential Mortgage Obligations (enabling the exemption in paragraph 114.c).

120. This will ensure that the exemptions agreed by Cabinet can be lawfully made in the Regulations. It will also allow individual exemptions to be made on the same basis under s 61D.

Recommended option 2: Amendment to section 61B(a)

121. Under section 61B(a), one of the purposes of the exemption-making provisions is to:
- provide flexibility where compliance with this Act is impractical, inefficient, or unduly burdensome but where the purpose of this Act can still be substantially achieved through terms and conditions of the exemption.

122. We recommend removing the words “but where the purpose of the Act can still be substantially achieved through terms and conditions of the exemption”.

[36]

123. We consider the provision’s objective will still be achieved without that phrase, because the Minister, in granting an exemption:
- a is already required to have regard to the purpose of the Act under section 61E(2)(a)
 - b can impose conditions on any exemption under section 61F(2), and

¹⁷ Note that Cabinet also agreed changes to the exemptions for incremental investments, but these can be achieved under the existing purpose in section 61B(c)(iii).

- c is constrained from granting exemptions that are broader than reasonably necessary under section 61E(1)(b).

[36]

- 125. If you prefer to retain an additional constraint on this purpose provision, we recommend amending the section with words to the following effect: “provide flexibility where compliance with this Act is impractical, inefficient, or unduly burdensome *and where any material risks associated with the investment can be adequately managed through conditions on the exemption*”.

2.4 Treatment of entities with existing Schedule 4 exemptions

- 126. The new exemptions for non-listed New Zealand incorporated entities and managed investment schemes (described in paragraph 114.a above) will replace existing exemptions in Regulations 48 and 49 which relate to portfolio investors and New Zealand controlled persons.
- 127. Exemptions can no longer be granted under Regulations 48 and 49 because any exemption would need to meet the purpose in s 61B(a), and, [36] that provision is unworkable. However, two companies already had exemptions under Regulation 49 prior to the 2018 amendments: Fulton Hogan Limited (Fulton Hogan) and Infratil Limited (Infratil). These companies are listed in Schedule 4 to the Regulations.
- 128. [36]
- 129. Infratil (a NZX listed entity) is unlikely to be an overseas person under the new definition for listed entities, although we will need to check this with the company. We also do not have the necessary information to determine whether Fulton Hogan (which is unlisted) would be eligible to apply for the new exemption for non-listed New Zealand incorporated entities (however the OIO expects that it would not be an overseas person once the Government’s changes are enacted).
- 130. We therefore seek your agreement for the Treasury and LINZ to consult with Fulton Hogan and Infratil on an in-confidence basis. The purpose of this consultation will be to assess the impact of removing the Regulation 49 exemption for these entities. In particular, we would seek to determine whether they would be classed as overseas persons under the new definition, and, in the case of Fulton Hogan, whether it would be eligible for the new exemption. If the companies would still be considered overseas persons, and would not be eligible for the new exemption, then we would need to consider possible savings provisions to allow their existing exemptions to continue (unless and until their circumstances change, or for a specified period of time).

2.5 Technical amendments

- 131. This section addresses a particular issue that has arisen with the Phase 1 reforms relating to the payment of fees for a standing consent to purchase residential land, as well as several minor and technical issues requiring legislative amendment.

Fees associated with standing consent to purchase residential land

132. As part of the Phase 1 reform, the Government introduced 'standing consents' for the acquisition of residential and forestry land. These allow investors to make one application to receive approval to complete multiple transactions (subject to meeting legislative requirements).
133. The costs of granting standing consents are, like other applications, recovered from applicants. For forestry standing consents, a fee is payable when the application is lodged and another fee is payable whenever a transaction covered by the consent is finalised. This aligns the OIO's ingoing and outgoing cash flows, reflecting the work that the OIO does to ensure that each transaction is consistent with the consent conditions.
134. For residential standing consents, one aggregated fee is paid up front (that is, an application fee plus a variable fee based on the number of transactions that the applicant expects to complete). This arrangement was agreed to following a 2018 OIO analysis which suggested that all costs associated with issuing a standing consent for residential land would be incurred at the time of the application. A singular payment was therefore considered the best way to align cash flows for this application type.
135. However, following the operationalisation of the Phase 1 changes it has become clear that there are two problems with the current fee structure for residential standing consents. These are:
 - a the OIO's initial assumptions were incorrect. The OIO is required to complete additional due diligence to support each transaction and this is leading to misalignment between the OIO's cash inflows and outflows; and
 - b it creates more uncertainty than expected for investors, given the need for them to forecast the number of transactions that they will complete under the standing consent when lodging their application, with no capacity to either enter additional transactions if necessary (without obtaining a new consent) or to be refunded fees if they enter fewer transactions than initially expected. At the margin this could reduce investment attractiveness.
136. Consequently, we recommend amending the fee structure of residential standing consents, and separate the per transaction fee to be payable at the time each transaction is entered into (rather than upfront). This would align the residential fee regime with the forestry fee regime and increase the Act's consistency.

Minor and technical issues requiring legislative amendment

137. Changes to the Act in October 2018 following the Phase 1 reform have given rise to some minor technical issues. There are also some longstanding minor and technical issues with the Act that should be resolved. We recommend that you agree to make the amendments listed in Appendix 1 to resolve these. If you disagree with any of those recommendations, then the status quo would remain in place.

Appendix 1 – Minor and technical issues requiring legislative amendment

	Problem	Recommendation	Minister's decision
General			
Section 6(1)	The definition of “foreshore and seabed” is not consistent with the statutory definition generally adopted in other legislation.	Adopt the definition of “marine and coastal area” from the Marine and Coastal Area (Takutai Moana) Act 2011.	<i>Agree / disagree</i>
Section 6(2)(a)(iii)	The “tax resident in New Zealand” category of the “ordinarily resident in New Zealand” definition does not cross-reference the Act’s definition of “tax resident in New Zealand”.	Include in a cross-reference to the Act’s definition of “tax resident in New Zealand” in this subsection.	<i>Agree / disagree</i>
Section 12(b)	There is ambiguity as to the ownership/control threshold necessary before an overseas person investor must seek consent to the acquisition of rights or interests in securities of a target person with an indirect interest in sensitive land. A 25 per cent threshold is applied elsewhere in the Act.	Establish an ownership or control threshold of 25 per cent or greater for consent where an overseas person is acquiring a target company (A) which has an indirect interest in sensitive land.	<i>Agree / disagree</i>
Section 16(1)(d) and (e)	These two categories of land are unclear as currently worded.	Clarify that section 16(1)(d) applies to land that is residential but also sensitive for another reason, and that section 16(1)(e) applies to land where part of that land is residential and another part is also sensitive for another reason.	<i>Agree / disagree</i>
Section 61D(1)	Previous versions of this power to issue exemptions could be exercised by “the Relevant Minister or Ministers”. The Phase One reforms unintentionally restricted this power to “the Minister”.	Amend this provision to specify that the power can also be exercised by “the Relevant Minister or Ministers”.	<i>Agree / disagree</i>
Section 61D(3)	The requirement to publish exemptions (or reasons) is framed as absolute. It is not clear that the Minister may dispense with publication where there are good grounds for doing so under the Official Information Act 1982, which is	Amend this subsection to be subject to the withholding grounds under the Official Information Act 1982, by including a cross-reference to subsection 61F(6).	<i>Agree / disagree</i>

	provided for in section 61F(6).		
Section 61F(6)	The words “if they were official information” at the end of the subsection are unnecessary as the information subject to this provision is by definition already “official information” under the Official Information Act 1982.	Remove the words “if they were official information” from this subsection.	<i>Agree / disagree</i>
Schedule 2 clause 11	The terms “overseas investment is given effect to”, “transaction is entered into” and “overseas investment transaction” have distinct meanings and are used inconsistently throughout the Act.	Reconcile/align the use of these terms across the Act.	<i>Agree / disagree</i>
[Throughout]	The Act uses “interest in land” and “land” in contradistinction throughout, when it is not always correct to do so.	Align the use of these terms throughout the Act.	<i>Agree / disagree</i>
Regulation 37(1)(a)	Previous versions of the regulation permitted overseas persons to restructure or reorganise their corporate structure without consent where there was no ultimate change in control. A drafting error in the 2018 amendment has limited the number of entities able to access this exemption (allowing only the parent in a corporate structure to acquire an interest in sensitive assets from its subsidiaries, but not to transfer such an interest), which runs contrary to the agreed policy intent [1]	Redraft exemption in line with the policy agreed by Government. Any entity within a corporate group that is 95% owned by the same overseas person, may acquire an interest in sensitive assets from another entity within that group without obtaining consent.	<i>Agree / disagree</i>
Residential			
Schedule 2 clause 17(3)	The “non-occupation outcome” is not limited to occupation for residential purposes. This creates a risk it could be construed as prohibiting occupation (for example) by developers for commercial construction purposes, which is inconsistent with the policy of	Amend the clause to specify that the non-occupation outcome is for residential purposes.	<i>Agree / disagree</i>

	the Act.		
Schedule 2 clause 12(2)	<p>This provision relates to consent pathways for the acquisition of residential land for non-residential use and incidental residential use. It links to criteria that ensure that the acquisition of the residential land occurs in the ordinary course of business and is genuinely incidental to a non-residential business (the latter is only for incidental residential use pathway).</p> <p>As drafted the definition of “relevant business” does not expressly cover situations where the relevant business is that of the entity being acquired rather than the purchaser. This is inconsistent with the policy intent.</p>	Introduce additional categories to the definition of “relevant business” covering the business of a target person in which an overseas person is acquiring shares, where that target person holds the relevant business and already owns the residential land and where the overseas person acquires the business and residential land of a target person outright.	<i>Agree / disagree</i>
Schedule 3 clause 5(3)	The Act uses the term “premises used, or intended to be used, in the course of business principally for providing temporary lodging to the public” to define “hotel” in this clause, and elsewhere in the Act to define “excluded accommodation facility”. This should be corrected to avoid confusion.	Amend this clause to clarify that a “hotel” constitutes an “excluded accommodation facility” within the meaning of that term in s 6(1).	<i>Agree / disagree</i>
Regulation 40	The class exemption for the transfer of trust property was intended to remove the administrative overhead costs associated with applications to transfer such property. The exemption does not cover the transmission of trust property from a deceased person’s estate to the executor, administrator or trustee, which is inconsistent with the policy intent.	Include a fourth category that exempts the transmission of trust property from a deceased person’s estate to the executor, administrator or trustee of that trust.	<i>Agree / disagree</i>