

# The Treasury

## Reform of the Overseas Investment Act Information Release

July 2020

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- [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: Cabinet Legislation Committee approval to introduce the Overseas Investment Amendment Bill

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<b>Date:</b>	10 March 2020	<b>Report No:</b>	T2020/544
		<b>File Number:</b>	IM-5-3-8 (Overseas Investment Act Phase Two)

### Action sought

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	Action sought	Deadline
<b>Minister of Finance</b> (Hon Grant Robertson)	<b>Note</b> the contents of this report.	11 March 2020
<b>Associate Minister of Finance</b> (Hon David Parker)	<b>Agree</b> to lodge the paper (Annex 1) with the Cabinet Legislation Committee, which seeks approval to introduce the Overseas Investment Amendment Bill (the Bill).  <b>Agree</b> to the final changes to the Bill.	11 March 2020

### Contact for telephone discussion (if required)

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Name	Position	Telephone	1st Contact
[39]	[39]	[39]	N/A
Chris Nees	Principal Advisor, International	[39]	[23]

### Minister's Office actions (if required)

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**Return** the signed report to Treasury.

**Forward** a copy of the report and the attached papers to the Minister for Land Information.

Note any feedback on the quality of the report

**Enclosure:** Yes (attached)

# Treasury Report: Cabinet Legislation Committee approval to introduce the Overseas Investment Amendment Bill

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## Executive Summary

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This report seeks your (Minister Parker's) decisions on lodging the Overseas Investment Amendment Bill (the Bill) for Cabinet Legislation Committee consideration, final changes to the Bill and confirmation of your agreement to two details for the regulations.

This report is copied to the Minister of Finance for his information.

### **We seek your agreement to lodge the LEG Paper and Bill**

We are seeking your agreement to lodge the paper at Annex 1 with the Cabinet Legislation Committee (LEG). The LEG paper seeks approval to introduce the Bill.

[31]

Other than technical and typographical changes, only two changes to the enactment timeframes have been made since the draft paper was last provided to you, so that:

- the national interest test comes into force 6 months after the day of Royal assent. This will strengthen the regime earlier and help manage risks; and
- the water bottling considerations for the benefits test come into force 6 weeks after the day of Royal assent.

To proceed with your agreed schedule, the LEG paper will need to be lodged on 12 March for LEG to consider it on 17 March.

Talking points for the LEG meeting are provided at Annex 2.

### **Your agreement is sought to a set of final changes to the Bill**

Since the Bill was last provided to you for consideration, a set of changes have been identified that will give effect to your previous policy decisions and resolve issues that arose during the drafting process.

We recommend that the automatic condition for managing national security and public order (NSPO) risks should prohibit overseas persons acting towards their investment with 'a purpose or intention of adversely affecting national security or public order'. This will only apply to national interest or call in transactions and it will ensure the enforcement tools are available to manage NSPO risks from these transactions where they are no specific conditions applied. Framing the condition in this way will not overly restrict overseas investors from taking actions for legitimate commercial purposes.

[1]

We recommend empowering the Minister to place interim conditions on call in transactions, to allow the Minister time to make an informed decision about which NSPO risk management action is necessary. This will reduce the likelihood that decisions will be [36] overly restrictive on investors.

We recommend small changes to provide more clarity and certainty regarding the special land screening process. The changes are that:

- the provisions will only apply to those applications which are in the benefit test pathway (including the special forestry test pathway), and not residential land, consistent with the original policy intent;
- the provisions will apply where the overseas investor is a joint owner over the land, even where the other owners are New Zealanders; and
- the Minister for Land Information will assess whether to waive the right to acquire the special land where the risk, liability or cost of ownership outweighs the amenity or conservation value.

We have further considered how to give effect to Cabinet's decision that sensitive adjoining land will include land where a collective Māori group manages land under the Reserves Act; and where a collective Māori group owns land managed in accordance with the Conservation Act. We recommend that the Act should specify the broad description of these categories of sensitive adjoining land, allow for regulations to be made to list the relevant Acts, and require the regulator to publish a list of land under each of those Acts on its website.

## **Confirming your agreement to two proposals for the regulations**

### ***Statutory timeframes: quality assurance period***

We recommend that the statutory timeframes set out in the Overseas Investment Regulations include an initial quality assurance period in which the OIO may reject incomplete applications. This would be structured so that, if an application has not been rejected before the quality assurance period expires, then it will be deemed complete and the OIO must make a substantive decision on the application.

### ***Irrigation schemes subject to the national interest test***

We want to confirm your agreement to define irrigation schemes automatically subject to the national interest test as:

*“A water supply system involving the collection, storage, and/or reticulation of water primarily for agricultural production, with a resource consent or consents to abstract more than **25 million cubic metres of water per year**”.*

Based on the Ministry for the Environment's 2018 data, this threshold will capture about 25 irrigation schemes.

## Recommended Action

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We recommend that you:

### Introducing the Bill

- a **agree** to lodge the paper at Annex 1 for consideration by the Cabinet Legislation Committee on 17 March.

*Agree/disagree.*

- b **note** that talking points to support you at the LEG meeting are provided at Annex 2.

*Noted.*

- c **note** that, other than technical and typographical changes, only two changes to the enactment timeframes have been made since the draft paper was last provided to you, so that:

- i. the national interest test comes into force 6 months after the day of Royal assent. This will strengthen the regime earlier and help manage risks; and
- ii. the water bottling considerations for the benefits test come into force 6 weeks after the day of Royal assent.

*Noted.*

### Final changes to the Bill

#### ***Managing risks to national security and public order***

- d **note** that we previously sought your agreement to continue consulting on an automatic condition to ensure that enforcement powers can be used to manage NSPO risks where necessary and without unduly restricting actions taken for legitimate commercial purposes [T2020/95 refers].

*Noted.*

- e **agree** to include an automatic condition for call-in and national interest transactions which allows national security and public order (NSPO) risk management actions to be taken if an investor acts 'with a purpose or intention of adversely affecting national security or public order'.

*Agree/disagree.*

- f [1]

*Agree/disagree.*

- g **agree** to empower the Minister to place interim conditions on call-in transactions to give the Minister more time to decide which permanent NSPO risk management action is appropriate.

*Agree/disagree.*

#### **Fresh or seawater areas**

- h **agree** to only apply special land (now called “fresh or seawater areas”) provisions to transactions in the benefit test pathway, including the special forestry test pathway, to remain in line with the original policy intent.

*Agree/disagree.*

- i **agree** to apply fresh or seawater area provisions where the overseas investor is a joint owner over the land, including where the other owners are New Zealanders to create more certainty in the process and prevent overseas investors from attempting to circumvent the requirements by having a New Zealand joint owner when purchasing certain land.

*Agree/disagree.*

- j **agree** to make the acquisition waiver criteria for fresh or seawater areas narrower and provide more clarity by only allowing the Minister for Land Information to assess whether to waive the right to acquire the where the risk, liability or cost of ownership outweighs the amenity or conservation value. This language provides more clarity and will make decision-making more straight forward rather than assessing against ‘public interest’.

*Agree/disagree.*

#### **Sensitive adjoining land**

- k **note** that Cabinet has agreed that sensitive adjoining land will include land where a collective Māori group manages land under the Reserves Act; and where a collective Māori group owns land managed in accordance with the Conservation Act.

*Noted.*

- l **agree** that the Bill will specify the broad description of these categories of sensitive adjoining land, allow for regulations to be made to list the relevant Acts, and require the regulator to publish a list of land under each of those Acts on its website.

*Noted.*

### **Confirming your agreement to proposals for the regulations**

#### **Statutory timeframes: quality assurance period**

- m **agree** that the statutory timeframes will include an initial quality assurance period in which the OIO may reject incomplete applications.

*Agree/disagree.*

- n **note** that if the quality assurance period expires and the application has not been rejected, then it will be deemed complete and the OIO must make a substantive decision on the application.

*Noted.*

***Irrigation schemes subject to the national interest test***

- o **agree** to define irrigation schemes to be automatically screened under the national interest test as: *“water supply systems involving the collection, storage, and/or reticulation of water primarily for agricultural production that have a resource consent or consents to abstract more than 25 million cubic metres of water per year.”*

*Agree/disagree.*

Chris Nees  
**Principal Advisor, International**

Hon Grant Robertson  
**Minister of Finance**

Hon David Parker  
**Associate Minister of Finance**

## **Treasury Report: Cabinet Legislation Committee approval to introduce the Overseas Investment Amendment Bill**

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### **Purpose of Report**

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1. This Report seeks your agreement to lodge the paper at Annex 1 with the Cabinet Legislation Committee (LEG). The LEG paper seeks approval to introduce the Overseas Investment Amendment Bill. We have also provided talking points to support you at the LEG meeting.
2. This Report also seeks your agreement to the final changes we have made to the Bill, to give effect to your previous policy decisions and resolve concerns that have been raised during the drafting process.

### **We are seeking your agreement to lodge the LEG paper and the Bill**

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3. The LEG paper will need to be lodged by 12 March if LEG is to consider the Bill on 17 March and to meet your agreed schedule for passing of the Bill this Parliamentary term. Talking points on the LEG paper are provided at Annex 2.
4. [31]
5. The New Zealand Bill of Rights Act vetting process is currently underway, and we have not had any feedback to date, although the Ministry of Justice has been consulted throughout the policy and drafting process.
6. Other than technical and typographical changes, the only significant change to the LEG paper since it was last provided for your consideration is that the national interest and the new water bottling considerations in the benefits test will be brought into effect earlier. This will strengthen the regime earlier and help manage risks. The earlier timing is supported by Land Information New Zealand.
7. The Bill also provides for relevant provisions to be brought into force by Order in Council if the necessary regulations are ready before 365 days after the date of Royal Assent.
8. The timeframes for bringing the Bill into force, as set out in the LEG paper, are on the following page.

Time	Reforms coming into effect
6 weeks after the date of Royal assent	<ul style="list-style-type: none"> <li>• Changes to the definition of overseas person (that is, no longer screening fundamentally New Zealand entities)</li> <li>• Tipping points for investments in New Zealand listed issuers</li> <li>• Increased threshold for screening less than freehold interests over sensitive (but not residential) land</li> <li>• Reductions in categories of ‘sensitive adjoining land’</li> <li>• New investor test and repeat investor process</li> <li>• New enforcement powers and clarification of Court powers</li> <li>• New information gathering and sharing powers</li> <li>• Managing classified security information in court proceedings</li> <li>• Water bottling considerations in the benefits test</li> </ul>
6 months after the date of Royal assent	<ul style="list-style-type: none"> <li>• The national interest test and provisions to support it (e.g. the identification and treatment of Critical Direct Suppliers)</li> <li>• Enhanced farmland advertising requirements</li> <li>• New process for offering fresh and saltwater areas to the Crown</li> </ul>
12 months after the date of Royal assent	<ul style="list-style-type: none"> <li>• The new benefit to New Zealand test (including in respect of the Fisheries Act)</li> <li>• The new national security and public order call in power</li> <li>• Statutory timeframes for decisions made under the Act</li> </ul>

## Changes to the Bill

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9. Your agreement is sought to a set of final changes to the Bill that will give effect to your previous policy decisions and resolve issues that arose during the drafting process.

### **The new automatic condition will help manage NSPO risks without overly restricting legitimate commercial actions**

10. We recommend including the new automatic condition<sup>1</sup> for national interest and call in transactions. It will ensure that enforcement powers will be available to manage NSPO risks when necessary. Overseas persons will only breach the condition if they act with ‘a purpose or intention of adversely affecting national security or public order’.

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[36]

11. We were still consulting with subject matter experts when the draft of the Bill was provided to you previously. You agreed that, if necessary following consultation, the automatic condition should be changed to enable NSPO risks to be managed effectively without overly restricting actions taken for legitimate commercial purposes (T2020/95 refers).
12. This new framing better allows significant NSPO risks to be managed without unduly restricting actions taken for legitimate commercial purposes.

[1]

### **Interim conditions will allow the Minister more time to consider how to manage NSPO risks from call-in transactions**

17. We recommend empowering the Minister to place interim conditions on call-in transactions. It is important that the Minister is able to identify the appropriate NSPO risk management action because, once a call-in transaction has been allowed to proceed, it is granted safe harbour and no further actions can be taken unless a condition is breached or the information provided in the notification was false or misleading.
18. The Minister will probably have incomplete information regarding non-notified transactions. A NSPO risk management action can be judicially reviewed if the Minister did not have reasonable grounds to believe that the transaction gives rise to a NSPO risk, or if the power used by the Minister was beyond what was necessary. For example, if the Minister ordered disposal of the property when the risk could be adequately managed with a condition.
19. Placing an interim condition on the transaction, targeted at any potential risks, gives the decision-making Minister more time to decide which NSPO risk management action is

appropriate, [36]

permanent actions will be more tailored to the risk, and less impactful on investors' property.

It will also mean that

## **Changes to the special land provisions will make the process clearer and more certain**

20. We are seeking your agreement to small changes to the process for “special land”, which are now called “fresh or seawater areas”. These changes are outlined below.
21. The previous draft of the Bill was silent on the types of land to which the provisions would apply. We recommend clarifying that they apply only to sensitive land transactions which go through the benefit test pathway (including the special forestry test pathway). This means they will not apply to investments going through the residential land pathways, in line with the original policy intent of streamlining consent for investments in this sector.
22. The previous draft was also silent on whether the provisions would apply in situations where the overseas investor is a joint owner of the land. We recommend clarifying that they do apply in this situation, even where the other owners are New Zealanders. This approach will create certainty in the process and prevent overseas investors from attempting to circumvent the requirements by ensuring they have a New Zealand joint owner when purchasing the land. It should be noted that to remain in line with previous decisions to compensate third parties who lose their interests in fresh or seawater areas which are acquired by the Crown, New Zealanders who hold a partial interest in fresh or seawater areas will also be eligible for compensation to recognise their loss.
23. Finally, we recommend changing the language describing the criteria used to determine whether to acquire a fresh or seawater area. The previous draft of the Bill said that the Minister of Land Information could decide not to acquire the fresh or seawater area where the public interest in ownership is outweighed by the risk, liability or cost of acquisition. The use of the term public interest reflected the language LINZ put forward in T2019/4139. However, we recommend changing this to ‘amenity or conservation value’ so that the new criteria is that acquisition is not required if the risk, liability or cost of ownership outweighs the land’s *amenity and conservation value*. Because this language is less ambiguous than ‘public interest’, it will make decision-making more straight-forward and will provide more certainty for investors. It is also in line with your initial decision to waive acquisition only where the land offers little amenity or conservation value [T2019/2885 refers].

## **Listing categories of sensitive adjoining land to provide certainty to investors**

24. We have thought further about the best approach to providing certainty about two categories of sensitive adjoining land: where a collective Māori group manages land under the Reserves Act; and where a collective Māori group owns land managed in accordance with the Conservation Act. The details of this type of land will be listed across a range of legislation, which is almost exclusively Treaty settlement legislation, but also includes legislation where an area of land has been given its own legal identity, such as the Te Urewera Act 2014.
25. The land within these categories will need to be updated over time (e.g. to reflect new Treaty settlement outcomes). We also wish to provide certainty to investors so that they do not need to conduct significant research and scanning through different legislation to see if their investment in sensitive land.

- 26. As a result we propose that the Bill sets out the broad description of these categories of sensitive adjoining land, making regulations to list the relevant Acts and requiring the regulator to publish a list of land under each of those Acts on its website. This approach will meet our objectives of being specific about the relevant land and allowing it to be updated over time to reflect new settlements and arrangements.
- 27. This does not change the policy intent of screening this category of sensitive adjoining land.

**Proposals for the regulations**

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**Allowing the OIO to reject incomplete applications early on**

- 28. We are seeking your agreement that statutory timeframes include an initial quality assurance (QA) period in which the OIO may reject incomplete applications. This will incentivise investors to submit high quality applications the first time and reduce any back and forth to ensure that applications are complete.
- 29. On 9 March, we discussed with you the approach of statutory timeframes being a single overall timeframe, incorporating an initial QA period (see below figure). The QA period is not separate, rather it is a defined period that forms a part of the overall statutory time to assess an application.
- 30. The QA period allows the OIO to stop the clock on the timeframe and reject an application, if it is incomplete. Once the QA period has passed, the OIO can still ask for further information later on, but the ‘clock does not stop’. The OIO still need to make this investigation within the statutory timeframe (for example, 40 days below).
- 31. The figure below provides an example of how the QA period could work:



- 32. The process when an application is received would be as follows:
  - a As soon as an application is received, the clock starts on the statutory timeframe.
  - b If an application is complete, the OIO proceeds to determine the application within the timeframe.
  - c If an application is incomplete, the OIO may reject it during the initial QA period (e.g. in the first 10 days on the example above).
  - d If the QA period expires and the application has not been rejected, then it will be deemed complete and the OIO must make a substantive decision on the application.
  - e If an application has been rejected, the applicant may wish to resubmit their application. If the application is resubmitted to the OIO, the timeframe will restart (e.g. the full 40 days in the example above).

**Setting the threshold for irrigation schemes automatically subject to the national interest test**

33. As discussed with Hon Sage and Hon O’Connor, we want to confirm your agreement to define irrigation schemes automatically subject to the national interest test as:

*“A water supply system involving the collection, storage, and/or reticulation of water primarily for agricultural production, with a resource consent or consents to abstract more than **25 million cubic metres of water per year**”.*

34. Based on the Ministry for the Environment’s 2018 data, this threshold will capture about 25 irrigation schemes.<sup>2</sup> Other investments in irrigation schemes that do not meet the threshold could be subjected to the national interest test on a case-by-case basis if the Minister considers that they may be contrary to the national interest.

**Next Steps**

35. Subject to your agreement to lodge the LEG paper, the next steps will be:

<b>Milestone</b>	<b>Dates (2020)</b>
Paper lodged with LEG Committee	12 March
LEG Committee consideration	17 March
Cabinet Consideration	23 March
Introduction to Parliament	24 March
First Reading	2 April
FEC Committee reports back to the House of Representatives	By 23 June
Second reading	2 July
Third reading	By 30 July
Royal Assent	August

36. The timetable above will result in a shortened Select Committee phase of 11 weeks. The exact timing of this part of the process will be determined by the Chair and the Committee, but will mean that each part is significantly compressed. We recommend that you have an early discussion with the Chair of the Committee so that they can begin the design of this process.

<sup>2</sup> The Treasury previously provided advice on this threshold [T2019/4139 refers]. T2020/544 Approval to introduce the Overseas Investment Amendment Bill

**Note:**

The Summary of Approach to Supporting Regulations is online and can be found at: <https://treasury.govt.nz/publications/resource/overseas-investment-amendment-bill-2020-summary-approach-supporting-regulations>.

## Annex 1: Cabinet Legislation Committee paper

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We are seeking your agreement to lodge this paper, which seeks the Cabinet Legislation Committee's approval to introduce the Overseas Investment Amendment Bill.

Chair

Cabinet Legislation Committee

## **Overseas Investment Amendment Bill: Approval for Introduction**

### **Proposal**

1. This paper seeks the Cabinet Legislation Committee's approval for the introduction of the attached Overseas Investment Amendment Bill (the Bill).
2. Consistent with paragraph 2.39 of the Cabinet Manual, I submit this paper with the knowledge and approval of the Minister of Finance.

### **Policy**

3. This Bill will implement the policy decisions made by the Cabinet Economic Development Committee (DEV) on 13 November 2019 to improve the effectiveness and efficiency of the overseas investment screening regime [DEV-19-MIN-0306 refers], having been authorised by Cabinet to have Power to Act on 11 November 2019 [CAB-19-MIN-0562 refers; CAB-19-MIN-0593 confirms].
4. Changes to the overseas investment screening regime require legislative action because screening is governed by the Overseas Investment Act 2005 (the principal Act). [33]

### ***The Bill better balances the advantages and risks in screening overseas investment***

5. New Zealand needs productive overseas investment. Advantages include better access to markets, technology and capital, and, as a result, a more productive economy. However, overseas control or ownership of sensitive and other strategically important assets can result in some risk, and run contrary to this Government's view that there is inherent value in New Zealand ownership of these assets.
6. Our overseas investment regime, as contained in the principal Act, must balance these benefits and risks by ensuring that New Zealand has access to the investment we need, while also ensuring the government has the tools to manage risks associated with that investment.
7. There is good evidence that the regime does not have this balance right. We screen many transactions where there is either little to no risk, or the amount of risk is disproportionate to the time and cost of screening. The regime also has some clear gaps. In particular, there is no ability to consider risks to national security and public order, which makes New Zealand unique among comparable countries.

8. The Bill follows the amendments made in the Overseas Investment Amendment Act 2018 (the amendment Act), which came into effect on 22 October 2018. The amendment Act rationalised the screening regime for forestry assets and certain other profits-à-prendre, and added a general requirement for overseas persons to obtain consent to acquire residential land.
9. Consistent with the principal Act's purpose, "that it is a privilege for overseas persons to own or control sensitive New Zealand assets" and Cabinet's decisions in November 2019, the purpose of the Bill is to:
  - 9.1. enable the Government to effectively manage overseas investment; while
  - 9.2. ensuring that the Act operates efficiently and effectively; and
  - 9.3. supporting overseas investment in productive assets.
10. To achieve these objectives, the Bill will strengthen how the Act manages risk by:
  - 10.1. introducing a 'national interest test', which allows the Minister responsible for the Act (currently the Minister of Finance) to deny consent to any investment ordinarily screened<sup>1</sup> under the Act deemed contrary to New Zealand's national interest. This power is intended to be used rarely and has been modelled on the Australian regime, which gives the Minister broad discretion to determine what will be considered to be in the 'national interest' in each case;
  - 10.2. introducing a 'call in' power, which will allow the government to review certain investments not ordinarily screened and allows the Minister responsible for the Act (currently the Minister of Finance) to impose conditions on, block, or unwind those that pose a significant risk to national security or public order;
  - 10.3. defining the 'strategically important businesses' that these tests will apply to, which in general terms are businesses that develop, produce, or maintain military and dual use technology, are critical direct suppliers to defence and security agencies, provide telecommunications infrastructure or services, generate or distribute electricity, designated ports and airports, are systemically important financial institutions and financial market infrastructures, and media businesses that have an impact on New Zealand's media plurality. In respect of the national interest test, certain large irrigation schemes are also strategically important businesses as are firms that hold or generate certain types of sensitive data (for example, health or financial data) in respect of the call in power;
  - 10.4. embedding a higher threshold for acquiring farmland, reflecting its significant economic and cultural importance;
  - 10.5. enabling decision makers to consider the impacts of investments involving water bottling or bulk water extraction for human consumption on water quality and sustainability;

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<sup>1</sup> Investments in sensitive land, fisheries quota, and significant business assets are ordinarily screened under the Act. An overseas investment in significant business assets is, in general terms, where an overseas person will gain a more than 25% ownership or control interest in an entity worth more than \$100m, or where the value of the investment is worth more than \$100m. The threshold is higher for some of New Zealand's trading partners, for example, only investments over \$200m are considered overseas investments in significant business assets for parties to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. For Australian non-government investors, the threshold is \$537 million.

- 10.6. providing better recognition for Māori cultural values, including by taking into account plans to protect or enhance wāhi tūpuna, wāhi tapu areas and Māori reservations;
  - 10.7. requiring investors to disclose information relating to their proposed investment structure and tax treatment to Inland Revenue, to support the integrity of New Zealand's tax system;
  - 10.8. strengthening the Regulator's enforcement tools, to ensure that the government can appropriately manage a range of breaches, and actions by overseas persons that pose risks to national security and/or public order (for example, placing an entity into statutory management); and
  - 10.9. facilitating greater information sharing between agencies on national security and public order risks, and ensuring that such information is appropriately protected during court proceedings.
11. The Bill will also make it easier to make productive investments in New Zealand – simplifying the regime and cutting red tape by:
- 11.1. no longer requiring lower-risk transactions to be screened, such as:
    - 11.1.1. certain investments in less sensitive land that are only screened because it adjoins land that is sensitive in its own right ('sensitive adjoining land');
    - 11.1.2. transactions involving fundamentally New Zealand entities;
    - 11.1.3. leases of less than 10 years (whether this threshold is reached in a single or cumulative leases);
    - 11.1.4. small transactions that do not grant an overseas investor any control of sensitive assets; and
    - 11.1.5. transactions involving Residential Mortgage Obligations, which support financial stability;
  - 11.2. simplifying the screening process for the remaining transactions by:
    - 11.2.1. undertaking more targeted assessments of an investor's character and capability, by only considering serious proven matters and allegations of such where proceedings have begun;
    - 11.2.2. streamlining the process for determining whether an investment in sensitive land will benefit New Zealand, including by simplifying and clarifying the counterfactual assessment;
    - 11.2.3. introducing statutory timeframes for decisions by the Regulator; and
    - 11.2.4. no longer requiring investors to carry out a full screening process for subsequent investment applications if they have been screened and approved in a prior investment.
12. To maintain confidence in the financial system, the provisions for statutory management allow for joint direction of statutory managers when organisations regulated by the Reserve Bank are placed into statutory management. Statutory management is being considered in phase 2 of the Reserve Bank of New Zealand Act Review and the statutory management provisions

introduced by the Bill, particularly as they relate to organisations regulated by the Reserve Bank of New Zealand, may be altered following that review.

13. [1]

14. The Bill is likely to be contentious, with some strong interest groups favouring expanding the scope of the screening regime and others advocating for streamlining it. These strong interests were reflected in the feedback received during public consultation on reform options.

***The Bill implements policy decisions made under delegated authority***

15. The Associate Minister of Finance (Hon David Parker) was authorised by Cabinet to make decisions on any additional policy issues that arose during the drafting of the Act [DEV-19-MIN-0306 refers; CAB-19-MIN-0593 confirms]. The Associate Minister of Finance (Hon David Parker) was also authorised to decide on:

15.1. tax-related matters as part of the screening process in consultation with the Minister of Revenue, the Minister of Finance, the Associate Minister of Finance (Hon Dr Clark), the Minister for Land Information and the Associate Minister of Finance (Hon Jones), and

15.2. which legislation, and agency, should administer riverbed and lakebed and any other design matters which may arise in relation to the special land provisions during the drafting process, in consultation with the Minister for Land Information and the Minister of Conservation.

16. Decisions made under this delegated authority include:

16.1. In applying the good character component of the investor test, allowing the decision-maker to consider outstanding unpaid tax of NZ\$5 million or more, certain tax-related penalties and allegations, settlement agreements made with the Overseas Investment Office (the OIO) and contraventions of the principal Act.

16.2. Requiring investors to provide certain information about a proposed investment's structure and tax treatment. This information will be used by Inland Revenue for monitoring purposes and will not be considered as part of an application for consent.

16.3. Compensating third parties who have their registered interests removed from the title, when the Crown acquires special land, where those interests were registered on the title of the special land prior to it being purchased by the overseas investor.

16.4. Adjusting the criteria for the Crown to waive its right to acquire special land so that, while the land will only be acquired where there is some amenity or conservation value can be balanced against the risks, costs and liability to the Crown arising from maintenance and ensuring public safety can be considered. This will allow the Crown to waive its rights where ownership of the special land will impose significant costs relative to the amenity and conservation values offered.

- 16.5. Adjusting the criteria used to determine whether the Crown will acquire special land (renamed 'fresh or seawater area') so that acquisition is not required where the Minister for Land Information:
  - 16.5.1. decides that the land's amenity or conservation value is outweighed by the risks, costs or liability of ownership; or
  - 16.5.2. is not satisfied with the amount of compensation to be paid to the landowner.
- 16.6. Empowering the regulator (the OIO) to gather and share information related to national security and public order risks. The OIO will be able to require a person to provide information if it has reasonable grounds to suspect that an investment is a non-notified voluntary call in transaction which may pose national security or public order risks. The OIO will also be able to share information with other agencies (and vice-versa) to aid in assessing national security and public order risks for transactions screened under the national interest test or subject to the call in power.
- 16.7. Treating New Zealand incorporated entities as overseas persons in cases where overseas persons, with holdings of 10% or more of any class of an entity's equity securities, collectively have the power to control the composition of 50% or more of that entity's governing body.
17. Under this delegated authority, the Associate Minister of Finance (Hon David Parker) also took a small number of decisions to flesh out Cabinet's earlier policy decisions.

### **Impact analysis**

18. A Regulatory Impact Statement (RIS) was prepared in accordance with the necessary requirements and was submitted at the time approval was sought for the policy relating to the Bill [CAB-19-MIN-0593 refers]. The RIS has been updated to reflect policy decisions made by the Associate Minister of Finance (Hon David Parker) under authorisation from DEV. Updates include the decisions detailed above to:
  - 18.1. Allow outstanding unpaid tax over NZ\$5 million and certain tax-related penalties and allegations to be considered in the investor test;
  - 18.2. empower the regulator to gather and share information related to national security and public order risks; and
  - 18.3. compensate third parties who have their registered interests removed from the title when the Crown acquires special land.
19. The Regulatory Quality Team at the Treasury has found that the both the original and updated RIS partially meets the quality assurance criteria. The key reason for the panel's assessment is that the proposal regarding moving the rural land directive to primary legislation do not meet the consultation requirements. This proposal has not been consulted on publicly, or with key non-Crown stakeholders, including Māori. The proposals regarding special land acquisition also contain some features that have not been subject to public consultation.
20. A technical change has been made to make transactions in special land less costly and time-consuming. Rather than the Crown placing a memorial on the title of the fresh or seawater area to protect its ability to acquire the land, as originally proposed, this process will now be undertaken by the consent holder in accordance with the provisions in Schedule 5 of the Act and the associated Regulations. This change diverges from the Cabinet decision but has not

been included in the updated RIS because it is technical and will have a minor impact on regulated parties.

## Compliance

21. The Bill complies with:
  - 21.1. the principles of the Treaty of Waitangi;
  - 21.2. the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993; [This is provisional on NZBORA vetting]
  - 21.3. the disclosure statement requirements. A disclosure statement has been prepared consistently with the requirements. Notably, the disclosure statement details the changes to strengthen the enforcement powers and the new powers for managing national security and public order risks because these have significant effects on rights and obligations under the Act;
  - 21.4. the principles and guidelines set out in the Privacy Act 1993. The Bill will empower the regulator to gather and share information relating to national security and public order risks and tax. The Office of the Privacy Commissioner agrees that the Bill and the new information sharing scheme complies with the relevant principles and guidelines set out in the Privacy Act 1993; and
  - 21.5. the *Legislation Guidelines* (2018 edition), maintained by the Legislation Design and Advisory Committee.
22. [1,36]

## Consultation

23. Consultation was undertaken from late-2018 to late-2019, before the provision of drafting instructions to Parliamentary Counsel Office in November 2019. Officials held meetings with stakeholders and the public (19 meetings with approximately 175 attendees throughout New Zealand and in Sydney). This included meetings open to the public, hui with representatives from iwi organisations and Māori businesses, and meetings with technical audiences and investors. A consultation document was released in April 2019 and 733 written submissions were received.
24. Due to the timing of policy development work, there was no consultation on some aspects of the policy package, including the proposal regarding moving the rural land directive to primary legislation, and some of the proposals regarding special land acquisition. Officials have since consulted extensively on these topics with relevant government agencies, legal counsel and stakeholders where appropriate.

25. Relevant government departments were consulted before Cabinet decisions were reached in November 2019 and before decisions were made by the Associate Minister of Finance (Hon David Parker) under delegated authority.
26. Officials met with the Legislation Design and Advisory Committee (LDAC) on three occasions to discuss aspects of the proposed reforms.
27. An exposure draft Bill will not be released due to time limitations. However, officials met with stakeholders in December 2019 to provide an update and seek feedback following Cabinet's policy decisions, and the Cabinet paper including the policy decisions was proactively released in December 2019.
28. This Bill will continue to meet the commitment in the Coalition Agreement between the New Zealand Labour Party and New Zealand First to "strengthen the Overseas Investment Act."
29. Consultation with the government caucus and other political parties has been undertaken.

### **Binding on the Crown**

30. The principal Act binds the Crown and the Bill will be binding on the Crown upon commencement.

### **Allocation of decision making powers**

31. The Bill introduces new decision making powers and procedures, which have been drafted consistently with the criteria relating to the qualifications and responsibilities of decision makers.
32. The new national interest test will be used to screen investments that may be contrary to New Zealand's national interest, and the call-in power will be used to screen investments, not ordinarily screened under the Act, for national security and public order risks. These powers include the ability to order disposal of property, recommend statutory management, prohibit transactions and place conditions on transactions. The decision-making role for these new powers is intended to be separate from the Act's other tests to create a degree of independence and reflect that these are backstop powers to be used rarely.
33. The Bill empowers the appointment of a statutory manager by an Order in Council on the recommendation of the Minister authorised by the Prime Minister to make these decisions. This power is to be used on the rare occasions where a statutory manager is necessary to manage national security and public order risks pending disposal of an overseas person's interest. The Minister will be the appropriate decision maker given the significant impact statutory management has on a business and the need to make an assessment and respond within a short timeframe to immediate risks.

### **Associated regulations**

34. Various new regulations, using existing and amended regulation-making powers, will be required to give full effect to the policy that the Bill is intended to implement. The Summary of approach to supporting regulations attached as Annex 1 will be publicly released alongside the Bill to support engagement through the parliamentary process.
35. The Bill allows timeframes to be set in regulations for all decisions to provide greater certainty to investors. These timeframes will not come into effect until they have been set in regulation. Indicative ranges for the timeframes are set out in the Summary of approach to supporting regulations.

36. The regulations will require applicants to disclose information about a screened investment's structure and tax treatment as part of an application. New regulations will be required to specify exactly what information will need to be provided. An indicative summary of the tax information required for particular types of applications is set out in the Summary of approach to supporting regulations.
37. New regulations will be needed to give full effect to policies for special land, farmland advertising, and Residential Mortgage Obligations. This includes allowing the special land requirement to be satisfied by placing a memorial on the title of the land, and the changes to the process and considerations for acquiring special land.
38. New regulations will be needed to bring some of the call-in and national interest test powers into effect. The call-in power will apply to investments in strategically important business assets as defined in the legislation and regulations. The national interest test will also apply automatically to those strategically important business assets and certain investments by non-New Zealand governments. Most assets that raise national security and public order risks will be defined in regulations to allow for the appropriate level of detail and flexibility. As such, regulations are required to bring the full scope of these powers into effect.

39. The exemption criteria in the Act will be amended to enable relevant changes to the exemptions from the definition of an overseas person to be set in the regulations. These new provisions will give the government the power to exempt certain fundamentally New Zealand entities from the need to obtain consent. The exemptions themselves will not be available until regulations are promulgated.

### **Other instruments**

40. The Bill does not include any provision empowering the making of other instruments that are deemed to be legislative instruments or disallowable instruments.

### **Definition of Minister/department**

41. No changes to the current definition of Minister are proposed. The principal Act does not contain a definition of department.

### **Commencement of legislation**

42. The Bill will come into force in the following three stages:
- 42.1. changes which do not require associated regulations and which reduce the number of transactions screened under the Act will come into force six weeks after the date of Royal assent;
  - 42.1. changes which reduce the number of transactions screened but that require new regulations, and the new national interest test will be brought into effect six months after the day of Royal assent; and
  - 42.2. the remainder of the bill will come into force 365 days after the date of Royal Assent.
43. The Bill provides for relevant provisions to be brought into force by Order in Council if the necessary regulations are ready before 365 days after the date of Royal Assent.
44. The new measures would apply to transactions entered into after these dates. The existing principal Act rules will continue to apply to all transactions entered into before the commencement date, including 'conditional agreements' for sale and purchase where conditions precedent are not yet met and the contract is not yet enforceable at the commencement date.
45. If necessary, the commencement method or date may be amended during the Bill's passage through the House.

### **Parliamentary stages**

46. The Bill should be introduced and referred to the Finance and Expenditure Committee on 24 March 2020 and passed by 30 July 2020. This will require the Finance and Expenditure Committee to be instructed by the House, upon introduction, that the Bill is to be reported back to the House by 23 June 2020.

### **Proactive Release**

47. I propose to release this paper proactively in whole, subject to redaction as appropriate under the Official Information Act 1982, within 30 business days.

## Recommendations

The Associate Minister of Finance (Hon David Parker) recommends that the Committee:

1. [33]
2. **note** that, consistent with the Overseas Investment Act 2005's purpose "that it is a privilege for overseas persons to own or control sensitive New Zealand assets", the aim of the Bill is to:
  - 2.1. enable the Government to effectively manage overseas investment; while
  - 2.2. ensuring that the Overseas Investment Act operates efficiently and effectively; and
  - 2.3. supporting overseas investment in productive assets.
3. **note** the Summary of approach to supporting regulations at Annex 1 which sets out the key regulatory provisions to support engagement through the parliamentary process;
4. **note** that, statutory management is being considered in phase 2 of the Reserve Bank of New Zealand Act Review and the statutory management provisions introduced by the Bill, particularly as they relate to organisations regulated by the Reserve Bank of New Zealand, may be altered;
5. **approve** the Overseas Investment Amendment Bill for introduction, subject to the final approval of the Government caucus and sufficient support in the House of Representatives;
6. **agree** that the Bill be introduced on 24 March 2020;
7. **agree** that the Government propose that the Bill be:
  - 7.1. referred to the Finance and Expenditure Committee for consideration, with a report back by 23 June 2020;
  - 7.2. complete its third reading by 30 July and enacted by 28 August 2020.

Authorised for lodgement

Hon David Parker

**Associate Minister of Finance**

Annex 2: Talking points on the Overseas Investment Amendment Bill

## Talking points: Cabinet Legislation Committee

### Overseas Investment Amendment Bill: Approval for Introduction

- This Bill implements the decisions Cabinet made late last year to reform the Overseas Investment Act. [31]

#### ***The Bill will better manage the risks posed by overseas investment...***

- Foreign investment can – and increasingly does - pose risks. Risks as diverse as [1] to us losing control over our productive farmland. The Bill will better manage these risks by allowing us to:
  - decline consent if a transaction is not in our national interest
  - review smaller investments that don't require consent in certain strategically important businesses (like our electricity and water infrastructure) to determine if they pose significant risks to our national security or public order.
- It also embeds the high-threshold for foreign investors acquiring our farmland we introduced when coming into government, into the Act meaning that only Parliament can remove them.

#### ***...while simplifying the process for low-risk investments***

- The changes will allow us to focus on what matters by prioritising what we screen, and how we screen it, by
  - removing low risk transactions from the regime (like businesses owned and operated primarily by New Zealanders), and
  - removing or simplifying unnecessarily complex parts of the process.

#### ***I've made some minor decisions on issues that arose through drafting***

- Under my delegated authority, I (in consultation with relevant Ministers) have made some additional policy decisions during the drafting of the Bill. These are listed in the paper, but the key ones are:
  - requiring investors to disclose tax-related information about investments, which will support IRD in ensuring the integrity of our tax system, and
  - new information gathering and sharing powers, with appropriate protections for personal information, necessary to protect our national security and public order.

#### ***This Bill is a priority and I want it to pass before the election***

- This Bill will show New Zealanders that this Government is committed to ensuring foreign investment is in our national interest. I therefore recommend we pass this Bill before the election.
- This will require a shorter legislative timeframe:
  - I will introduce the Bill on 24 March, with the first reading on 2 April
  - The Finance and Expenditure Committee will be asked to report back to the House in 3 months - by 23 June
  - The Bill then should then complete its third reading by 30 July, and be enacted by 28 August.

## **Talking points: Cabinet Legislation Committee**

### **Overseas Investment Amendment Bill: Approval for Introduction**

- While this means the Committee won't have the normal period to consider public submissions, I'm confident public engagement has been comprehensive:
  - Pre-Cabinet's policy decisions, Treasury received including over 700 submissions on a public discussion document, held public meetings, hui, and other engagements.
  - Post Cabinet's decisions, the Treasury has briefed key stakeholders and proactively released the Cabinet paper and related policy advice.