

Departmental Disclosure Statement

Overseas Investment Amendment Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Treasury.

The Treasury certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

13 December 2017

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Part One: General Policy Statement

This Bill amends the Overseas Investment Act 2005 (the Act) to ensure that investments made by overseas persons in New Zealand will have genuine benefits for the country. The Bill has a focus on residential land, but also makes more general changes to the Act, including enhancing the information-gathering and enforcement powers of the Overseas Investment Office.

The Bill will ensure that overseas persons who are not resident in New Zealand will generally not be able to buy existing houses or other pieces of residential land. This will lead to a housing market with prices shaped by New Zealand-based buyers. The Bill will therefore make homes more affordable for New Zealand buyers at some times in the property market cycle, including for first home buyers, while also supporting our efforts to build a more productive economy, by helping redirect capital to productive uses.

Sensitive land that is residential land will be all properties classified as either “residential” or “lifestyle” for rating valuation purposes under the Rating Valuations Rules, which are issued by the Valuer-General. A property’s classification is held by the relevant territorial authority and could be obtained directly from them, or from various property-information websites.

A natural person is an overseas person under the Act if they are neither a New Zealand citizen nor “ordinarily resident in New Zealand”. The Bill modifies the definition of “ordinarily resident in New Zealand” for the purposes of the new residential land provisions. Under that new definition, a person will be ordinarily resident here if they hold a permanent resident visa and have been residing in New Zealand for at least a year and have been present in New Zealand for at least 183 days in the past year. The definition of “ordinarily resident in New Zealand” remains as it is in the current Act for all other purposes.

The Bill provides that overseas persons would be able to buy sensitive land that is residential land in certain situations. These are—

- if they will be developing the land and adding to New Zealand’s housing supply; or
- if they will convert the land to another use and are able to demonstrate this would have wider benefits to the country; or
- if they hold an appropriate visa and can show they have committed to reside in New Zealand.

The Bill requires that conditions be imposed if an overseas person purchases residential land utilising one of these exemptions, for example, if an overseas person purchases residential land to build houses on it, they will be required to sell the land when the houses are built.

The Bill enhances the information-gathering and enforcement powers of the Overseas Investment Office, including by providing for civil liability for those involved in a contravention of the Act. These enhancements will assist in ensuring compliance with the Act.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	NO
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Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
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Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>“Screening Overseas Investment in Sensitive Residential Land”, The Treasury, 30 November 2017</p> <p>Available from: http://www.treasury.govt.nz/publications/informationreleases/ris</p>	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	YES
<p>The Regulatory Quality Team at the Treasury has reviewed the Regulatory Impact Statement “Screening Overseas Investment in Sensitive Residential Land” by the Treasury in accordance with revised expectations for Regulatory Impact Assessments covering 100-day priorities.</p> <p>The Regulatory Impact Statement clearly sets out the implementation choices and the reasoning for the selection of preferred options from among those. Within the constraints set out in the section “Key Limitations or Constraints on Analysis”, the analysis of the likely impact of the proposed approach on the New Zealand housing market is more limited, for instance through the impact on investor incentives and the commercial attractiveness and viability of building new houses under the new system.</p> <p>It will be important to continue to focus on ways of monitoring the impact of this policy on overall housing market outcomes to help address this, for example to assess whether new housing built with funding from overseas is additional to, or a substitute for, housing that would otherwise have been built using domestically sourced funding, in addition to continued attention on managing implementation risks.</p>	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	YES
<p>The options discussed in part 3.C (Who should be covered by the policy), part 3.F (How to apply the ability to let under the new build test), and the discussion of the commitment to reside in New Zealand test in section 5, differ to what is in the Bill.</p>	

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	NO
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
These matters are considered at a high level in the Regulatory Impact Statement, available through the link above.	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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The Ministry of Foreign Affairs and Trade has been involved in the development of the changes this Bill gives effect to, to ensure that the changes are consistent with policy space preserved in trade agreements for the operation of our overseas investment screening regime.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

Treasury officials consulted with Te Puni Kōkiri to determine whether the changes in the Bill (in particular, the restriction on overseas person purchasing residential property) are consistent with the principles of the Treaty of Waitangi. Through this, a potential problem was identified: the policy could potentially prevent a non-citizen of Māori descent acquiring an interest in Māori freehold land with which the person is associated in accordance with tikanga Māori. Accordingly, it is intended that an exemption to the policy will be introduced through regulations to ensure that this does not occur.

Te Puni Kōkiri have noted that it is important for this exemption to apply from when this Bill takes effect, as otherwise there is a risk that the non-citizens of Māori descent could be prevented from having their ancestral connection to Māori freehold land recognised.

Due to time constraints, it has not been possible to consult more widely on this. However, interested parties will have an opportunity to make submissions on the Bill as part of the Select Committee process.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	YES
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Advice provided to the Attorney-General by the Ministry of Justice, or a section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. Such advice, or reports, will be accessible on the Ministry's website at <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/>

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
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(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
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(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	NO
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Clauses 27, 28 and 31

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
<p>The Ministry of Justice was consulted during both the policy development and the drafting of the Bill.</p> <p>The Ministry received draft versions of the Bill for their comment. The Ministry's feedback was incorporated in some of the provisions of the Bill where this was feasible in the time available.</p>	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
Clauses 21 to 25	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
<p>The Privacy Commissioner was consulted on the content of the Bill.</p> <p>As a result of the consultation, provisions that confirm the confidentiality of information obtained under the Bill's information gathering powers have been amended to ensure that personal information is subject to the Privacy Act 1993.</p> <p>However, the Commissioner considers that expressly limiting the purpose of the information gathering powers to determining eligibility to purchase would be beneficial from a privacy perspective. The Commissioner will present proposed drafting improvements to Select Committee.</p>	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	NO
<p>Due to the short timelines for developing this Bill, there has been no consultation with private sector organisations or public consultation process. However, we understand that the Bill will be referred to a select committee, so there will be an opportunity for the public to make submissions on the policies this Bill gives effect to.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
<p>These changes were developed in close consultation with the Overseas Investment Office (the regulator under the Overseas Investment Act) with the aim of trying to ensure that they are workable. We note the changes have been developed in a very short timeframe.</p>	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
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Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
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Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
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Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	YES
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	YES

Clauses 28, 29 and 31

The Bill provides for civil liability for people who are 'involved' in a contravention of the Act, the commission of an offence, or a failure to comply with a notice or condition. Some of the contraventions, offences, and failures (already in the Act) are strict liability matters. The concept of involvement in the civil liability context reflects the party liability concept in the criminal context.

In order to ensure that people who have a good excuse do not unfairly have civil liability imposed on them, the Bill contains 2 defences on which an 'involved person' could rely. The defences are:

- that the involved person reasonably relied on information supplied by another person; or
- that the involved person took all reasonable and proper steps to ensure that the person primarily responsible for the contravention, offence, or failure complied with the Act, did not commit the offence, or complied with the relevant notice or condition (as the case may be).

In both cases, the burden of proving that the defence applies is on the 'involved person', because the accused person is best placed to give evidence as to the existence of the defence.

The Bill imposes a duty on conveyancing practitioners in relation to transactions involving residential land. The practitioner is required to certify that, to the best of their knowledge, the transaction does not contravene the Act. A practitioner who, without reasonable excuse, fails to certify, or to retain the certificate for 7 years, commits an offence. The 'without reasonable excuse' component of the offence requires the conveyancing practitioner to establish that they have a "reasonable excuse" if they want to rely on that. The offence is treated in this way because the accused person is best placed to establish the existence of a reasonable excuse.

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	YES
<p>Clause 26</p> <p>The Bill provides for immunity for civil and criminal liability for a person who complies with a notice to dispose of property. Under new section 41E, the regulator would be able to issue a notice to dispose of property to a person where the regulator has reasonable grounds to believe that the person has, in relation to the property, contravened the Act, committed an offence under the Act, or failed to comply with a condition of a consent or of an exemption. If the person complies with the notice (by disposing of the property), new section 41F(1) would provide that they have immunity from civil or criminal liability in relation to the contravention, offence, or failure to comply on which the notice was based.</p> <p>The purpose of the provision is to provide the regulator with an option that encourages a non-compliant purchaser to comply with the Act, without the need for prosecution.</p>	

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
<p>Clauses 11, 14 and 16</p> <p>The Bill provides the relevant Minister with new decision making powers – in particular, the threshold for various tests in the Bill are that the relevant Minister is satisfied that various criteria are satisfied.</p> <p>This is consistent with the approach currently taken in the Overseas Investment Act, where the ultimate decision making rests with the relevant Ministers (such as under section 14 of the Act).</p>	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	YES
<p>Clause 33</p> <p>The Bill amends the existing regulation-making powers to provide for the following matters:</p> <ul style="list-style-type: none"> • prescribing, for the purposes of the Act,— <ul style="list-style-type: none"> ◦ classes of dwellings not to be treated as residential dwellings: ◦ classes of facilities to be treated as excluded accommodation facilities: • for the purposes of the commitment to New Zealand test (relevant to the acquisition of interests in residential (but not otherwise sensitive) land)— <ul style="list-style-type: none"> ◦ prescribing visa classes and types and persons with a specified nationality status (“qualifying individuals”), and factors for assessing commitment to reside in New Zealand for each type of qualifying individual: ◦ trigger events (being events that, in relation to a qualifying individual that has acquired an interest in residential (but not otherwise sensitive) land, trigger the requirement to dispose of the interest) • to provide for the acquisition by a Māori person of an interest in residential land that is Māori freehold land for which the person is a member of the preferred classes of alienees (where those terms have the same meaning as in Te Ture Whenua Māori/Māori Land Act 1993). The intent of this provision is to enable regulations to be made that ensure Māori persons are not inadvertently prevented from acquiring that kind of interest as a consequence of the changes made in relation to residential land. • to provide for the implementation of obligations in existing international agreements and that relate to overseas investments in sensitive land and overseas investments in significant business assets. <p>It is necessary for these matters to be dealt with through regulations because they will be technically complex and potentially subject to change, both of which are factors that weigh in favour of locating them in regulations. These new regulation-making powers are limited in scope, constraining their use.</p>	

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>Clause 29 of the Bill amends section 34 of the Act.</p> <p>Section 34 provides the Minister with the ability to direct the regulator (the Overseas Investment Office) in relation to certain matters by a Ministerial directive letter. The regulator must comply with the directive letter. The directive letter is a type of delegated legislation.</p> <p>The Bill will add, to the matters that are already set out in section 34, the following matters in relation to which the Minister can direct the regulator:</p> <ul style="list-style-type: none"> • conditions of consent • whether, and in what circumstances, proposed new section 16A(3)(b) (which relates to the commitment to New Zealand test for certain overseas investments in sensitive land) may be applied. 	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO
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