

Departmental Disclosure Statement

Overseas Investment Amendment Bill (No 3)

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; and
- 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.

4 May 2020.

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Part One: General Policy Statement

Overseas Investment Amendment Bill (No 3)

This Bill (the Bill) amends the Overseas Investment Act 2005 (the Act). This Bill is one of two Bills which are being introduced as a package to replace the Overseas Investment Amendment Bill (No 2), which was introduced on 19 March 2020. This Bill contains measures which the Government considers do not need to be put in place urgently to manage the economic effects of COVID-19.

The Bill's purpose, in conjunction with the Overseas Investment (Urgent Measures) Amendment Bill, is to ensure that risks posed by foreign investment can be managed effectively while better supporting productive overseas investment by reducing the regulatory burden of the screening process. These changes are consistent with the Act's purpose that it is a privilege for overseas persons to own or control sensitive New Zealand assets. The Bill is an omnibus Bill, introduced under Standing Order 263(a), which amends a number of Acts to achieve the Bill's single broad purpose.

The Bill strengthens how the Act manages risk by—

- embedding a higher threshold for acquiring farm land, reflecting its significant economic and cultural importance, as well as ensuring that farm land is advertised in a way that best ensures New Zealanders have a chance to acquire it (once regulations are made);
- 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;
- 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 (once regulations are made);
- enabling decision makers to consider the impacts of investments involving water bottling or bulk water extraction for human consumption on water quality and sustainability; and
- introducing a regulation making power, giving the government scope to reintroduce an emergency notification regime similar to that included in the Overseas Investment (Urgent Measures) Amendment Bill, if necessary respond to a future emergency.

This Bill makes it simpler to make productive investments in New Zealand by making permanent some of the changes introduced in the Overseas Investment (Urgent Measures) Amendment Bill as temporary measures, and further reducing the number of lower-risk transactions that must be screened.

This Bill also makes it simpler to make productive investments in New Zealand by simplifying the screening process for the remaining transactions by—

- streamlining the process for determining whether an investment in sensitive land will benefit New Zealand, including by simplifying and clarifying the counterfactual assessment; and
- 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.

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?	YES
<p>The consultation document linked below was prepared for the Overseas Investment Amendment Bill (No 2).</p> <p>Consultation document: Reform of the Overseas Investment Act 2005 - Facilitating productive investment that supports New Zealanders' wellbeing, The Treasury, April 2019. https://treasury.govt.nz/publications/consultation/reform-overseas-investment-act-2005.</p> <p>Some of the content that was consulted on is now included in the other Overseas Investment Bill: the Overseas Investment (Urgent Measures) Amendment Bill.</p>	

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>A Regulatory Impact Assessment (RIA) was prepared in accordance with the necessary requirements and was submitted at the time approval was sought for the policy relating to the Overseas Investment Amendment Bill (No 2).</p> <p>“Reform of the Overseas Investment Act 2005 – Phase 2”, The Treasury, 6 March 2020, issue date 19 March 2020. http://www.treasury.govt.nz/publications/informationreleases/ria</p> <p>Parts of the regulatory impact statement have been withheld under the grounds set out in the Official Information Act 1982. The particular withholding grounds are noted on the regulatory impact statement (RIS).</p> <p>The proposals in this Bill, do not materially differ from the Overseas Investment Amendment Bill (No 2), so a further RIA has not been prepared. Cabinet has also suspended the Regulatory Impact Assessment requirements for COVID-19 response related legislation.</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?	NO
<p>The RIA above for the Overseas Investment Amendment Bill (No 2) did not meet the threshold for needing an independent opinion on the quality of the regulatory impact assessment from the Regulatory Impact Assessment Team in the Treasury. An internal panel at the Treasury assessed both the RIS provided before Cabinet's consideration, as well as the updated RIA which was provided to the Associate Minister of Finance (Hon David Parker), who made a number of decisions following Cabinet's consideration of the reforms in 2019, as authorised by Cabinet. There was no change to the panel's overall assessment following a review of the updated RIA.</p> <p>Overseas Investment Act RIA Review</p> <p>Overall assessment: partially meets</p> <p>The RIA clearly describes the policy problems, objectives, options and the policy process to date. It also clearly identifies where officials' recommendations differ from the options being recommended to Cabinet, and the differing judgements and weightings behind those differing recommendations.</p> <p>The RIA is clearly written but lengthy, reflecting the complexity and breadth of the issues this policy package addresses.</p> <p>The review panel assessed the great majority of the RIA as meeting the quality assurance criteria. The key reason for the panel's overall assessment being the RIA "partially meets" the quality assurance criteria is that the proposal to move the rural land directive to primary legislation does 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. Addressing the "partially meets" assessment would require appropriate consultations, and inclusion of the results of that consultation, in the proposals.</p> <p>We do not plan to conduct further consultation on this Bill, given the pressing need for implementation.</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>Clause 18 (new section 59A) introduces a regulation making power, giving the government scope to reintroduce an emergency notification regime similar to that included in the Overseas Investment (Urgent Measures) Amendment Bill, if necessary respond to a future emergency.</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?	YES
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The RIA was updated in March 2020, subsequent to Cabinet’s consideration to reflect policy decisions made by the Associate Minister of Finance (Hon David Parker), as authorised by Cabinet, but has not been updated to reflect the COVID-19 related changes to the Bill. The updates that are relevant to this Bill, included:

- in applying the good character component of the investor test, allowing the decision maker to consider tax defaults over a relevant threshold, certain tax-related penalties and allegations of tax-related offences, settlement agreements made with the Overseas Investment Office (the OIO) and a broader range of contraventions of the principal Act;
- requiring applicants to disclose information about the structure and tax treatment of their proposed investment. This information will be provided to Inland Revenue for monitoring purposes and will not be considered as part of an application for consent; and
- 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.

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?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	YES
<p>These matters were considered in the RIA for the Overseas Investment Amendment Bill (No 2):</p> <p>http://www.treasury.govt.nz/publications/informationreleases/ria.</p>	

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
<p>These matters were considered at a high level in the RIA for the Overseas Investment Amendment Bill (No 2).</p> <p>http://www.treasury.govt.nz/publications/informationreleases/ria.</p>	

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 help assess whether the changes are consistent with the 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 and Te Arawhiti to determine whether the changes in the Overseas Investment Amendment Bill (No 2) are consistent with the principles of the Treaty of Waitangi.
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Public consultation included hui with representatives from iwi organisations and Māori businesses. Their feedback informed changes to better account for Māori cultural values when considering investments in sensitive land. Investors' plans to protect or enhance historic heritage such as wāhi tapu can already be considered under the Act, and this will be expanded to include other sites of significance, such as wāhi tūpuna and places of ancestral and cultural significance. Once amended, the Act will recognise, as potential benefits of investments, protecting or enhancing wāhi tūpuna, wāhi tapu areas and Māori reservations and providing, protecting or enhancing access across land for the purposes of stewardship of historic heritage or a natural resource.

However, due to the timing of decisions, changes to the rural land directive and special land acquisition were not consulted on publicly, or with key non-government stakeholders, including Māori.

This Bill has not been consulted on separately given it is materially the same as aspects of the Overseas Investment Amendment Bill (No 2). The new regulation making powers in clause 18 (new section 59A) have been tested with the relevant agencies.
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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 for this Bill, will be accessible on the Ministry of Justice website at:
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https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/

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)?	NO
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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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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 Overseas Investment Amendment Bill (No 2), and received draft versions of that Bill for comment. The Ministry's feedback was incorporated in the following provisions of the Overseas Investment Amendment Bill (No 2).</p> <p>The new civil pecuniary penalty threshold was developed in close consultation with the Ministry of Justice, to ensure that it is aligned with current practice for pecuniary penalties, as is reflected in the Telecommunications Act 2001 and following the Commerce Act 1986 reform. The Bill incorporates the Ministry of Justice's feedback that "civil" should be inserted into all references to "pecuniary penalties".</p> <p>The Treasury also tested the proposal to differentiate the maximum fixed pecuniary penalty thresholds between individuals and all other parties with the Ministry of Justice.</p> <p>The Ministry of Justice was consulted in the policy development of the powers for managing national security and public order risks, and a draft of the Overseas Investment (Urgent Measures) Amendment Bill was provided to the Ministry for comment.</p> <p>New regulation making powers in clause 18 (new section 59A) have been tested with the Ministry.</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
<p>Clause 16 allows the OIO to require 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.</p>	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
<p>The Office of the Privacy Commissioner agreed that the Overseas Investment Amendment Bill (No 2) and the new information gathering and disclosure powers complied with the relevant principles and guidelines set out in the Privacy Act 1993.</p> <p>We expect the result would be the same with this Bill.</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?	YES
<p>Consultation on the Overseas Investment Amendment Bill (No 2) 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.</p> <p>Due to the timing of policy development work, there was no consultation on some aspects of the policy package. Officials have since consulted extensively on these topics with relevant government agencies, legal counsel and stakeholders where appropriate.</p> <p>An exposure draft of the Bill was not released due to time limitations. However, officials met with stakeholders in December 2019 to provide an update on and seek feedback following Cabinet’s policy decisions, and the Cabinet Paper including the policy decisions was proactively released in December 2019.</p> <p>The following agencies and entities were consulted on the draft Overseas Investment Amendment Bill (No 2): the Ministry for Primary Industries, the Ministry of Justice, the Department of Conservation, the Ministry for the Environment, the Inland Revenue Department, the Ministry of Foreign Affairs and Trade, the Ministry of Defence, New Zealand Trade and Enterprise, the Department of the Prime Minister and Cabinet, Land Information New Zealand, Te Puni Kōkiri, the Ministry of Housing and Urban Development, the New Zealand Security Intelligence Service, the Government Communications Security Bureau, the Ministry of Business Innovation and Employment, the Ministry of Culture and Heritage, Te Arawhiti, and the Reserve Bank of New Zealand.</p> <p>This Bill has not been consulted on separately with agencies due to time constraints. However, some visibility is available through Cabinet processes. New regulation making powers in clause 18 (new section 59A) have been tested with the relevant agencies.</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 OIO (the regulator under the Overseas Investment Act) with the aim of ensuring that they are workable.</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?	YES
Schedule 3 allows the Crown to compulsorily acquire fresh or seawater areas (previously 'special land'), including by removal of any third parties' interests from the title when the Crown acquires fresh or seawater areas. Schedule 3 requires compensation to be provided to the overseas investor, and allows third parties to apply for compensation if their registered interests are removed from the title, where those interests were registered on the title of the fresh or seawater area prior to it being purchased by the overseas investor.	

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?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO
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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
Clauses 8 and 9 amend the benefit to New Zealand test, simplifying the criteria for decision-makers by reducing the 21 narrowly framed factors to 7 less prescriptive factors, with an additional factor that only applies to investments involving water bottling or bulk water extraction for human consumption. This decision-making power is appropriately limited through these criteria, and decisions will be subject to judicial review.	

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
The Bill requires 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. The form and information requirements will be constrained by the provisions in the Act.	
4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
Clause 18 (new section 59A) introduces a regulation making power, giving the government scope to reintroduce an emergency notification regime similar to that included in the Overseas Investment (Urgent Measures) Amendment Bill, if necessary respond to a future emergency.	

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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