

The Treasury

Reform of the Overseas Investment Act 2005 – Phase 2 Regulatory Impact Assessment

March 2020

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Coversheet: Reform of the Overseas Investment Act 2005 — Phase 2

Advising agency	The Treasury
Decision sought	This regulatory impact assessment has been prepared for the purpose of informing decisions to be taken by Cabinet regarding the proposed reform of the Overseas Investment Act. It has been updated subsequent to Cabinet’s decisions to include analysis on regulatory decisions that were made by Ministers under delegated authority from Cabinet.
Proposing minister	Hon David Parker (Associate Minister of Finance)

Summary: Problem and proposed approach

Problem definition:
What problem or opportunity does this proposal seek to address?
Why is government intervention required?

The second phase of reform to the Overseas Investment Act 2005 (the Act), aims to achieve a better balance between supporting high-quality investment and ensuring the Government can adequately manage risks from overseas investment.

The proposals outlined in this regulatory impact assessment are designed to address the Act’s three main problems:

- The Act does not allow adequate assessment of whether proposed investments are in New Zealand’s overall national interest, or management of risks to New Zealand’s national security or public order.
- The consent framework¹ for overseas investment in sensitive assets is complex and creates uncertainty for investors. It requires investors to provide a significant amount of information of often limited value.
- The Act screens lower-risk investments, which imposes compliance costs that are disproportionate to the risks. Examples include transactions involving land of limited sensitivity or of fundamentally New Zealand entities, and investments that do not materially change overseas persons’ control over sensitive assets.

Government intervention is required to address these problems, because they stem from existing settings in the Act and the Overseas Investment Regulations 2005 (the Regulations).

¹ The consent framework includes the ‘investor test’ (which generally applies to all transactions and assesses an investor’s competency and capacity) and the ‘benefit to New Zealand test’ (the benefit test – which applies to most transactions involving sensitive land and fishing quota).

Proposed approach:

How will government intervention work to bring about the desired change?

How is this the best option?

The proposals outlined in this regulatory impact assessment include legislative amendments to address problems with the Act, the Regulations and the Fisheries Act 1996. If agreed by Cabinet, the amendments will achieve two main aims:

- ensure the regime effectively manages risks to New Zealand from overseas investment, and
- reduce complexity and compliance costs.

The proposed amendments need to work together as a coherent package in order to balance the risks and benefits of overseas investment. The Cabinet paper proposals, and Treasury's recommended options, each form a coherent package of proposed reforms. Overall, the Cabinet paper package places greater weight on managing the risks of overseas investment (whereas the Treasury package equally weights the reform criteria (discussed in Section 3.2 below)). The appropriate weighting for reform criteria is a matter of judgement.

Section B Summary impacts: benefits and costs

Who are the main expected beneficiaries and what is the nature of the expected benefit?

New Zealanders will benefit from proposals to strengthen the Government's ability to decline investments that are contrary to New Zealand's national interest, including through managing significant risks from overseas investment to national security and public order. This will promote confidence in the Government and contribute to New Zealanders' overall security. The potential impact of these changes cannot be monetised, but is expected to be significant, given the nature of the risks being managed.

Some New Zealanders will also benefit from knowing that land such as farm land and waterways (ie, land with high ownership value) is protected. The proposal to establish an elevated benefit threshold for farm land (which embeds the existing rural land directive), and proposals relating to the protection of special land², recognise the high ownership value in these types of land. The farm land proposals will also benefit New Zealand purchasers by embedding a higher threshold for foreign ownership, potentially lowering the price of New Zealand farm land.

New Zealand businesses and overseas investors will also benefit from proposals to streamline the consent process and reduce the regulatory burden for most investors. The Government's economic strategy aims to build a productive, sustainable and inclusive economy. Overseas investment contributes to this aim when it brings new jobs and

² Special land is qualifying foreshore, seabed, riverbed or lakebed.

increases productivity, which is the biggest determinant of people's living standards in the longer term.³

Given the shortfall between New Zealand's savings and investment needs, overseas investment plays a pivotal role in building the economy and enhancing New Zealanders' wellbeing. There is significant evidence that relaxing restrictions on foreign direct investment (FDI) increases the flow of overseas investment.⁴

Proposed improvements to the consenting framework, and reducing screening of lower-risk transactions, should remove around 14% of applications from the overseas investment screening regime. The changes will reduce transaction costs for most investors, and make it easier for New Zealand businesses to attract investment.

Improvements to the consenting framework, combined with statutory timeframes, should reduce decision-making times, assuming appropriate information/education and process changes by the Overseas Investment Office (OIO) and process changes by applicants and their advisers.

Vendors, excluding vendors of farm land and assets subject to the national interest test or call in power, will benefit from a speedier sale process because of streamlined requirements for screening overseas investment. If a sale process is protracted because of screening requirements, businesses can 'stagnate' through diminished or no investment by the vendor and no investment by the buyer while it is unclear whether the sale will proceed.

Where do the costs fall?

Changes to the investor test to allow consideration of corporate offending and contraventions may marginally increase applicants' costs in isolation. This is likely to be offset by other, liberalising changes to the investor test, particularly no longer considering the conduct of entities that may be related to the directors of a prospective investor, but which have no relation to the proposed investment itself.

The preferred package will impose additional costs on investors involved in higher-risk transactions that are subject to the new national interest test. The new call-in power will also impose costs on some investors not ordinarily subject to screening under the Act, through additional notification requirements. The impact of additional screening is expected to be low, as international experience suggests that only very few transactions are likely to be called in.

Vendors of assets subject to the national interest test and call-in power may (particularly in the short term) experience costs arising from longer sale periods and potentially lower sale prices, if changes reduce the pool of potential purchasers. Vendors of farm land subject to the elevated benefits threshold may experience slightly higher costs, although this change is largely embedding the existing approach under the rural land directive.

³ Research indicates, for example, that foreign owners raise average wages — a proxy for productivity — between two and eight percentage points more than similar, non-acquired firms: Fabling, R and Sanderson, L (2011) [Foreign acquisition and the performance of New Zealand firms](#) Reserve Bank of New Zealand Discussion Paper Series 2011/08.

⁴ Mistura, F and Roulet, R (2019) [The determinants of foreign direct investment: do statutory restrictions matter?](#) (01/19). *OECD Working Papers on International Investment* 2019/01.

Introducing a national interest test and call-in power will also impose implementation costs on the agencies involved. There will also be general implementation costs for the OIO arising from the Phase 2 reforms. These costs could either fall to the Crown or be recovered from applicants for consent. The Act already authorises — but does not require — the responsible minister to recover the costs of the regulator and ministers incurred in exercising functions and powers, performing duties and providing services under the Act. No changes are proposed to this framework. Any changes to fees resulting from these reforms will be subject to a full cost-recovery impact assessment in accordance with Cabinet’s requirements. Refer to section 5.2 for more detail.

What are the likely risks and unintended impacts, how significant are they and how will they be minimised or mitigated?

[1]

Incorporating the rural land directive into legislation could signal reduction in New Zealand’s openness to investment

- Incorporating the rural land directive into legislation will lock in a slightly higher threshold for farm land than currently exists. Although the intent is to enshrine existing practice, there is a risk that overseas investors perceive the elevated threshold as indicating a stronger or more enduring reduction in New Zealand’s openness to overseas investment.
- Embedding the elevated threshold for farm land will continue to constrain capital available to the primary sector, which could make it harder for the primary sector to transition to the lower-impact land uses the Government is pursuing through sustainability-focused reforms. We do not have a clear picture of the potential magnitude of this impact.
- It could also embed an incentive to convert land to forestry, due to the more permissive investment screening process for forestry (although this incentive already exists under the existing rural land directive). [33]
- That said, however, the elevated threshold is intended to reflect the view that farm land has a higher ownership value than other types of sensitive land, and that New Zealanders already have world leading farming practices.

[1]

Speed of reform

- The Act is complex, and the proposed reform package is of a large scale. The timeframe is tight, as the Government intends to enact reforms by the [33]. The complexity, scale and time pressures create risks of unintended consequences. These are being mitigated to the extent possible by extensive consultation, close interagency cooperation, including with Land Information New Zealand (LINZ) on detailed design and with the Parliamentary Counsel Office.

Changes to the consenting framework may create more uncertainty in the short term

- Proposed changes to the consenting framework will create some initial uncertainty for investors. This risk will be mitigated through providing guidance to investors on how the OIO will approach its assessment under the new framework. Over time, the system should provide more certainty and time-savings to investors as precedent is established.

Scope of the new national security/public order call-in power

- The number of notifications generated in relation to the call-in power can only be estimated at this stage, but mandatory and voluntary notifications will generate costs for regulated parties. The regulatory burden of notification will be mitigated by tight definitions in the Act and in regulations of the transactions covered by the call-in power, to focus on areas of significant risk to national security and public order. This regulatory burden can be further reduced by the OIO ensuring that the information required to be provided by prospective investors is not more than necessary.
- Use of this power is likely to impose additional costs on affected investors. However, international experience, and advice from relevant agencies, suggests that very few transactions are likely to be subject to in-depth screening on national security or public order grounds.

Scope of the new national interest test

- The new national interest test is likely to impose greater costs on a small number of businesses. Risks of investor uncertainty and regulatory over-reach will be addressed through tight definitions in regulations. Potential risks of over-use by governments will be mitigated through legislative design (for example clearly defining asset classes within scope), and decision-making by a minister other than the normal decision-making minister under the Act. Based on analysis of previous transactions, we anticipate that around 20 transactions per year will be automatically subject to the test (less than 10% of total transactions).

New statutory timeframes

- New statutory timeframes could place pressure on the OIO and ministers when making decisions on applications. Consequences could include reduced quality of assessment, more incomplete or declined applications, or breaches of the timeframes. OIO resourcing will be taken into account in calibrating appropriate timeframes, tailored to the Act's different consent pathways. Timeframes will be prescribed in regulations, and can be revisited to ensure they are set appropriately. Decision-makers will have the ability to extend timeframes where necessary, but will also have to tailor their level of inquiry to reflect the statutory timeframes (and the legislated tests of consent) require.
- Risks will also be mitigated through the creation of new incentives on investors to ensure that their applications are of sufficient quality from the start of the process. Through its initial quality assurance period, the OIO will be empowered to reject applications that do not meet its requirements. Higher-quality applications should reduce the time that the OIO and investors need to go through the consent process.

Identify any significant incompatibility with the Government's 'Expectations for the design of regulatory systems'.

The Treasury's preferred options comply with the Government's 'Expectations for the design of regulatory systems'. The options seek to achieve clear objectives efficiently and effectively. We have robustly analysed, and consulted on, the proposed changes to identify the costs and benefits as far as practicably possible. Gaps in consultation are noted in section 2.5. The results of the changes will be monitored, evaluated and reviewed to ensure their effectiveness.

In relation to the proposal to legislate the rural land directive, time and data constraints have prevented full analyses of the impact of the existing regulatory approach to overseas investment in the primary sector, and of the proposed approach.

Careful consideration has been given to the proposed reform package's compliance with New Zealand's international obligations and Treaty of Waitangi implications.

[36]

Section C Evidence certainty and quality assurance

Agency rating of evidence certainty

Overall, there is a good evidence base for the proposed reforms. We drew on international analysis (eg, by the Organisation for Economic Cooperation and Development (OECD)), academic research, consultation with other agencies, stakeholder input and experience in other jurisdictions. Limitations in the evidence base are outlined where relevant below in section 1 and the chapters in section 4, and evidence certainty is rated for each issue in section 5.2.

Quality assurance reviewing agency:

The team of quality assurance assessors, comprising staff from the Treasury and the Ministry of Business, Innovation and Employment, has reviewed this regulatory impact assessment prepared by the Treasury. Two assessors also reviewed additional analysis of regulatory proposals that were made by Ministers under delegated authority from Cabinet.

Quality assurance assessment:

The quality assurance assessors consider that the information and analysis summarised in the regulatory impact assessment partially meets the quality assurance criteria.

Reviewer comments and recommendations:

The RIS 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.

The RIS is clearly written but lengthy, reflecting the complexity and breadth of the issues this policy package addresses.

The review panel assessed the great majority of the RIS as meeting the quality assurance criteria. The key reason for the panel's overall assessment being the RIS partially meets the quality assurance criteria 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. [1]

Addressing this would require appropriate consultations, and inclusion of the results of that consultation, in the proposals being made to Cabinet.

Regulatory impact assessment: Reform of the Overseas Investment Act 2005 — phase 2

Section 1: General information

Purpose

The Treasury is solely responsible for the analysis and advice set out in this assessment. It contains analysis and advice that has been produced for the purpose of informing key policy decisions to be taken by Cabinet.

Key limitations or constraints on analysis

Not a 'first principles' review

- The Phase 2 reform is not a 'first principles' review. It does not revisit the purpose of the Overseas Investment Act 2005 (the Act), or reconsider the Crown's right to make final decisions on consent applications. It also does not revisit substantive issues addressed in Phase 1 of the reform.⁶

Constraints imposed by New Zealand's international obligations

- New Zealand's international obligations restrict the Government from expanding the scope of the investment screening regime. [36]

- [1, 36]

Limitations on consultation

- The Treasury consulted publicly in April and May 2019 and sought feedback on policy options.⁷ Due to the timing of policy development work, we did not consult on detailed design proposals relating to the new call-in power (though we did consult on the higher-level question of whether or not to introduce a call-in power), or incorporating the rural land directive into the Act. [1]

We chose not to consult on proposals to strengthen the enforcement powers of the Overseas Investment Office (OIO), [4]

⁶ Phase 1 reforms were principally changes to rationalise the screening regime for forestry assets and certain other profits-à-prendre (the right to take natural resources from a property), and to restrict foreign investment in residential land. These had to be completed before the Comprehensive and Progressive Agreement for Trans-Pacific Partnership was ratified. The Act mandates a review of the changes in Phase 1 to forestry provisions to begin by October 2020.

⁷ Consultation is described further in section 2.5.

[4] We have since consulted extensively on these topics with relevant government agencies and, where relevant, with legal counsel. Finally, consultation did not occur on four of the five tax options (each option except for the *investor test option 2*).

- We also had limited engagement from the fishing sector in response to public consultation. We have worked closely with Ministry of Primary Industries on the implications for the overseas investment fishing provisions in the Fisheries Act 1996.

Evidence of the problem / data quality

- Overall, we have a good evidence base for the proposed reforms. Some risks and impacts are more difficult to assess (eg, risks to ownership or cultural values, the impact of proposals to exclude fundamentally New Zealand companies from the regime, and compliance costs of the national security/public order call-in power). In these areas, we have based our analysis on expert advice and stakeholder feedback.
- There is strong evidence that New Zealand's overseas investment screening regime is more restrictive than in most other countries. The OECD assesses New Zealand's regime as the seventh most restrictive to foreign direct investment (FDI) out of 68 countries, including all OECD countries.⁸ We received strong and consistent feedback from stakeholders that applying for consent in New Zealand is expensive, takes considerably longer than in other jurisdictions, and is discouraging investment in New Zealand. This is consistent with evidence that restrictive investment screening reduces rates of overseas investment.⁹
- Based on historical application data, there is good evidence that proposals to simplify the consent framework and remove some types of land from the screening regime will reduce the regulatory burden for most investors currently subject to screening under the Act.
- We have more limited data on the extent to which proposals will reduce who we screen (eg, excluding fundamentally New Zealand companies). We have based our assumptions and analysis in this area on stakeholder feedback and technical advice, including from experts who regularly engage with the Act. Data from the Companies Office and the OIO have also provided useful background.
- We estimate that the number of transactions affected by the proposed changes to managed investment schemes, incremental investments and tipping point transactions is likely to be low. These changes may encourage a small number of investments that would otherwise not have occurred.
- Data about the operation of the rural land directive gives reasonable certainty about the general nature of impacts associated with legislating an elevated threshold for farm land. But time and data constraints, and the relative newness of the rural land directive, mean the magnitude of impacts on the primary sector, and the longer-term impacts of the directive, are less clear.

⁸ This ranking largely results from the low monetary threshold for screening significant business assets, and the significant amount of land screened under the Act.

⁹ Mistura, F and Roulet, R (2019) The determinants of foreign direct investment: do statutory restrictions matter? (01/19). *OECD Working Papers on International Investment* 2019/01.

- Proposals for measures to address national security and public order risk have been informed by international trends and advice from security and intelligence agencies. The fact that many other governments, including all comparable jurisdictions, are increasing their ability to intervene in foreign investments on national security and public order grounds indicates that these risks exist and are increasing. [1]

The proposed national interest test and call-in power will significantly improve New Zealand's ability to manage these types of risks.

- Given the limited evidence base it is more difficult to assess other types of risks associated with overseas investment, for example in relation to cultural or ownership value. We have based our assumptions on anecdotal experience and stakeholder perspectives, and engagement through hui.

Conclusion

- Despite these limitations, we consider that for the most part the policy and regulatory analysis carried out is sufficient for Cabinet to base its decisions on. There are, however, risks in proceeding with proposals relating to farm land without broader consultation and analysis. In particular, without further analysis and consultation, there is a risk that this impact assessment may not identify all of the impacts associated with this proposal. This risk, however, is likely low because it is largely embedding an approach that is already in place through the rural land directive. Targeted consultation, and further collation and analysis of data, would assist in mitigating this risks, though this would risk delaying the reform process.

Responsible manager

March 2020

Thomas Parry
Manager, International
The Treasury

Section 2 Problem definition and objectives

2.1 What is the context within which action is proposed?

Risks and benefits

New Zealand benefits from overseas investment. Benefits can include creation of businesses and jobs,¹⁰ infusion of new technologies and processes, increased human capital (through, for example, learning more efficient ways of doing things) and more diverse international connections including access to global distribution networks and markets.

However, overseas investment can also pose risks. These include that overseas investment can take ownership and control of, and profits from,¹¹ economic activity out of New Zealand. In rare cases, this could lead to underinvestment, or firms moving offshore.¹² Overseas investment may conflict with New Zealand's national interest, and pose risks to national security or public order. There is a view that some New Zealand assets – like farm land and waterways – should be owned and controlled by New Zealanders.

Overseas investment environment

Between 2015 and 2019, total foreign direct investment stocks in New Zealand increased from \$356.726 billion to \$429.2 billion.¹³ This includes FDI (\$113.0 billion), portfolio investment (\$221.2 billion), other investment (\$77.0 billion) and financial derivatives (\$18.0 billion). The major sources of total foreign investment in New Zealand were Australia, the UK, and the USA.

In 2018, investments in financial and insurance services accounted for over half of all foreign investment (52%). Investment into public administration and safety (primarily government services), manufacturing, electricity, gas, water and waste services and wholesale trade accounted for a further 27% of total investment. Investment in agriculture, forestry and fishing accounted for 2% of total investment.

Over the same period, the OIO approved consents for around \$10.82 billion of foreign investment into New Zealand — around 15% of all foreign investment, but only 3% of transactions (this does not include transactions that were granted consent but did not proceed).

¹⁰ Fabling, R and Sanderson, L (2011) [Foreign acquisition and the performance of New Zealand firms](#) Reserve Bank of New Zealand Discussion Paper Series 2011/08. The authors found that firms acquired by foreign owners raise average wages between two and eight percentage points more than similar, non-acquired firms.

¹¹ The extent to which this is a problem is not clear – an asset's sale price should reflect the value of expected future profits, and this capital (released in the sale) may be reinvested in the New Zealand economy.

¹² Foreign investment may also lead to profits going offshore rather than being retained and invested or spent in New Zealand. The extent to which this is a problem is not clear. An asset's sale price should reflect the value of the expected future profits, and this capital (released in the sale) may be reinvested in the New Zealand economy.

¹³ Statistics New Zealand – International investment position data. Statistics New Zealand (2019) [Foreign direct investment in New Zealand continues to increase](#).

International comparisons

New Zealand attracts proportionately less, and has correspondingly lower stocks of, foreign direct investment (FDI) than many other small, advanced economies.¹⁴ While New Zealand's FDI stock at 38% of GDP is similar to the OECD average, it is significantly below that of other small, advanced economies. Foreign direct investment inflows as a percentage of GDP are also relatively low.

The overseas investment regime is restrictive by international standards. The OECD assesses New Zealand's regime as the seventh-most restrictive to FDI out of 68 countries, including all OECD countries.¹⁵ This ranking results largely from the low monetary threshold for screening significant business assets and the significant amount of land screened under the Act.

If changes are not made

In the absence of the proposed reforms, the OIO's ongoing improvement programme would continue. This should deliver some further process improvements, but could not address the underlying issues associated with the Act's scope and complexity, which are the primary cause of delay and uncertainty for investors and contribute to New Zealand's low relative attractiveness as a foreign investment destination. Nor do any of the OIO's operational changes offer any capacity to fill existing gaps in the screening regime, particularly those related to protecting New Zealand's national security or public order.

2.2 What regulatory system, or systems, are already in place?

Overseas investment in New Zealand is regulated by the Act, the Overseas Investment Regulations 2005 (the Regulations) and, in respect of investments in fishing quota, the Fisheries Act 1996 (the Fisheries Act).¹⁶ These provisions seek to balance the need to support high-quality investment and ensure that the Government has tools to manage risks appropriately. They do so by providing a framework for screening certain types of foreign investments to help ensure that such investments benefit New Zealand.

These provisions are not the only tool for regulating foreign investors' conduct. Overseas persons operating in New Zealand are subject to New Zealand laws governing their activities, in the same way as domestic investors. This includes laws related to tax, land use, and environmental protection.

An overseas person is, in general terms:

- an individual who is neither a New Zealand citizen nor 'ordinarily resident in New Zealand',

¹⁴ Landfall strategy group: Foreign direct investment in small economies (August 2018).

¹⁵ This ranking largely results from the low monetary threshold for screening significant business assets, and the significant amount of land screened under the Act. OECD Foreign Direct Investment Regulatory Restrictiveness Index: <http://www.oecd.org/investment/fdiindex.htm>

¹⁶ The Act incorporates sections 56 to 58B of the Fisheries Act 1996 (which contain the overseas investment fishing provisions) as if they were part of the Act, so in this document a reference to the Act includes reference to these provisions that are contained in the Fisheries Act.

- a body corporate (such as a company) that is incorporated outside New Zealand, or is a 25% or more subsidiary of a body corporate incorporated outside New Zealand, or
- a body corporate or other entity (eg, a partnership or trust) that is 25% or more beneficially owned or controlled by overseas persons.

Overseas persons require consent to acquire sensitive assets. Sensitive assets include significant business assets (generally those worth at least \$100m), certain types of land, and fishing quota. To receive consent, overseas persons are generally required to satisfy the 'investor test', which assesses their character and capability. In addition, overseas persons investing in sensitive land (excluding residential land) must satisfy the benefit test, that is, they must generally show that their investment is likely to benefit New Zealand.¹⁷ Overseas persons investing in fishing quota must satisfy requirements under the Fisheries Act that broadly reflect the investor test and the benefit test.

The Minister of Finance has policy responsibility for the Act, which is administered by the Treasury.

The OIO, a regulatory unit within LINZ, implements the overseas investment regime, and assesses applications from overseas persons lodged under the Act to determine whether they meet the relevant criteria for consent. Consent decisions are made by the relevant minister(s)¹⁸ with advice from the OIO, or by the OIO itself under delegation from ministers.¹⁹ The OIO monitors compliance with the Act and consent conditions, and can take enforcement action. It works closely with other agencies, including the Department of Conservation, Walking Access Commission, Heritage New Zealand, Immigration New Zealand, New Zealand Trade and Enterprise, the Ministry for Primary Industries and the Treasury.

The Act allows the Minister to direct the OIO on certain matters in the form of a ministerial directive letter. These matters include the Government's policy approach to overseas investment in sensitive New Zealand assets, the relative importance of different benefit factors for particular types of assets and matters relating to the regulator's functions, powers, or duties. The current ministerial directive letter was issued in November 2017. It raised the bar for investments in rural land (the rural land directive), and encouraged overseas investment in forestry that increases value-added processing of raw products.

¹⁷ Different tests apply to residential land and to forestry activity on sensitive land. Overseas persons who intend to reside in New Zealand indefinitely do not need to show that their investment in sensitive land is likely to benefit New Zealand. These consent pathways were introduced in the Phase 1 reforms and are out of scope in Phase 2.

¹⁸ Decisions are made by the Minister of Finance (in practice delegated to an Associate Minister of Finance) either alone, or with the Minister for Land Information or the Minister of Fisheries, depending on the type of application.

¹⁹ Detail on the OIO's delegations can be found here: <https://www.linz.govt.nz/overseas-investment/about-overseas-investment-office/legislation-ministers-delegated-powers>

The Act and Regulations were amended in 2018. These changes restricted foreign investment in residential land, and rationalised the regime for forestry investment by requiring consent for acquisitions of forestry registration rights and certain other profits à prendre²⁰ (the Phase 1 reforms). A review of the Phase 1 changes to the treatment of forestry must begin by 22 October 2020.²¹

Cabinet agreed terms of reference²² for the Phase 2 reform in October 2018.²³ This phase of the reform aims to enable the Government to effectively manage overseas investment, by ensuring the Act operates efficiently and effectively and supports overseas investment in productive assets.

2.3 What is the policy problem or opportunity?

The Act recognises that foreign ownership or control of sensitive New Zealand assets is a privilege and not a right. It seeks to achieve a balance between supporting high-quality investment and ensuring that the Government has the tools to manage any risks arising from overseas investment.

There is reliable evidence (discussed below) that the Act is not getting this balance right.

The screening regime contains significant gaps. Overseas ownership, control, or access to certain assets could pose risks to New Zealand's economic and national security or public order. The Act currently does not allow the Government to screen transactions based on these risks because it does not:

- enable the Government to ensure that transactions that are already screened under the Act are consistent with New Zealand's security and broader national interests,
- allow for screening of all transactions that may give rise to national security or public order risks, or
- provide powers for the Government to intervene in (decline, unwind or impose conditions on) investments that pose significant national security or public order risks.

The Act also does not allow decision makers to assess whether proposed investments are, overall, in the national interest.²⁴

There is also little recognition in the Act of the special ownership value that many New Zealanders attach to certain types of land – like farm land and waterways. The concentration of wealth internationally, [1]

may mean that international foreign investment markets are not always competitive.

²⁰ Profits-à-prendre are the right to take natural resources from a property.

²¹ Schedule 1AA, Part 1, clause 10 of the Act.

²² CAB-18-MIN-0481 – set out in Appendix 1.

²³ Phase 1 reforms had to be completed before the Comprehensive and Progressive Agreement for Trans-Pacific Partnership was ratified.

²⁴ To receive consent to acquire fishing quota, investors must satisfy the Fisheries Act's 'national interest test'. However, this largely replicates the 'benefit to New Zealand' test and has the same limitations as that test in preventing investments that may pose risks to New Zealand.

There is accordingly concern about New Zealand land markets becoming international rather than domestic markets, with the risk that New Zealanders may be unable to buy New Zealand land. This has the potential to erode the government's social license to pursue free and open trade internationally, with corresponding impact for the New Zealand economy.

On the other hand, the Act's scope and complexity can discourage productive overseas investment in New Zealand. Business community stakeholders told us that applying for consent can cost more than \$100,000 (excluding application fees), and that processing and decision-making times are significantly longer than in other jurisdictions.²⁵ Stakeholders also cited examples of deals falling through, and New Zealand assets being carved out of global transactions, because of the time taken to obtain consent.

Legislative changes are needed to address these problems. This is because they stem from existing settings in the Act and Regulations, which determine who, what, when and how overseas investment is screened. Improvements have been made to operational processes (eg, to improve decision timeframes), but cannot address problems arising from legislative settings.

2.4 Are there any constraints on the scope for decision making?

The terms of reference²⁶ set the parameters for the Phase 2 reform. The reform is not a first principles review of the Act, so it will not reconsider the purpose of the Act or the Crown's right to make final decisions on consent for overseas investments in sensitive New Zealand assets. It also will not revisit substantive issues addressed in Phase 1 through the Overseas Investment Amendment Act 2018.

The review is not generally intended to result in the screening of new categories of assets for which overseas investment is not currently screened, reflecting constraints imposed by New Zealand's international obligations. [36]

Some issues in this analysis are connected to ongoing policy work in other areas, such as water extraction (eg, *Essential freshwater: healthy water, fairly allocated*).

2.5 What do stakeholders think?

Stakeholder consultation

We consulted publicly on options to reform the Act²⁷ in April and May 2019. This included 19 meetings across New Zealand and in Sydney that were attended by approximately 175 people. These included: three technical round-tables with investors and professional advisers; three public meetings attended by stakeholders from environmental and recreational groups, investors and members of the business community; and five hui with representatives from iwi organisations and Māori businesses. We also met separately with

²⁵ OIO data shows that decisions under the Act take 100 days on average. In Australia, for example, decisions generally take 30 days (or 60 days with an extension).

²⁶ The terms of reference are attached as appendix 1.

²⁷ Treasury (2019) [Consultation document: reform of the Overseas Investment Act 2005](#).

investors and recreation groups, including members of the Prime Minister's Business Advisory Council, Federated Farmers and Fish & Game.

We received 733 written submissions. Of these, 629 were individual submissions. The others came from businesses and investors, industry groups, professional advisers, iwi groups, non-governmental organisations, New Zealand central and local government agencies, state-backed or associated investment funds and foreign governments.

Overall feedback on the consultation document was positive. Stakeholders generally considered that we had correctly understood the problems with the Act. There was a general consensus that the Act's consenting framework is overly complex and not well targeted in its assessment of risks and benefits.

The business community (investors, New Zealand businesses and their advisors) underscored the extent of problems with the Act's scope and complexity – discussed above in Section 2.3. This community generally supports proposals to simplify the consent framework and remove lower-risk investments from the regime. Some of these submitters supported or proposed alternative reform options that were more liberal than those we recommend (eg, screening companies only where a foreign investor (alone or together with their associates) holds more than 25% of the entity), but they did not in our view reflect the purpose of the Act or the review's objectives.

We also heard individuals' concerns that the Act does not reflect important underlying values, particularly in relation to water and environmental sustainability more broadly. There was also concern that the Act does not allow decision-makers to assess whether proposed investments are overall in the national interest.

Māori businesses and iwi/hapū have mixed views about the proposed reforms. Overseas investment is an important source of capital for Māori businesses, and anything that could be perceived as adding barriers to the use of land could be regarded as a limit on self-determination, and potentially as diminishing the benefit of any affected Treaty of Waitangi redress. Māori also have an interest in ensuring the Act adequately protects their land and cultural values. Māori stakeholders were keen to see more engagement with iwi and hapū, to ensure decisions take appropriate account of impacts on Māori.

The options discussed in the chapters of section 4 below reflect feedback received during consultation. Most options were amended following consultation and further engagement with relevant agencies. We also consulted with private-sector legal experts on proposals relating to the definition of, and exemptions from the definition of, overseas persons. This was due to the complex and interrelated nature of these proposals, as well as the significant role they play in the Act's operation. Where appropriate, chapters in section 4 discuss specific stakeholder feedback on each reform proposal.

Departmental consultation

We worked closely with relevant agencies to develop the recommended reform package. These agencies include LINZ (including the Overseas Investment Office), the Ministry of Foreign Affairs and Trade (MFAT), the Ministry of Business, Innovation and Employment (MBIE), the Ministry of Māori Development Te Puni Kōkiri (TPK), the Office for Māori Crown Relations Te Arawhiti, the Ministry for Primary Industries (MPI), New Zealand Trade and Enterprise, the Ministry for the Environment (MfE), the Walking Access Commission (WAC) the Department of Conservation (DOC), the Ministry for Culture and Heritage (MCH),

Heritage New Zealand, the Ministry of Justice, Inland Revenue, the New Zealand Defence Force and the Department of the Prime Minister and Cabinet (Policy Advisory Group). We also consulted with the Department of the Prime Minister and Cabinet's (DPMC) National Security Group, and the security and intelligence agencies on the proposed call-in power relating to national security and public order. We engaged regularly with the Legislation Design and Advisory Committee (LDAC) on aspects of the proposed reforms.

We worked with MPI to determine how proposed changes to the investor test and benefits test should be reflected in the Fisheries Act (in relation to overseas investment in fishing quota), to ensure consistency across the overseas investment screening regime.

Our recommended package reflects the need to take a broad view of how best to support overseas investment while managing its risks.

Some agencies consulted (DOC,²⁸ MPI and the WAC) disagree with our recommended option for reducing the scope of land adjoining land with sensitive characteristics, suggesting that it would limit opportunities for environmental and access conditions to be imposed. MPI and the WAC noted that the impact of our recommended approach on access conditions would be relatively minor. The alternative option provided reflects these concerns, by removing only the category of adjoining land that generally has the least environmental, historic and cultural value, and where there are rarely access concerns.

TPK expressed broader concerns about the scope of the review when consulted on a draft of this regulatory impact assessment. TPK's feedback suggested the review's scope should allow for adopting manaakitanga, kaitiakitanga and whanaungatanga in the Act's decision-making framework, and should consider a change in the treatment of former Māori lands (particularly raupatu or confiscated land) screened by the Act, requiring them to be offered for purchase to Māori with an interest in that land before consent is granted. These issues are outside the terms of reference.

Limits on consultation

Due to the timing of policy development work, we did not consult publicly on detailed design around the national security/public order call-in power (although we did consult on the higher level question of whether to introduce a call-in power). We did, though, seek advice from legal counsel, and consulted with Callaghan Innovation and the Venture Investment Fund to get a better understanding of how the call-in power would affect industry. This consultation led to some changes, in particular the separate treatment of investments in listed equity securities versus other types of interests.

We also did not consult publicly on proposals relating to the regulator's enforcement powers,^[1]

We did consult with relevant agencies and LDAC on this topic.

Due to the timing of policy decisions, we also did not consult on the option to incorporate the rural land directive into the Act,^[1]
or four of the five tax proposals.

²⁸ The functions of the Department of Conservation include "to advocate the conservation of natural and historic resources generally", and "to promote the benefits to present and future generations of the conservation of natural and historic resources generally and the natural and historic resources of New Zealand in particular" (s 6, Conservation Act 1987).

Section 3 Options identification

3.1 What options are available to address the problem?

For each issue we have identified and analysed a range of reform options. We describe the reform options in detail in section 4 below. These options must work together as a coherent package in order to balance the risks and benefits associated with overseas investment. The Cabinet paper proposals, and Treasury's recommended options, each form a coherent package of proposed reforms. Differences between the Cabinet paper package and Treasury's recommended package generally reflect a different weighting given to reform criteria (with the Cabinet paper weighting the risk management criterion higher than other criteria for some options).

The package of reforms proposed in the Cabinet paper will deal with two main areas:

Risks to New Zealand will be better managed

A new national interest test for higher-risk transactions will act as a 'backstop' to the simplified benefits to New Zealand test (discussed below). A new ministerial call-in power will be introduced to allow scrutiny of transactions not ordinarily screened under the Act (such as business acquisitions of less than \$100m) for significant risks to national security or public order. Enforcement measures and powers available to the regulator will be enhanced.

Changes will also be made to:

- embed in the Act a higher benefit threshold for farm land over five hectares
- clarify the farm land advertising requirements, and
- clarify that the offer back of special land to the Crown is mandatory for all consent pathways. These first two bullet pointed proposals differ from the Treasury's recommended approach. The Treasury recommended retaining the status quo in respect of the farm land benefits threshold, and removing the farm land advertising requirements. In relation to the third proposal, the Treasury recommended clarifying that the existing special land provisions are voluntary rather than mandatory. There are also some small differences between the proposals, and the Treasury's recommended approach regarding the decision-making framework for the national interest test and the call in power.

Complexity and compliance costs will be reduced

The consenting framework will be made less complex, by improving the focus and clarity of the investor test and simplifying the benefit to New Zealand test. Statutory timeframes for decisions under the Act will be introduced. There will be minor changes to strengthen the Act's recognition of Māori cultural values.

Compliance costs will be reduced by removing some lower-risk transactions from screening by:

- reducing the amount of land screened only because it adjoins land with sensitive characteristics,
- raising the threshold for screening non-freehold interests (such as leases and profits-à-prendre) in land other than residential land to 10 years, and
- excluding investors that are fundamentally New Zealand entities, and transactions that do not materially change overseas persons' control over sensitive assets (incremental investments).

There are some small differences between the proposals, and the Treasury's recommended approach regarding the threshold for leases and the treatment of incremental investments.

Reducing complexity and compliance costs will improve New Zealand's attractiveness to investment. This will have flow on benefits for productivity and economic growth. The changes will provide greater certainty to investors and increase the Government's ability to manage risks associated with overseas investment.

For several topics, there are interdependencies between proposals that require consideration as a package. We note these interdependencies in relation to the specific options discussed in section 4 below.

We considered non-regulatory options. We have recommended some, such as operational improvements in the identification of responsible overseas persons and individuals with control to be subject to the investor test, and in improving awareness of, and consultation with Māori about, significant cultural sites. In general, though, regulatory solutions are necessary because the problems this review is endeavouring to solve stem from settings in the Act and Regulations.

We have drawn on experience from comparable jurisdictions in developing the reform proposals. For example, Australia's overseas investment screening regime includes a broad national interest test, which has informed our thinking around options to improve the benefit test and the role a 'backstop' national interest test could play. In designing the proposed call-in power we have also drawn on the regimes (existing or under development) in Australia, Canada, the United States of America and the United Kingdom.

3.2 What criteria, in addition to monetary costs and benefits, have been used to assess the likely impacts of the options under consideration?

We assessed reform options against three criteria to determine whether they meet the Government's objectives for this phase of the reform. Consistent with the Treasury's Living Standards Framework, these criteria reflect the broad range of ways that overseas investment can influence New Zealanders' wellbeing.

- ***Manages the risk of overseas investment to New Zealanders' wellbeing.*** Does the option provide decision makers with the flexibility to effectively manage or protect against current and emerging risks from overseas investment to New Zealanders' wellbeing? This includes considering whether an option may create or increase opportunities for avoiding the Act. It also includes the concept of protecting cultural and ownership value in sensitive New Zealand land.
- ***Supports overseas investment in productive assets.*** Does an option support confidence in New Zealand as an attractive investment destination for productive investment? This includes considering whether an option minimises the costs involved in preparing applications and complying with consent conditions, and in administering and enforcing the regime.
- ***Encourages more predictable, transparent and timely outcomes.*** Is an option consistent with the basic principles of best-practice regulation? This considers whether the option achieves its objectives in a way that makes the law more certain, predictable and transparent, and encourages timely decision-making.

These criteria were used in developing policy options for the Phase 2 reform and in the consultation phase. Throughout these processes we have weighted the criteria evenly — the impact of increased management of risks needs to be balanced against the benefits of overseas investment to New Zealand and New Zealanders, in a coherent regulatory package. Applying a different weighting to risks and benefits will lead to different preferences for elements of the reform package. We have identified where this has happened (eg, with the Cabinet paper recommending a different option from Treasury's recommendations, by weighting criteria differently).

There is tension in balancing these criteria. For example, increasing the regime's predictability for investors will often reduce decision-makers' discretion to manage risks. Conversely, increasing decision-makers' discretion will reduce predictability and investment attractiveness.

3.3 What other options have been ruled out of scope, or not considered, and why?

Options not otherwise considered or progressed are identified in relation to each policy proposal in section 4 below.

Section 4: Specific problem definition, option identification and impact analysis

This section describes the reform options in detail, set out under the two main aims of the reforms:

4.1 Ensuring the regime effectively manages risks

- A Benefit threshold for farm land
- B Farm land advertising
- C Special land
- D Managing risks to New Zealand’s national interest
- E Managing risks to New Zealand’s national security and public order
- F Enforcement provisions
- G Considering tax as part of screening

4.2 Reducing complexity and compliance costs

- H Investor test
- I Benefit to New Zealand test
- J Māori cultural values
- K Water extraction
- L Statutory timeframes
- M Leases and other non-freehold interests
- N Land adjoining land with sensitive characteristics
- O Who is screened and when
- P Fees

Ratings

In the impact analysis section of each chapter (section 4.3) the options for dealing with the issues set out in the problem definition are all assessed against the status quo, which is reflected in the rating for each option against each criterion. The impact tables do not include the status quo, which would always be rated **0** reflecting no change.

Key compared with doing nothing (the status quo):				
++ much better	+ better	0 about the same	- worse	-- much worse

The overall assessment for each option is essentially an average of the rating against each criterion. Judgement is applied in determining the overall rating for each option.

Section 4.1 Ensuring the regime effectively manages risks

A Benefit threshold for farm land

A4.1 What is the specific problem?

Several types of land are discussed in this section:

- **farm land** is defined in the Act to mean land used exclusively or principally for agricultural, horticultural, or pastoral purposes, or for the keeping of bees, poultry, or livestock,
- **non-urban land** is defined in the Act to mean farm land and any land other than land that is both in an urban area and used for commercial, industrial or residential purposes,
- **rural land** is the subject of the current rural land directive, contained in the ministerial directive letter issued in November 2017, where the term is defined as non-urban land over five hectares (excluding any associated land), excluding land where the principal existing use is forestry.

There is some public concern about overseas ownership of farm land. There is concern over New Zealand land markets becoming international rather than domestic markets, with the risk that may make it more difficult for New Zealanders to buy New Zealand land. Some people also perceive that larger-scale farming is putting traditional family-owned farming out of reach for many New Zealanders.²⁹ The Government's view is also that overseas investment in the primary sector can be less compelling given that New Zealand is already a world leader in this area.³⁰ Time and data constraints have prevented exploration of the impact of overseas investments in the primary sector and the extent of public concerns.

The Act sets an elevated benefit threshold for non-urban land over five hectares, by requiring that benefits are 'substantial and identifiable'. It also requires farm land to be advertised before it can be acquired by an overseas person.³¹ Both requirements recognise the high ownership value of these types of land.

The Act allows the minister to direct the OIO on certain matters in the form of a ministerial directive letter (described in section 2.2 above). The current ministerial directive letter recognises the importance of the land-based primary sector to the economy, and requires the OIO to place high relative importance on economic benefit factors and New Zealanders' participation in an investment when transactions involved certain types of non-urban land. This component of the ministerial directive letter is called the 'rural land directive'. About 83% of the land currently captured by the rural land directive is farm land.

²⁹ MPI (2017) [New Zealanders' views of the primary sector](#). UMR Research.

³⁰ Rural land directive (November 2017).

³¹ Farm land advertising is discussed in chapter B of this section.

Since the rural land directive was issued in November 2017, the number of applications to acquire rural land has dropped by around 13% (historically, around 75% of applications involved rural land;³² in the period since the rural land directive was issued this has dropped to around 62%).³³ The rural land directive is considered to have contributed significantly to this drop in applications involving rural land.

Around 43% of rural land applications have not received consent since the directive was issued, due to applications being withdrawn or declined. The proportion of withdrawn applications is likely to reflect applicants' lack of familiarity with the change in threshold, rather than a permanent feature of screening under the directive.

The rural land directive is a tertiary legislative instrument and may be amended by the Minister at his or her discretion. There is an argument that the elevated threshold is a significant policy choice more appropriately reflected in primary legislation. Embedding the elevated threshold in legislation then triggers the need to clarify the policy objective, which is focussed on protecting farm land (rather than all rural land).

A4.2 What options are available to address the problem?

We developed two options for an elevated farm land benefit test. These are compared with the status quo (the rural land directive).

The options would both apply an elevated benefit threshold to about 58% of sensitive land applications that do not involve residential land, the intention to reside or the special forestry pathways. The options involve a narrower range of land than the rural land directive, capturing about 83% of the land currently covered by the directive. This reflects the view that farm land has a higher ownership value than other types of land and should receive increased protection under the Act.

Both options would require Parliament to amend the Act to vary the threshold.

Option 1 is to provide in legislation that farm land is more sensitive than other types of sensitive land, and that where an application involves farm land over five hectares an application must show a proportionately higher level of economic benefit or involvement of New Zealanders in the investment than other types of sensitive land. Applications that are clearly minor or technical would be excluded from the threshold.

Option 2 is to legislate that where an application involves farm land over five hectares, decision-makers must:

- place high relative importance on factors involving economic benefit and involvement of New Zealanders in the investment, and
- be satisfied that those benefits demonstrate a substantial point of difference.

Applications that are clearly minor or technical would be also excluded from the threshold.

³² 359 out of 480 over a five-year period from 1 July 2014 to 30 June 2019.

³³ The remaining 38% of applications comprise land that falls outside the 'rural land' definition (eg, due to size), applications that have been subject to the forest land directive, or applications to which a directive was dis-applied.

A4.3 Impact analysis

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
<p>Option 1: Legislate that farm land over 5 ha is more sensitive than other types of sensitive land, and thus an application must show proportionately higher levels of economic benefit or involvement of New Zealanders in the investment.</p>	<p>0 / + Embeds a higher bar for investment in farm land. This would cover a narrower range of land than the directive, but would target the most sensitive type of rural land – reflecting the special ownership value of, and ensuring New Zealanders have an opportunity to purchase, New Zealand farm land. Could incentivise investments in short-term leases that are not screened.</p>	<p>0 / - Embeds a higher threshold that will continue to significantly restrict overseas investment in agricultural and pastoral land, and moderately restrict overseas investment in horticultural land. This could make it harder for the primary sector to transition to lower-impact land uses. While this option targets a narrower type of land than the directive, there will be less flexibility to dis-apply the higher threshold in marginal cases (eg, transactions involving relatively small amounts of land or minor shareholding changes).</p>	<p>0 No material change expected. Option is consistent with the Legislation Guidelines, recognising increased protection for farm land as a significant policy objective.</p>	<p>0</p>
<p>Option 2: Legislate that where an application involves farm land over 5 ha, decision-makers must place high relative importance on factors involving economic benefit and involvement of New Zealanders in the investment, and be satisfied benefits demonstrate a substantial point of difference.</p>	<p>0 / + As above, but would more explicitly require benefits to be of a substantial nature. This would benefit prospective New Zealand buyers (by raising the threshold for overseas buyers).</p>	<p>- As above, but likely to set a more restrictive threshold and have a higher risk of unintended overreach.</p>	<p>- Greater uncertainty and compliance burden as this option would introduce a new, higher threshold that that could be challenging to precisely define. Option is consistent with the Legislation Guidelines, as per option 1.</p>	<p>-</p>

A4.4 What other options have been ruled out of scope, or not considered, and why?

Design options involving non-urban land, rather than farm land, were ruled out. They would elevate the investment threshold for less sensitive non-urban land such as large industrial and commercial sites located outside urban areas, and not address the problem definition in relation to farm land.

A4.5 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

Treasury's recommendation is to retain the status quo, under which an elevated threshold may be set via the ministerial directive letter. It would also allow decision-makers greater discretion not to apply an elevated threshold where this would not achieve the threshold's policy intent.

The Cabinet paper proposes option 2. As noted earlier, this reflects a higher weighting on the risk management criterion, directed toward protecting the special ownership value associated with farm land.

Both options are consistent with the Legislation Guidelines (reflecting that it is a matter of judgement whether to treat the elevated threshold as a significant or secondary policy choice).

B Farm land advertising

B4.1 What is the specific problem?

Farm land must be advertised for sale on the open market before consent can be given to an overseas person to purchase it. This requirement is intended to ensure that New Zealanders have the opportunity to acquire, enjoy and use farm land.

The current requirements are overly complex and are not meeting the Act's objectives. Advertising requirements can be met after a conditional sale and purchase agreement, or other form of agreement, has been entered into. The minimum advertising standards are generally considered ineffective: for example, a vendor can meet the requirements simply by placing a placard on the relevant land.

The process also lacks flexibility. Applicants must either meet the advertising requirement or obtain an exemption, and there is no middle ground such as allowing an alternative form of advertising that is better suited to the circumstances. Over the past two years approximately 50 applications met the farm land advertising criteria, and an additional 14 applications were granted an exemption from the requirement to advertise.³⁴

There is no data on how often the advertising requirements result in farm land being obtained by New Zealanders, because in such cases no application for consent is lodged.

Submitters expressed mixed views. Individuals and interest groups supported retaining the requirements on the basis that New Zealanders should have the opportunity to acquire farm land. Businesses and professional advisors submitted that the provisions are unnecessary as a vendor has an interest in testing the market, where appropriate, to maximise their sale price.

B4.2 What options are available to address the problem?

We developed two options to resolve the problems with farm land advertising.

Option 1 is to remove the requirement to advertise farm land. Vendors have an interest in securing the best price for their asset, and will publicly advertise the sale of farm land where it makes sense to do so. A vendor not wishing to test the market is likely to have good reasons for this choice, which mean they will also have little interest in competing offers that may result from advertising.

Option 2 is to clarify and strengthen farm land advertising rules by

- updating the prescribed forms of advertising, increasing the minimum advertising period, and specifying that the advertising must occur before any agreement (formal or informal) is entered into
- clarifying that the regulator can approve alternate forms of advertising in complex circumstances to ensure that advertising is appropriate for the type of asset being sold

³⁴ OIO data 2019.

- clarifying that the type of interest in land being acquired must be the same as is being offered for acquisition on the open market (for example, if the vendor is offering a 50-year lease, then a 50-year lease, not a sale, must be advertised), and
- improving the process for exemptions from the requirement by clarifying that:
 - the Minister can impose conditions on exemptions to ensure that they are not being used to circumvent advertising requirements, and
 - an exemption application may be submitted and decided before an application for consent is lodged and that the regulator can charge a fee for doing so.

These changes would ensure farm land advertising is genuine and accessible to the public, while also allowing flexibility to manage atypical cases.

B4.3 Impact analysis

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
Option 1: Remove farm land advertising requirements	0 Vendors would likely still advertise to New Zealanders as it would be in their interest to maximise the sale price.	+ Would reduce compliance costs and complexity, and send a positive signal about New Zealand's openness to investment.	++ Increased predictability and timeliness as regulatory requirement removed.	+
Option 2: Clarify farm land advertising requirements	+ Would enhance the Government's ability to manage the risk of overseas investment by better allowing New Zealanders the chance to purchase farm land, recognising its particular cultural value.	0 Marginal impact on New Zealand's attractiveness to investment because, although it makes advertising requirements more stringent (by requiring advertising before a transaction), this is mitigated by a clearer process. No material change in regulatory burden.	+ Farm land advertising requirements are clearer and more likely to achieve their objective	+

B4.4 What other options have been ruled out of scope, or not considered, and why?

We considered using legislative guidance to clarify the range of situations in which decision-makers could grant a discretionary exemption. This was ruled out due to the difficulty in capturing in legislation the range of circumstances in which decision-makers could grant an exemption.

B4.5 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

The Treasury prefers option 1 — to remove the farm land advertising requirements — given that in the majority of cases we would expect advertising to occur anyway if a vendor is genuinely prepared to consider competing offers (to maximise the sale price).

The Cabinet paper proposes option 2. There are legitimate policy objectives for retaining and clarifying the farm land advertising requirement, given farm land's particular cultural value. When assessed against the criteria for reform, these options are finely balanced.

C Special land

C4.1 What is the specific problem?

The Act includes a process for applicants to offer special land to the Crown. Special land is qualifying foreshore, seabed, riverbed or lakebed.³⁵ Offering special land to the Crown is a factor in the benefits test and a mandatory requirement under the new special test relating to forestry activities (the 'special forestry test'). The special land provisions reflect that some New Zealanders derive a welfare benefit from knowing that certain types of land are owned and controlled by New Zealanders (in this case, the Crown). Ownership of special land does not provide the Crown or public access to that land.

Approximately 16% of sensitive land applications in the past five years have involved special land (totalling approximately 20 applications per year), as have 75% of forestry applications under the special forestry test since it was introduced in October 2018 (because land suitable for forestry tends to contain waterways).

Currently, the special land provisions are:

- *Failing to achieve their original policy intent.* The Crown has not been able to secure full legal ownership of the special land it has been offered since the provisions were introduced in the 2005 Act.
- *Undermining other policy objectives.* The special forestry test, introduced in October 2018, was designed to streamline the consent process for overseas investment in the forestry sector, which is highly dependent on foreign capital. However, under the special forestry test, processing times for applications with special land take around 40% longer to process than those without. This means the provisions are becoming a barrier to overseas investment in forestry, which is important for enabling the Government's One Billion Trees programme.

Moreover, because the requirement to offer special land must occur before each piece of land is acquired, it is incompatible with the special forestry test's standing consent option (which is designed to speed up the consent process by allowing an applicant to acquire land without first having to meet consent criteria).

Other problems with the special land provisions are:

- The responsibility for notification – and the rest of the offer process – sits with the vendor, rather than the overseas person seeking consent. This is inconsistent with the treatment of other consent requirements, which sit with the overseas person, and can hold up the consent process.

³⁵ Definitions in the Act are:

- Lake means a lake (as defined in section 2(1) of the Resource Management Act 1991) that has a bed that exceeds 8 hectares in area.
- River means a river (as defined in section 2(1) of the Resource Management Act 1991) that has a bed of an average width, for its length on or adjoining the relevant land, of 3 metres or more. (Note that special land does not include beds of 'navigable' rivers or those subject to tidal flow, which are already considered Crown land.)

- Surveying to define the special land is complex and expensive, taking up to six months and incurring costs in the tens of thousands of dollars. This delays consenting. Because LINZ is not funded for survey costs, the Crown has never been able to take full legal ownership of special land.
- Uncertainty is generated by the ambiguity about the status of the special land provisions. Whether they are mandatory or voluntary differs across the Act and the Regulations.
- Special land is restricted to the *beds* of waterways, which in practice limits the extent to which the provisions are able to secure public access to these waterways.
- The Act provides no guidance on the scope of ownership interest to which the provisions apply (e.g. freehold only, or leasehold too). In practice the OIO has taken the view that they do not apply to anything less than a freehold interest, but the ambiguity remains and creates uncertainty for investors.

The consultation paper sought feedback on options for improving the process for offering special land to the Crown. Submitters generally supported amending the special land provisions, including to clarify that the provisions apply only to the acquisition of freehold interests and improve the offer process.

C4.2 What options are available to address the problem?

We considered three options in relation to special land.

Option 1 is to make several general and technical changes to the special land provisions including:

- making the investor responsible for the offer-back process (rather than the current owner)
- streamlining the offer process (for example, by improving the surveying and valuation processes, creating mandatory terms and conditions for the sale and purchase agreement)
- clarifying that foreshore and seabed offered to the Crown is transferred to the common marine and coastal area in accordance with the Marine and Coastal Area Act 2011, and riverbed and lakebed enters the Crown estate and becomes subject to the Land Act
- clarifying that the special land provisions are not mandatory (but potentially using the Ministerial directive letter to convey the importance the Crown places on offers of special land)
- removing riverbed from the definition of special land (because surveying and acquisition costs may outweigh the public interest benefits of ownership)
- confirming that the provisions apply only to the acquisition of freehold interests.

Option 2 mirrors option 1, with two key differences:

- rather than excluding riverbed from the definition of special land, guidance would clarify the circumstances in which the Crown would seek to acquire riverbed, and
- rather than making the special land provisions non-mandatory, they would be made non-mandatory for riverbed and lakebed only, and mandatory for foreshore and seabed.

[1]

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C4.3 Impact analysis

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
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[1, 36]

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
<p>Option 1: Make the investor responsible for meeting the requirements, streamline the offer process, remove riverbed from the definition of special land, clarify that the special land provisions are not mandatory, and clarify that they apply only to freehold transactions and Crown pastoral leases.</p>	<p>0/-</p> <p>Streamlining the offer process will not change the Government's ability to manage risk. It will make provisions workable and mean that, where offered, special land will likely be transferred to the Crown.</p> <p>The option would reduce the amount of special land offered to the Crown. This could be mitigated by providing direction (via the ministerial directive letter) about the high weighting the Government places on this factor.</p> <p>Requiring freehold transactions to go through the offer back process is consistent with the OIO's operational approach and has no impact on ability to manage risk.</p>	<p>++</p> <p>Changes would significantly reduce compliance burden for the acquisition of sensitive land and signals an openness to investment.</p> <p>Removing riverbed from the definition of special land will also strongly support investment in the forestry sector, consistent with other government objectives.</p>	<p>+</p> <p>Making the investor responsible for the provisions will make the provisions consistent with other consent requirements in the Act and the Regulations, which will improve certainty for vendors and investors.</p>	<p>+</p>

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
<p>Option 2: Use guidance to clarify the circumstances in which the Crown would seek to acquire riverbed and make special land provisions mandatory for foreshore and seabed only</p>	<p>0/-</p> <p>Likely to have limited effect on managing the risks of investment as it simply provides guidance to an existing requirement. Requiring offer back of only foreshore and seabed would reflect the heightened value of this land. However, it could result in some riverbed not being acquired by the Crown that might otherwise have been. This could be mitigated by providing direction (via the ministerial directive letter) about the high weighting the Government places on this factor.</p>	<p>+</p> <p>Making it voluntary to offer back riverbed would reduce complexity and support investment, particularly in the forestry sector where the offer back process for riverbed is significantly delaying transactions.</p>	<p>+</p> <p>As above, could clarify and simplify the offer back process.</p>	<p>0/+</p>
[1]	[1]	[1]	[1] [1, 36]	[1]

C4.4 What other options have been ruled out of scope, or not considered, and why?

The consultation document considered a range of options, including establishing different ways to provide access, and different solutions to improve the offer process as described in regulations. These options are largely reflected in option 1, with refinements to reflect stakeholder feedback and further technical advice on problems with the existing provisions.

Options for providing access across an overseas investor's land to the special land were not pursued. Most submitters considered, and the Treasury agrees, that this option would introduce significant complexity to the regime.

C4.5 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

The Treasury prefers option 1. In our view this is the best way to facilitate the Crown's acquisition of special land (recognising its inherent ownership value) and would resolve the majority of problems with the status quo.

C4.6 Addendum: further improvements to the special land acquisition process

Context

On 13 November Cabinet [1]

and agreed to the majority of changes included in option 1, with the exceptions that:

- the special land offer provisions will be mandatory across the Act, rather than voluntary
- riverbeds will be retained within the definition of special land, rather than removed
- the special land provisions will be extended to the acquisition of perpetually renewable leasehold interests under the Crown Pastoral Land Act 1998, rather being limited to the acquisition of freehold interests

Cabinet also noted that the Associate Minister of Finance would work with the Minister for Land Information and the Minister of Conservation to determine:

- whether riverbed and lakebed are administered as Crown land under the Land Act 1948 or as conservation land under the Conservation Act 1987; and,
- any other design matter relating to special land that may arise during the drafting process.

The Associate Minister of Finance subsequently agreed a number of minor process matters:

- riverbed and lakebed will be administered as Crown land under the Land Act 1948 when it is acquired by the Crown, with the option for it then to be transferred, as appropriate, to another party for administration under other legislation,
- responsibility for the special land acquisition process will be shifted from the vendor to the overseas investor (in order to streamline the process),
- the overseas investor can offer special land to the Crown for nil consideration, should they choose to do so, and

- LINZ will determine a suitable process for acquiring special land on Crown pastoral lease properties if and when required.

However, during legislative drafting, two more substantive policy issues emerged: the treatment of third party interests that are affected by the Crown's acquisition of special land, and whether the Crown's right to acquire special land remains if the overseas investor sells that land.

Problem definition

1. *The treatment of third party interests:* some special land the Crown wishes to acquire will be subject to the interests of third parties (e.g. a neighbour's right of way across a riverbed). Sometimes these interests will conflict with the objectives of the special land policy - for example, third parties' rights to take gravel from a riverbed may impede public access.³⁷ In such cases, the Crown may wish to remove them. However, under the standard land transfer process used by the OIO, removing such interests from the land's title requires negotiation with the relevant third parties, which can be complex and time-consuming (especially if there are multiple titles and multiple third parties).³⁸
2. *Whether the Crown's right to acquire special land remains if the overseas investor sells their land:* Cabinet agreed that for the purposes of obtaining consent, the special land requirement will be satisfied by the overseas person placing a memorial on the title noting the Crown's right to acquire the special land. However, it was not clear whether this memorial would be binding on future owners of the land containing the special land. If it is not binding, the Crown's intention to acquire the special land may be frustrated if the land is sold prior to the acquisition process being completed.

Options

Third party interests: as an alternative to the status quo, we recommended that the special land would be transferred into Crown ownership through a vesting process, similar to that used in the Public Works Act 1981 (**PWA**) and Resource Management Act 1991 (**RMA**). Because such a process does not require the Crown to negotiate with third parties whose interests are being removed, it provides a much more streamlined approach than the status quo.

Where third parties have their registered interests removed from the title, we recommended they be compensated for their losses. Providing compensation is consistent with Cabinet's decision to compensate others affected by the special land process (i.e. the overseas person, and through them, their mortgagee).³⁹ It is also in line with the treatment of third party interests that are extinguished in the PWA, under which such interests are valued and

³⁷ Other examples of third party interests include leases, mining rights and easements for phone lines, power lines or other uses. There may also be interests over the land that are not registered on the title, e.g. Māori customary rights.

³⁸ While LINZ does not hold data on the number or nature of third party interests in past sensitive land applications, it does note that most involve titles on which third party interests are registered.

³⁹ Paying compensation is also consistent with New Zealand's international obligations and our common law, as outlined in the guidelines of the Legislation Design and Advisory Committee (which state that compensation should generally be paid for property taken by government and if it is not, cogent policy justification is required). As the Ministry of Justice has advised, achieving the special land policy objective of public ownership of and access to New Zealand's waterways does not rely on avoiding compensation, nor is it undermined by providing compensation. Moreover, as the third party would not have been involved in the decision to sell the property to the overseas person, there is a strong policy rationale in favour of compensating them for their loss.

compensation is provided through an established process that will be familiar to key stakeholders.

Right to acquire: we recommended clarifying that the Crown’s right to acquire special land (as notified in the memorial on the title) is binding on future owners (including New Zealanders). This would mean that if the overseas person sells their land before the Crown acquires the special land (or waives its right to do so), the new owner would “step into the shoes” of the previous owner and be bound by the special land process, including any actions that had been completed before the sale. We considered this appropriate because the new owner would have been made aware of the Crown’s right to purchase the special land through their due diligence process.

Impact analysis (compared to the package agreed by Cabinet)

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
Transferring special land using vesting process + compensation for third party interests	- Will not change the Government’s ability to manage risk, but should further increase the ease with which the Crown can acquire special land.	+ Will further reduce complexity in sensitive land transactions involving special land, which may make such investments marginally more attractive.	+ Should further improve certainty and timeliness of the special land acquisition process.	++
Clarifying that right to acquire is binding on future owners	- Will not change the Government’s ability to manage risk, but will ensure the Crown does not lose its right to acquire the special land if the process is not completed prior to the land being sold.	0 Will not further increase support for overseas investment in productive assets.	+ Will improve certainty for those looking at buying land containing special land from an overseas person, as the Crown’s right to buy this land will be clear.	+

D Managing risks to New Zealand's national interest

D4.1 What is the specific problem?

Protecting New Zealand's national interests

There are significant gaps in the management of risks posed by overseas investment to New Zealand's key national interests. New Zealand's overseas investment regime is unique in this regard among comparable jurisdictions including Australia, Canada, the USA and Japan.

The Act does not empower the Government to manage key potential security risks posed by foreign investment. For example, it does not:

- allow decision-makers to consider potential risks to national security or public order when determining whether an investment should be allowed⁴⁰
- allow the Government to consider whether investments in significant business assets are beneficial or not, despite the fact that investments in strategically important industries (such as transport and media) could provide opportunities for espionage or sabotage, or

[1, 36]

The Act also does not enable ministers to deny consent to transactions that could present risks of substantial economic or other harms to New Zealand, such as:

- investments in critical infrastructure (such as electricity and water distribution networks)
- entities that link New Zealand to global value and distribution networks, or
- investments that would result in a significant portion of an industry or supply chain being owned by a limited number of entities.

Most stakeholders agreed with our assessment of the gaps in managing risks to New Zealand's national interest and supported a 'backstop' national interest test for higher risk transactions.

Information-sharing for anti-money laundering and countering financing of terrorism purposes

The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (the AML/CFT Act) creates a framework for information-sharing and cooperation among various government agencies and reporting entities such as banks. This is to allow the Government to detect and deter money laundering and the financing of terrorism.

⁴⁰ The use of the term 'public order' in this paper mirrors language that is used in exceptions contained in New Zealand's free trade agreements and key World Trade Organization agreements. [1, 36]

According to the New Zealand Police's Financial Intelligence Unit, two significant ways that money is laundered internationally are through the sale and purchase of land, and the sale and purchase of, and trading activity involving, 'significant business assets'.

[1, 4]

D4.2 What options are available to address the problem?

Better protecting New Zealand's national interests

We considered two options to address gaps in the protection of New Zealand's national interests.

Option 1 would introduce a national interest test that could apply to any investment screened under the Act. Design features are listed below.

- An investment would be declined if it was contrary to New Zealand's national interest, having regard to risks to national security, public order, international relations, the economy, the environment and other national interests; the degree to which these risks can be mitigated; any benefits associated with the transaction; and New Zealand's international obligations.
- The national interest test would automatically apply to investments where foreign governments have a greater than 10% interest (except transactions involving only residential land that is not sensitive for another reason), that are assessed as presenting national security risks, or in specified strategically important industries and high-risk critical national infrastructure.
- The test could be applied to other transactions by agreement between the ordinary decision-making minister and the minister responsible for exercising the national interest test.
- To better ensure the test is viewed as a backstop power, there would be a separate decision-maker — not the minister ordinarily responsible for assessing the particular application. Decisions made under the test would also be made public, with exceptions necessary to protect national security, international relations, or commercial-in-confidence information.

Option 2 would be a similar test, however the decision-making framework would be simplified such that ministers would be able to decline transactions if they determined that they were contrary to New Zealand's national interest (rather than having to have specific regard to the considerations in bullet 1 above).

Information-sharing for anti-money laundering and countering financing of terrorism purposes

We considered two options for enabling the exchange of information between LINZ (including the OIO), and other agencies responsible for enforcing the AML/CTF regime.

Option 1 is to amend section 140 of the AML/CTF Act to include a reference to the Overseas Investment Act 2005. This would have the effect of allowing information gathered under the Act to be used to support compliance with the AML/CTF Act. New Zealand Police’s Financial Intelligence Unit, which collects, analyses and disseminates financial intelligence relating to suspicious transactions/activities, money laundering and the financing of terrorism, has specifically asked for this change to be made.

Option 2 is for LINZ and the OIO to enter an Approved Information Sharing Agreement (AISA) with relevant agencies, to enable the exchange of information necessary to support the enforcement of the AML/CTF Act.

D4.3 Impact analysis

Better protecting New Zealand’s national interests

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
Option 1: Introduce a backstop national interest test that applies to certain transactions automatically, can be applied to others with ministerial agreement, and has set decision making criteria.	++ Strongly positive impact. Will empower the Government to decline transactions that present material risks to New Zealand.	0/- There is a risk that the test could be interpreted as New Zealand becoming less open to foreign investment, however this is mitigated by the fact that such a test is not unusual globally. In rare cases, productive investments might be declined. This could negatively affect New Zealand’s long-term productivity growth (particularly as it is targeted at the types of infrastructure investments that New Zealand needs).	- The introduction of the test will create additional uncertainty for investors.	+

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
Option 2: As above, however empower ministers to decline investments that are contrary to New Zealand's national interest (with no legislative guidance on what could constitute the national interest).	++ As above, with a broader discretion on the factors to be considered.	0/- As above, but in addition there may be a perception that the lack of criteria around the test's decision-making framework increases the likelihood of transactions being declined, although in practice the benefits will always be weighed against the risks.	- The introduction of the test will create additional uncertainty for investors, particularly with no legislative guidance on factors to be considered. Clear public communication and regulatory guidance will help to mitigate this risk.	+

Information-sharing for anti-money laundering and countering financing of terrorism purposes

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
Option 1: Add a reference to the Overseas Investment Act to section 140 of the AML/CTF Act.	++ Improves Government's ability to manage AML/CTF risks that may emerge through the acquisition of land or business assets. This benefit is enhanced through using an existing information-sharing mechanism for managing these risks.	0 No impact on New Zealand's attractiveness to high-quality productive investment.	0 No impact on consistency with regulatory best practice.	++
Option 2: LINZ and the OIO enter AISAs with relevant agencies to exchange information necessary to support the AML/CTF Act	+ Improves Government's ability to manage AML/CTF risks from the acquisition of land or business assets. Would take longer to implement than option 1 (as an AISAs would involve at least five agencies).	0 No impact on New Zealand's attractiveness to high-quality productive investment.	0/- Small risk that having an AISA when a statutory regime exists could cause confusion or duplication.	+

D4.4 What other options have been ruled out of scope, or not considered, and why?

Better protecting New Zealand's national interests

We considered but did not progress two additional options: the introduction of a backstop 'substantial harm' test, and replacing the Act's entire existing consent framework with a national interest test that would require all applications for consent to demonstrate that they were in the national interest.

A substantial harm test would have considered a relatively narrow set of harms (to public order, public health and essential security interests) and provided less of a 'backstop' to other, liberalising changes to the Act's consent framework.

A positively-framed national interest test that applied across the Act would have created significant uncertainty for investors, and required significantly more resources to operationalise. [1, 36]

Information-sharing for anti-money laundering and countering financing of terrorism purposes

No other options were considered. Enhancing the Government's ability to manage AML/CTF risks is consistent with the overarching objectives of the Phase 2 reform, and is supported by key relevant agencies including New Zealand Police, the Department of Internal Affairs and the Ministry of Justice.

D4.5 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

Better protecting New Zealand's national interests

Treasury prefers option 1 — a negatively-framed backstop national interest test that could apply to any transaction ordinarily screened under the Act, with clear criteria underpinning decision-making.

The Cabinet paper will propose option 2, which provides more flexibility around the criteria for decision-making than option 1.

Information-sharing for anti-money laundering and countering financing of terrorism purposes

We recommended option 1: amending the AML/CTF Act by adding the Overseas Investment Act 2005 to section 140. This option is also reflected in the Cabinet paper.

[1, 36]

E Managing risks to New Zealand’s national security and public order

E4.1 What is the specific problem?

The national interest test described above would still leave some risks unmanaged – it would enable scrutiny of national security and public order risks but only for transactions already screened under the Act. It would provide no ability to manage risks posed by investments not currently subject to screening (eg, if they do not meet the thresholds of ownership or control, or the size of the business asset).

This gap would leave New Zealand open to significant risks from overseas investment. [1]

The risks of foreign ownership and control are receiving increasing attention internationally. Other jurisdictions have already incorporated, or are incorporating, national security assessments as part of their foreign investment screening regime.⁴³

Some stakeholders recognised the need to respond to gaps in the government’s ability to manage risks to national security and public order arising from overseas investment, and supported a call in power (described below). Others noted that a call in power could reduce New Zealand’s attractiveness as an investment destination due to uncertainty about how it might operate in practice. A small number of submitters also noted that further consultation on the details of the call in power would have allowed them to provide more fulsome feedback.

E4.2 What options are available to address the problem?

This section considers the design of a legislative tool that provides for transactions not otherwise screened under the Act to be ‘called in’ for screening for national security and public order risks.

We developed three overall design options for the call-in power:

- low intervention, with potentially high exposure to risk
- high intervention, to minimise risks to the extent practicable, and

[1, 36]

⁴³ OECD (2019) [Acquisition- and ownership-related policies to safeguard essential security interests. New policies to manage new threats. Research note on current and emerging trends.](#)

- a balanced package that identifies the intervention/risk mitigation option for each element that best matches the criteria for the Phase 2 reforms, while taking into account the impact on the regulated community and the regulator’s resource requirements.

These options are set out in Table E1 below, and address design elements relating to scope, notification mechanisms and the decision-making framework. [1, 36]

Detailed design options for each element of the call-in power are discussed in **Appendix 2**.

Table E1: Options for the overall design of the call-in power

Element of call-in power	Low intervention	Balanced package	High intervention
Scope of power	Military and dual-use technology. Critical direct suppliers to security and defence agencies. Sensitive data. Critical national infrastructure. (ie, the balanced package without media).	Military and dual-use technology. Critical direct suppliers to security and defence agencies. Sensitive data. Media with an impact on the plurality of information, news, or opinion available to a public audience. Critical national infrastructure.	The same as the balanced package, but with the inclusion of media aggregators with an impact on the plurality of information, news, or opinion available to a public audience.
Definition of asset classes⁴⁴	Narrow definitions for all asset classes.	Wide definition of military and dual-use technology. Narrow definition of critical direct suppliers and media. Middle definition of sensitive data.	Wide definition for all asset classes.
Thresholds for coverage⁴⁵	More than 25% ownership or control for all asset classes.	Zero threshold for entities with control of or access to military and dual-use technology, direct suppliers, sensitive data and high-risk critical national infrastructure. ⁴⁶ More than 25% ownership or control of media entities (reflecting that access risks are not significant for media). Would exclude from scope transactions that result in	Zero threshold for all asset classes.

⁴⁴ The reference to asset classes includes entities holding those asset classes.

⁴⁵ Subject to a different approach for publicly-listed entities, apart from media entities.

⁴⁶ Zero threshold means that acquisition of any ownership or control interest would trigger the call-in power.

		acquisition of less than 10% of publicly-listed equity securities (except media entities where the threshold would remain more than 25%).	
Notification mechanism	Voluntary notification.	Mixed – voluntary notification for some asset classes, and voluntary for others.	Mandatory notification.
Decision-making framework	Same as the balanced package.	National security/public order considerations balanced by consideration of economic and other benefits.	National security/public order considerations only (no mandatory consideration of economic and other benefits).

Institutional design for the call-in power

A working assumption for the purpose of this analysis is that the host agency for the call-in will also manage the national interest test proposed in section 4 chapter D above. This is because supporting the administration of these tests requires similar functions.

For transactions called in for screening, there will be a separate decision-maker (a minister who is not the minister ordinarily responsible for assessing the application).

Options for operationalising the call-in power

We also considered two broad options for how the call-in power could be operationalised. The options can be applied to any of the three options for the call-in power's design set out above.

Option	Features
[1]	

Protection of national security information in court proceedings

As the call-in power and national interest test are designed to mitigate risks from foreign investment, it is likely that decision-makers will rely on national security information (information the release of which could damage New Zealand’s national security or international relations). It is critical that this information is protected in any court proceedings, such as judicial review of decisions made under the Act.

[33]

it is proposed that the Act will include provisions for protection of national security information in court proceedings that are in line with those in existing legislation⁴⁷ [33]

Provisions in the Act for protection of national security information in court proceedings will protect national security information, preserve the right to natural justice and procedural fairness to the extent possible given that information is being withheld from an affected person, [33]

E4.3 Impact analysis

Call-in package

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
Balanced package: Call-in power with options as set out in table E1 for scope, definitions, thresholds, notification mechanisms, decision-making framework and intervention tools	<p style="text-align: center;">++</p> <p>Would significantly improve the Government’s ability to manage investment risks. Focuses on areas of highest risk.</p>	<p style="text-align: center;">+</p> <p>Imposes additional compliance costs for a few investors (mixed notification requirements reflect level of risk). Reflects additional regulatory and commercial protections in respect of listed securities. Balancing security risks against economic and other benefits is more complicated than a simple risk-based approach, but signals openness to</p>	<p style="text-align: center;">0/-</p> <p>Provides clarity to investors on investments that will be subject to the call-in power. Will result in some delays to a small number of transactions.</p>	<p style="text-align: center;">+ / ++</p>

⁴⁷ Such as the Telecommunications (Interception Capability and Security) Act 2013.

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
		investment.		
Low intervention package: Low-intervention elements as set out in table E1 above	+ Would improve the Government's ability to manage risk, but misses some areas of significant risk	0/+ Imposes some additional compliance costs.	0/- Manages national security/public order risks from foreign investment in a clear way. Some negative impact on timely outcomes.	+
High intervention package: High-intervention elements as set out in table E1 above	++ Would significantly improve the Government's ability to manage investment risks Addresses a wider range of risks than the preferred package. The addition of media aggregators would not materially increase the Government's ability to mitigate risks. Aggregators are less responsible for, for example, misinformation than the original generator of that content. [36]	- Would impose significantly higher compliance costs, which may restrict productive investments. No requirement to consider economic and other benefits could signal that investments that offer significant benefits but pose limited risks may be declined. In practice, benefits will likely be considered in most cases.	-- Less clarity and predictability at the margins because of potential regulatory overreach. Significant negative impact on timely outcomes for some investments.	-

[1]

[1]

E4.4 What other options have been ruled out of scope, or not considered, and why?

Remaining without a call-in power

Remaining with this status quo was ruled out because the Government would remain unable to address potentially significant threats to New Zealand associated with investments not ordinarily screened under the Act. It would also leave New Zealand as an outlier from comparable jurisdictions. This option could result in bespoke, transaction-specific legislation in the future for specific classes of assets/entities, which could be more damaging to New Zealand's reputation as an investment destination, and create more uncertainty in the investment community, than the introduction of a call-in power.

Relying solely on non-regulatory measures

An alternative to instituting a call-in power would be to rely solely on raising awareness and building capacity among at-risk organisations. This would be beneficial, but limited in its effectiveness in improving the assessment and control of potential threats to New Zealand national security or public order from overseas investment.

[33]

This is designed to support regulatory provisions, rather than act as a substitute. Officials will continue to be mindful of potential linkages between the call-in power and complementary non-regulatory actions.

National security/public order test applying to domestic as well as overseas investment

The Government could introduce in other legislation new powers that apply to both foreign and domestic investors, such as an ability to screen either foreign or domestic acquisition of assets that might have national security or public order implications. However, the Phase 2 reform provided an immediate opportunity to address these risks. The development of a separate legislative regime that would apply to both domestic and foreign actors would be significantly more complex than incorporating a national interest test and a call-in power into Phase 2 reform of the Act, and it would take time for a separate policy and legislative programme to be initiated and completed. The approach taken now does not preclude the development of such a non-discriminatory regime in the future should the risk warrant it.

E4.5 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

The Treasury's preferred approach is the balanced package summarised in Table E1 above, [1]

We consider that the benefit of being able to manage national security and public order risks outweighs the possible effects of including a call-in power in reducing New Zealand's attractiveness as an investment destination, the potential loss of productive investments and the uncertainty created among investors.

The package proposed in the Cabinet paper reflects the Treasury's recommendations, with two changes:

- it permits (rather than requires) decision-makers to consider economic and other benefits before determining whether to block/unwind a prospective transaction, and
- it includes aggregators in the definition of media (that is, the wide package for scope).

[1]

[33]

E4.6 Addendum: information sharing to support managing risks to New Zealand's national security and public order

Context

This section has been included following Cabinet's agreement to introduce both the national interest test (for transactions already screened under the Act), and the call in power outlined in this section, to enable scrutiny of national security and public order risks. Cabinet authorised decisions around information sharing to be made by the Associate Minister of Finance under delegated authority.

Problem definition

The OIO, and other agencies, need access to information – including personal information – in order to effectively assess these risks. Although the OIO already has existing information gathering powers, the Privacy Act creates limits on the OIO's, and other agencies', ability to share personal information needed to assess national security and public order risks arising from a transaction. This is because the exceptions to the limits on the disclosure of personal information in the Privacy Act (privacy principle 11) are not necessarily broad enough. For example, at the point agencies need to be able to assess the national security and public order risks arising from a transaction, there are unlikely to be sufficient grounds for sharing personal information on the basis that non-compliance with the Privacy Act is necessary to avoid prejudice to the maintenance of the law.

The OIO will therefore need information gathering and sharing powers to operationalise the call-in power (and the national security and public order aspects of the national interest test) successfully. Information relevant to assessing whether a transaction presents national security or public order risks is likely to be held by a number of agencies. The OIO will need to lead information sharing with and across a group of these agencies to identify these risks, and consider whether and how the risks can be mitigated.

In circumstances where a foreign investor is proposing to purchase (or has purchased) a sensitive undertaking or asset, explicitly allowing for agencies to share information relevant to the transaction is an appropriate balance between protecting New Zealand's national security and public order, and the privacy of the individual concerned.

Options to enable information sharing to support managing national security and public order risks

We considered two options on how to enable the personal information sharing between agencies needed to assess national security and public order risks:

Option	Features
<p>Option 1: Legislative amendment to enable sharing of personal information relevant to national security and public order risks.</p>	<ul style="list-style-type: none"> • This would create a provision in the Act to enable the sharing of information, including personal information, between agencies. • This provision would be based on similar provisions developed for similar purposes in the Outer Space and High Altitude Activities Act 2017, and the Anti-Money Laundering and Countering Financing of Terrorism Act 2009. • Under this option, government agencies would be empowered to share information related to transactions screened under the national interest test or the call-in power that may be relevant to the effect of a proposed or completed investment on New Zealand's national security or public order. • To ensure the right to privacy is appropriately recognised, in addition to limiting this provision to the assessment of national security and public order risks and transactions screened under the national interest test or call-in power, this option would: <ul style="list-style-type: none"> ○ Enable the agency sharing information to impose conditions that it thinks fit relating to the use of the information or document; ○ Provide that regulations may be made, to govern information sharing ○ Note that nothing in these provisions limits disclosure under other provisions of the Privacy Act 1993; and ○ List in legislation the agencies that are able to share information. Further agencies would be able to be added through regulations, which would require consultation with the Privacy Commissioner.
<p>Option 2: LINZ and the OIO enter in an AISA with relevant agencies to enable sharing of personal information relevant to national security and public order risks.</p>	<ul style="list-style-type: none"> • Unlike the above option, the sharing of information, including personal information would be limited to existing legislative provisions. • An Approved Information Sharing Agreement (AISA) under the Privacy Act would be needed to enable adequate sharing of personal information relevant to the national security or public order risks of a particular transaction. Every government agency seeking to share this information would be required to become party to the AISA. • A detailed description of the types of personal information to be shared, and the circumstances under which that information would be shared would need to be specified in the AISA.

Impact analysis

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
Option 1: Legislative amendment to enable sharing of personal information relevant to national security and public order risks	<p style="text-align: center;">++</p> <p>A legislative amendment would enable listed agencies to share personal information needed to assess national security and public order risks from the point the call in power and national interest test are implemented.</p>	<p style="text-align: center;">0</p> <p>The broader nature of this amendment may lead to privacy concerns that could potentially deter some prospective investors. However, this is mitigated by only applying to transactions subject to the call in power and national interest test, and only to information determined to be relevant to assessing national security and public order risks.</p>	<p style="text-align: center;">+</p> <p>This option should enable more predictable, transparent and timely outcomes by ensuring the regulator has the information needed to effectively and efficiently assess national security and public order risks.</p>	<p style="text-align: center;">++</p>
Option 2: LINZ and OIO enter into an AISA with relevant agencies to enable sharing of personal information relevant to national security and public order risks	<p style="text-align: center;">+</p> <p>An AISA may not be available from the point the call in power and national interest test are implemented due to the limited time available to develop it in parallel with the legislative process.</p> <p>An AISA requires more specificity than the legislative amendment proposed. As such, it will not be able to respond to the range of situations likely to arise under the call in power as the environment changes, limiting this options ability to effectively manage risk over time.</p>	<p style="text-align: center;">0</p> <p>This option would better allay privacy concerns because it would require clearer specification of:</p> <ul style="list-style-type: none"> • the types of information to be shared • the circumstances under which that information could be shared. <p>However, because there is less flexibility compared to option 1, the trade-off is that it is likely to lead to more transactions being called in, more requests for further information. Moreover, it could lead to more transactions being declined on the basis that the regulator does not have sufficient information to properly assess mitigations to identified national security and public order risks.</p>	<p style="text-align: center;">+</p> <p>Compared to the status quo, this option should enable more predictable, transparent and timely outcomes by ensuring the regulator has the information needed to effectively assess national security and public order risks.</p> <p>There will be greater transparency compared to option 1 (as the types of information shared will be published in the AISA). However, as noted the trade-off with greater specificity is less flexibility. This may lead to delays in assessing transactions if further information is requested from the applicant and more transactions being delayed or even declined if the information is not available.</p>	<p style="text-align: center;">+</p>

What other options have been ruled out of scope, or not considered, and why?

Remaining with the status quo (no change to information sharing provisions) was ruled out because the OIO would not have access to the personal information needed to effectively assess national security and public order risks for transactions screened under the call in power and national interest test.

What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

Treasury's preferred option is a legislative amendment to enable agencies to share information relevant to national security and public order risks. This option will enable listed agencies to share personal information needed to assess national security and public order risks from the point the call in power and national interest test are implemented.

The Minister's decision under delegated authority agreed with Treasury's recommended option.

F Enforcement provisions

F4.1 What is the regulatory problem?

The regulator does not have an effective suite of enforcement tools suitable for both the current regime and the proposed changes to the Act's scope and the regulator's responsibilities. Key areas for improving the effectiveness of enforcement are:

Enforcement tools for responding to mid-level breaches of the Act and breaches of conditions of investment

In some situations existing enforcement tools do not provide the OIO with an ability to respond effectively to mid-level breaches of the Act or consent conditions. This may limit the Crown's ability to manage the risks of overseas investment. Mid-level breaches are those serious enough to warrant a sanction to deter further non-compliant behaviour, but which are not serious enough to reach the threshold for a court-ordered remedy such as disposal, imposition of civil penalties or criminal prosecution.

Existing tools that the OIO can use in these situations include settlement agreements, disposal notices (consents will often have a disposal condition attached) and 'amnesty' notices. Amnesty notices were introduced in the Phase 1 reform and enable the OIO to issue a notice requiring an investor to dispose of an asset which, if complied with, provides the investor with immunity from further action.

There are limits to these tools' effectiveness:

- Settlement agreements and amnesty notices are dependent on the investor's voluntary cooperation. They are not directly enforceable, meaning that where an investor does not comply with their terms the OIO's only recourse is to the High Court in respect of the original breach of the Act, rather than a breach of settlement conditions.
- [36]

This means that the regulator's tools to address mid-level breaches may be subject to challenge, and may not be directly enforceable. These tools can also be blunt in application, with little provision for the OIO to achieve an enforcement outcome that is effective for a given situation. The current enforcement tools also rely on court-ordered divestment as the primary enforcement response and outcome, which can be disproportionate relative to the breach that occurred and undesirable when other behavioural outcomes may be important as mitigation for particular investment risks.

[36]

The level of civil penalties provided

The OIO may apply to the court for an order against a person in breach, or involved in a breach, of the Act to pay a civil penalty. The penalty can be the higher of \$300,000 or three times the quantifiable gain⁵⁰ from the transaction. In some situations involving complex equity or debt arrangements, it can be difficult to determine the quantifiable gain. This leaves a penalty of up to \$300,000 as the primary penalty available.

Non-compliant investors (both individuals and corporate entities) stand to make significant financial gains from a breach of the Act. The current maximum penalty of \$300,000 is likely to be an insufficient reputational or financial deterrent to an investor with commercial incentives to bear this cost (eg, an investor in a significant business asset worth more than \$100 million).

General versus specific injunctive relief

The OIO can already apply to the High Court to provide injunctive relief, but it must rely on the court's inherent jurisdiction for this. Without the regulator having explicit statutory power⁵¹ to seek injunctive relief, there is not a more targeted ability, such as that found in other New Zealand commercial regulatory statutes, to seek specific injunctions, with additional flexibility to injunct, with lower evidential thresholds for different and tailored types of injunction.

Managing national security and public order risks

It may take time to enforce divestment ordered using the national interest test or call-in power, and in the meantime the asset is still being managed by the investor who poses security risks. Existing measures provide no ability for the regulator to have influence over a company's business operations once a national security or public order risk has been identified. This may be a particular problem if the investing entity is less sensitive to commercial pecuniary sanctions or other court orders.

F4.2 What are the regulatory options available?

We considered two options, in addition to the status quo, for addressing these problems: new regulatory powers, and greater use of existing powers coupled with enhanced guidance and outreach.

Option 1: Giving the regulator new additional powers and measures

Enforceable undertakings to deal with mid-level breaches

Provide in legislation that the regulator can impose enforceable undertakings. This would grant the regulator broad discretion to accept an undertaking from an investor to take specific actions, in exchange for the regulator agreeing not to bring proceedings in respect of an alleged breach of the Act.

⁵⁰ The 'three times the quantifiable gain' provision was added in the Phase 1 reforms.

⁵¹ A limited statutory injunctive power exists (s 51 of the Overseas Investment Act), but it is quite limited as it relies on a person being either a consent holder, or holding a class of individual exemption or an exemption certificate.

The parties can agree to actions that are wider and more tailored than those that a court might impose. Once accepted, the undertaking becomes binding and its terms are directly enforceable by application to the court.⁵²

The following design features will be included:

- a broad range of undertakings may be accepted, to enable bespoke solutions that address breaches in a proportionate manner (but the regulator would not be able to accept payment in lieu of a penalty),
- undertakings may include an admission of guilt, and
- the regulator must publish undertakings online.

This power is accompanied by civil penalties for breach of an undertaking. These would be set at a lower monetary level than the civil penalties that exist for a general breach of the Act: at \$300,000 for a corporate investor and \$50,000 for an individual investor. This would ensure that the penalty is aligned with the proposed increase to the general penalties (discussed below), and ensure that there is a balance between the deterrent value of the penalty and the incentives on an investor to bear the risk of the cost of proceedings.

The incentives for the investor to enter into undertakings depend on there being a credible threat of court action should the investor decline to cooperate. This means enforceable undertakings need to be supported by continued use of litigation where appropriate to secure convictions and fines, and well as the imposition of civil penalties and disposal of assets under the Act.

Increased and differentiated civil penalties

Increase the maximum penalty for a body corporate or any party other than an individual to \$10 million, and to \$500,000 for individuals.

These penalty levels are consistent with the upper limit for restrictive trade practices in the Commerce Act 1986 and recognise that corporates should generally be subject to larger penalties than individual defendants (to encourage corporate regulatory compliance, and because of the significant financial and reputational consequences that penalties can have on an individual).

Statutory provision for injunctive relief

Introduce an explicit power for the regulator to seek injunctive relief. A specific statutory power clarifies the remedies available to the regulator, means weight will be given to relevant considerations (particularly around national security and public order), and relaxes the general precedent that the applicant for an interim injunction must provide an undertaking as to damages. Having specific injunctive relief available to the regulator is consistent to similar powers given to other regulators governed by the Commerce Act and Financial Markets Conduct Act.⁵³

⁵² Examples of enforceable undertakings powers are contained in the Commerce Act 1986, the Financial Markets Authority Act 2011 and the Health and Safety at Work Act 2015.

⁵³ See, eg, Part 3 and Section 84 of the Commerce Act 1986.

Injunctive relief would align with existing pecuniary actions and sanctions available to the court (including enforceable undertakings). It may also be useful for mitigating risks to national security or public order, where full managed disposal is not needed.

Statutory provision for enforcing managed disposal

Provide that the regulator may appoint statutory management of a business, where a court orders its divestment for national security or public order reasons. This would be done to prevent continuation of the risks presented by the investment while divestment was implemented. The option is based on the Corporations (Investigation and Management) Act 1989, which provides the Crown with the ability to intervene to manage the affairs of a corporation upon a regulator’s recommendation, with appropriate checks and balances.

This enforcement measure would help mitigate, manage and deter non-compliant investment should it present particular national security or public order risks.

Option 2: Greater use of existing powers coupled with enhanced guidance, education and outreach

Increase the use of non-regulatory means of enhancing compliance such as issuing policy and guidance documents, direct outreach to the regulated community, publicising the outcomes of compliance activities, and using traditional and social media to increase awareness of the overseas investment regime (including compliance obligations and regulatory interventions).

These steps would be enhanced by greater use by the regulator of existing powers.

F4.3 Impact analysis

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
Option 1: New powers, increased and differentiated penalties	<p style="text-align: center;">++</p> <p>Would significantly improve the Government’s ability to manage investment risks. Provides greater flexibility for addressing mid-level compliance breaches. Provides proportionate sanctions for large corporate investors that may have commercial incentives to bear the costs of low level enforcement actions or ignore conditions of consent. [1]</p>	<p style="text-align: center;">0</p> <p>No implications for compliant investors. May deter investment in certain asset classes, due to risks of transactions being unwound directly through the courts and court-appointed statutory management (though use of these provisions will be rare).</p>	<p style="text-align: center;">+</p> <p>More predictable range of responses to breaches of the Act. Enables the scope and process around undertakings to be clearly prescribed, creating more transparency and accountability than the status quo (reliance on settlement agreements derived from implied powers). Some possibility of regulatory over-reach or reliance on undertakings rather than enforcing</p>	<p style="text-align: center;">+ / + +</p>

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
	[1] Specific injunctive relief may better support timely and tailored action to manage risk.		breaches of the Act.	
Option 2: Greater use of existing powers coupled with enhanced guidance, education and outreach	0/+ Would improve the Government's ability to manage investment risks, through greater awareness raising and advocacy and greater deterrence through more aggressive prosecution with existing penalties. Has no additional deterrent value for large corporate investors that may seek to absorb enforcement risks as a cost of doing business or avoid meeting conditions of consent on commercial grounds. This option would have a very limited deterrent value for high level non-compliance associated with national interest or public order risks. It would take time for possible voluntary compliance and deterrence benefits to accrue.	0 No implications for compliant investors.	0 Guidance would provide more certainty and predictability around the regulator's approach to enforcement, but no substantive change.	0

F4.4 What other options have been ruled out of scope, or not considered, and why?

We considered giving the decision-maker the ability to establish and enforce liquidated damages as a means to address and mitigate particular high-level national interest harms that may be associated with particular investments. This would involve, for example, the OIO specifying a pecuniary penalty that would apply to the breach of a condition of consent for every day that that breach existed.

We ruled this out based on advice from LDAC and other agencies. This approach would be inconsistent with New Zealand domestic law and precedents, and devolve too much pecuniary power to the regulator.

F4.5 What option, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

We recommend option 1, as it will give the regulator more effective enforcement tools, and improve compliance. In particular, it will give the regulator statutory powers to manage risks to New Zealand's national security and public order. The regulator's existing powers are not sufficient to deal with the current overseas investment environment. The Cabinet paper reflects the Treasury's recommended approach.

G Considering tax as part of the screening framework

G4.1 What is the specific problem?

There is public concern that overseas persons:

- acquiring sensitive New Zealand assets are paying a lower level of income tax in New Zealand than New Zealand counterparts, and
- with poor tax behaviour are acquiring sensitive New Zealand assets.

This could be viewed as contrary to the Act's purpose, which recognises that it is a privilege to invest in New Zealand.

Status quo – investor test

The Act currently requires any breach, or allegations of a breach, of tax law by individuals with control to be considered in the investor test. This means that illegal tax activities by individuals (but not corporates) can already be considered as part of the screening process.

Cabinet agreed to make changes to the investor test that would allow decision-makers to consider tax offences or contraventions by bodies corporate (as well as individuals) that resulted in fines or pecuniary penalties imposed by a court. However, this would exclude illegal tax activities where the penalty is imposed by an administrative body (i.e. a tax authority) rather than a court from consideration.⁵⁴

As these breaches could not be considered under the revised investor test, entities with a history of tax evasion and other serious breaches of tax law may be able to invest in sensitive New Zealand assets without their tax breaches being subject to screening. In recognition of this gap, Cabinet agreed that the Associate Minister of Finance (Hon Parker) would make decisions on proposals to consider tax as part of the screening process, under delegated authority (in consultation with the Minister of Finance, Minister of Revenue, the Minister for Land Information, the Associate Minister of Finance (Hon Jones) and the Associate Minister of Finance (Hon Dr Clark). The proposals are set out in G4.2 – G4.5 below.

Status quo – benefits test

The Act also does not allow tax compliance to be considered under the benefits test.

Views of stakeholders

Stakeholders' views on proposals to include a specific tax component to the screening process were mixed. The business community strongly opposed changes to the status quo (i.e. considering tax under the investor test) given that the OIO does not have the relevant expertise and that tax law is the best place to regulate tax compliance in New Zealand. On the other hand, some individual submitters considered that past tax activities ought to be considered when determining whether an overseas person can invest in sensitive New Zealand assets.

⁵⁴ Due to the technical nature of tax law, some serious penalties (such as penalties for tax evasion) are imposed by the tax authority.

G4.2 What options are available to address the problem?

Treasury and Inland Revenue identified five options to address the problems identified:

- *Investor test* options: two alternative options that modify the investor test. Each of these options expand the investor test agreed to by Cabinet, allowing decision-makers to consider:
 - *Investor test option 1*: serious tax defaults (over \$5 million) and shortfall penalties for tax evasion or an abusive tax position (or their equivalents in other jurisdictions), or
 - *Investor test option 2*: broader tax considerations such as tax disputes, residency in a low tax jurisdiction, and tax minimisation.
- *Complementary options*: three alternative options that could complement the investor test options. These are:
 - *A negatively framed tax factor in the benefit test*, which would consider whether an investment involving significant business assets and sensitive land presents a risk to New Zealand's tax revenue.
 - *A new tax information disclosure requirement*, which would require investors to disclose certain tax information on their proposed investment structure and tax treatment to Inland Revenue.
 - *A negatively framed test for significant business assets*: a new negatively framed test applying to all investments involving significant business assets that considers whether the investment will present a risk to tax revenue.

Of the options above, we only conducted public consultation on investor test option 2.

Decisions on these options were made by the Associate Minister of Finance (Hon Parker) under delegated authority from Cabinet. In the following sections, we measure the options against the status quo of Cabinet's decisions (i.e. the decision to alter the factors in the investor test, which excludes consideration of serious administrative penalties imposed by tax authorities).

G4.3 Impact analysis

<i>Investor test options</i>				
	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
<p>Recommended option: expand the good character component of the investor test to allow consideration of tax defaults over \$5 million and serious administrative penalties imposed on an investor by tax authorities (in addition to the tax offences which can already be considered)</p>	<p style="text-align: center;">+</p> <p>Ensures that decision-makers can consider serious breaches of tax law, which may be indicative of future tax activities in New Zealand.</p>	<p style="text-align: center;">0</p> <p>The tax offenses and contraventions (or allegations thereof) considered under this option are serious and the \$5 million threshold for defaults is reasonably high. Therefore, we would not expect a substantial reduction in New Zealand's attractiveness to productive investment.</p>	<p style="text-align: center;">0</p> <p>The tax offenses and contraventions (or allegations thereof) considered under this option are uncommon and the \$5 million threshold for defaults is reasonably high. Therefore we would not expect any substantial impact on timeliness.</p>	<p style="text-align: center;">+</p>
<p>Alternative option: include a limb in the good character component of the investor test which considers broader tax considerations of an overseas person, such as tax minimisation by investors, tax disputes and residency in a low tax jurisdiction.</p>	<p style="text-align: center;">+</p> <p>Ensures that decision-makers can consider a wider range of tax matters which may be indicative of whether a company will pay a lower level of income tax in New Zealand.</p>	<p style="text-align: center;">--</p> <p>There would be an increased risk considerations less likely to be relevant (e.g. lower level breaches, or legal and legitimate arrangements) being taken into account, which may result in potentially productive investments being declined. This is inconsistent with Cabinet's agreement to create a clear bright-light investor test.</p>	<p style="text-align: center;">--</p> <p>Would significantly increase uncertainty (e.g. because the additional considerations cover legal behaviour, and in the case of tax minimisation, very difficult to define), increase compliance costs and disclosure costs. It would also be difficult to enforce in practice.</p>	<p style="text-align: center;">--</p>

Complementary options				
	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
Complementary option 1: include a factor in the benefits test that considers whether an investment involving significant business assets and sensitive land (or fishing quota) presents a risk to New Zealand's tax revenue.	+ Ensures decision-makers can consider the risks an investment involving sensitive land poses to New Zealand's tax revenue against other factors in the benefits test. The additional information would also assist with Inland Revenue's monitoring and audit functions.	- May make it more difficult for overseas investors to satisfy the benefits test because they may pay less tax than New Zealand entities for legitimate reasons. This would make it harder for potentially productive investments to gain consent.	- Including a negatively weighted factor in the benefits test would increase complexity for decision-making (e.g. it would be difficult to determine how to weigh the factor against 'positive' factors), reduce the Act's coherence, and increase costs for applicants.	-
Complementary option 2: add a new requirement for investors to disclose certain tax information to Inland Revenue, which would not affect the consent decision.	0 The additional information would not be used in the screening, however it would assist with Inland Revenue's monitoring and audit functions, which would marginally improve its ability to monitor tax activities of new investors.	0 Information will not be used in the screening, therefore it is unlikely to have an impact	0 May marginally increase compliance costs for some applicants. However, information is sufficiently high-level that applicants are likely to be able to provide it at little cost. Inland Revenue would be required to screen the information for completeness, but this is unlikely to impact timeliness.	0

<p>Complementary option 3: add a new negatively framed test applying to all transactions involving significant business assets that considers whether an investment will present a risk to New Zealand's tax revenue.</p>	<p style="text-align: center;">+</p> <p>Same as complementary option 1, but would apply to all investments involving significant business assets (not just those involving sensitive land), which are the investments that are likely to pose the largest risks to New Zealand's tax revenue.</p>	<p style="text-align: center;">--</p> <p>Similar reasons as complementary option 1, but would apply to a broader group of investments. Would be a substantial change to the regime which would likely result in the reforms being considered restrictive (as a whole)</p>	<p style="text-align: center;">--</p> <p>Would substantially reduce timeliness of significant business asset applications, which would then require screening of the investment as opposed to the investor only.</p>	<p style="text-align: center;">--</p>
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G4.4 What other options have been ruled out of scope, or not considered, and why?

We did not progress the following three options:

- *Investor test certification* – we consulted on an option that would require investors to certify that in any jurisdiction it: was not involved in any tax avoidance scheme, had not breached any tax legislation and was not involved in any dispute with any tax authority. This option was not considered further because it was designed to work in concert with a checklist option for the investor test, which was also not considered. The list of factors were also too broad, and would result in disclosure of information which would be of limited relevance to determining whether an investor posed a risk to New Zealand (e.g. minor penalties).
- *Binding ruling* – we consulted on an option which would require investors to obtain a binding ruling from Inland Revenue that their proposed tax treatment of the investments complies with New Zealand tax law. We did not consider this option to be feasible as it would increase compliance costs and significantly reduce timeliness (binding rulings take three months on average), without substantially improving the Government's ability to manage tax risks (as binding rulings bind Inland Revenue, not taxpayers).
- *Positively framed factor in the benefits test* – we included an option to have a positively framed tax factor in the benefits test in our initial advice. We did not consider this option further because it would only be relevant if an investment had a positive impact on tax revenues. This is unlikely to occur in practice, as overseas persons may pay less New Zealand income tax for legitimate reasons.

G4.5 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

The Treasury and Inland Revenue's preferred approach is the recommended option. We consider it sensible to allow serious tax defaults and penalties for tax evasion and avoidance to be considered due to the seriousness of those activities. In our view they are comparable

to court-imposed (pecuniary) penalties even though in some jurisdictions (including New Zealand) they are imposed by a tax authority rather than a court.

While Treasury and Inland Revenue consider that serious breaches of tax law are relevant to determining an investor's character (like any other serious misconduct), we do not consider that the Act is the best tool to respond to risks of overseas persons not paying an appropriate amount of tax. The Act only covers a small portion of foreign investment so can never be a complete response to concerns about tax compliance by overseas investors. Tax law can, however, respond to the issues in a comprehensive and uniform way across all entities doing business in New Zealand.

The Minister's decision under delegated authority agreed with Treasury's and Inland Revenue's recommended option. The Minister also agreed to introduce a new tax information disclosure requirement (complementary option 2). Treasury and Inland Revenue did not recommend this option as it would marginally increase compliance cost for investors without substantially increasing New Zealand's ability to manage the risks associated with foreign investment (as the information would not actually be used in the screening). However, receiving additional information at an early stage of the investment process would assist Inland Revenue when monitoring overseas investors for compliance with New Zealand tax law, and assist with Inland Revenue's policy and audit functions. For those reasons, it was Treasury and Inland Revenue's preferred option among the complementary options.

Section 4.2 Reducing complexity and cutting unnecessary red tape

H Investor test

H4.1 What is the specific problem?

Overseas persons seeking consent to invest in sensitive New Zealand assets must, in most cases, satisfy the investor test. This test assesses the overseas person's fitness to invest in New Zealand against four criteria: business experience and acumen, financial commitment, good character and immigration eligibility. The test applies broadly to individuals identified as relevant overseas persons (ROPs) and individuals with control over relevant overseas persons (IWCs).

Problems with the investor test as currently set out in the Act are:

- it captures New Zealanders identified as ROPs/IWCs, even though they could acquire sensitive assets in their own right without being screened,
- it requires repeat investors to satisfy the test with every further investment, even if there has been no change in their character or capability,
- it does not allow direct consideration of corporate character. The OIO can consider corporate behaviour where that behaviour sheets home to individuals — either through consideration of corporate offending where an IWC has 25% or more ownership or control, or under the “any other matters” test where the corporate actions can be reasonably attributed to an IWC. However, this does not necessarily capture corporate entities directly involved in the transaction (eg, the offshore corporate owner of an entity seeking to invest in New Zealand),
- the test captures matters that do not pose a material risk. Two of the criteria — business experience and acumen, and financial commitment — are broad and of limited value. The breadth of the current good-character requirement also creates a high degree of uncertainty for investors — for instance, decision-makers can consider allegations and “any other matter” that reflects adversely on the investor, and
- there is duplication between the immigration and good character criteria. In particular, section 15 of the Immigration Act 2009 (which relates to persons with convictions or who have been deported from any jurisdiction) considers matters that are core to the ‘good character’ criterion.

Stakeholders consider that the investor test creates uncertainty and imposes compliance costs that are disproportionate to the risks being managed. Stakeholders generally supported narrowing the investor test. There was also broad support for including a factor considering corporate character.

H4.2 What options are available to address the problem?

We consulted on several options to address problems with the investor test, including modest and more significant changes to the existing test, and replacing the test with a bright-line, 'checklist'-style assessment.

Following consultation, we developed a package of reforms (option 1) that provides greater certainty for investors, while retaining flexibility for decision makers. This package would:

- introduce a clear purpose statement for the investor test,
- no longer require New Zealanders to satisfy the test,
- no longer requiring investors who have previously satisfied the test to complete it again for subsequent investments,
- empower decision-makers to consider the character of corporate entities involved in the investment, with consideration limited to the offences, contraventions and allegations listed below,
- remove the financial commitment criterion,
- narrow the business acumen criteria to focus on, for example, disqualifications and undischarged bankruptcies,
- narrow the good character criterion to consider only relevant offences and contraventions by:
 - prescribing the types of offences and contraventions that can be considered (where the investor has been convicted of an offence for which they have been sentenced to imprisonment for a term of five years or more, or at any time in the preceding 10 years has been convicted of an offence for which they have been sentenced to imprisonment for a term of 12 months or more, or has had any civil contraventions punished by pecuniary penalties or enforceable undertakings within the last 10 years),
 - limiting the types of allegations that can be considered to those related to the offences identified above, and only where proceedings have commenced,
 - removing the requirement to consider offences and contraventions by or allegations against any person in which the ROP/IWC has a 25% or more ownership or control interest, and
 - removing the requirement to consider "any other matter" that may be relevant, and
- remove the reference to section 15 of the Immigration Act.

We also developed another package (option 2) that mirrors option 1, but would allow decision-makers to:

- maintain the current business experience and acumen criterion and add the consideration of relevant factors such as undischarged bankruptcies and disqualifications.
- consider only relevant offences and contraventions, with 'relevance' determined by the decision-maker.
- consider a broader range of allegations (not only those for which official proceedings have commenced, but also those for which official investigations are underway)

Addendum: further changes to the Investor Test

On 13 November Cabinet agreed with the proposals in option 1. Subsequently, through the detailed design and legislative drafting process, the Associate Minister of Finance agreed to make further changes to allow decision-makers to consider:

- convictions for offences where a fine has been imposed on a corporate entity in the last 10 years, and
- offences or contraventions of the OIA that result in a court-imposed penalty in the last 10 years.

The Associate Minister of Finance agreed to add offences where a fine has been imposed on a corporate entity, to address a gap in the investor test limb relating to corporate character. This is because Cabinet agreed to only include criminal offenses that carry an imprisonment sentence, whereas corporate entities are fined rather than imprisoned.

The Associate Minister also agree to add offences and contraventions of the OIA that result in a court-imposed penalty, because such breaches of the OIA are likely to be material to assessing an investor's character. The OIA enables courts to apply a wide range of penalties for offences and contraventions, many of which would not be captured under the factors agreed to by Cabinet. However, any past breach of an investor's obligations under the Act leading to court-imposed penalties is likely to be material in assessing whether they will meet their obligations in the future.

These changes are included in the options table below.

H4.3 Impact analysis

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
Option 1: Narrower and simplified investor test, limited consideration of corporate character, limited consideration of allegations	0 Narrowing assessment criteria will have a minor negative impact on risk management. Would still screen for risks that are material to the investment, but removes screening for risks that would not lead to consent being declined. Negative impact offset by ability to consider corporate character for entities directly related to a transaction.	++ Signals greater openness to foreign investment and reduces enquiries into minor risks.	++ Improves certainty for investors, particularly limiting allegations considered and removing consideration of “any other matter”. Significant reduction in compliance costs. Some increase in costs associated with greater consideration of corporate character, but offset by savings from no longer considering the conduct of corporate entities that may be unrelated to the prospective investment. Standing consent and non-application to New Zealanders offers significant cost savings.	++
Option 2: Narrower and simplified investor test, considers slightly broader range of allegations (when compared to option 1)	0 Neutral impact on risk management. Can consider broader range of allegations than preferred package, but these do not have a material impact on investor risks.	+ Some increased openness to investment.	+ Positive impact on predictability, but retains more of the uncertainty associated with consideration of allegations.	+
Ministerial decision post Cabinet: allowing decision-makers to consider convictions for offences where a fine has been imposed on a corporate entity in the last 10 years	++ Compared to the package agreed by Cabinet, this change increases the ability to manage risk as it addresses a gap whereby the investor test would not allow consideration of offenses by corporates where a fine has been imposed. This is a gap because corporates	- Compared to the package agreed by Cabinet, this change may slightly increase the restrictiveness of the test because it expands the types of past behaviour that can be considered. However, decision-makers can weigh the importance of this factor, which limits the extent of	0 Compared to the package agreed by Cabinet, this change will add further certainty as it clarifies the situation for corporate offending. However, as it represents an additional set of information to be provided and considered, it may reduce timelines of outcomes – though this	+

	cannot be imprisoned (the type of penalty Cabinet agreed to include in the test for individuals).	impact this option would have.	issue should be mitigated through the introduction of statutory timeframes.	
Ministerial decision post Cabinet: allowing decision-makers to consider any offence or contraventions of the OIA that results in a court-imposed penalty in the last 10 years	++ Compared to the package agreed by Cabinet, this change increase the ability to manage risk as it ensures that decision-makers can consider offences and contraventions of the OIA which are likely to be material in considering an investor's character.	- Compared to the package agreed by Cabinet, this change may slightly increase the restrictiveness of the test because it expands the types of past behaviour that can be considered. However, decision-makers can weigh the importance of this factor, which limits the extent of impact this option would have.	0 Compared to the package agreed by Cabinet, this change will add further certainty as it clarifies the situation for breaches of the OIA itself. However, as it represents an additional set of information to be provided and considered, it may reduce timelines of outcomes – though this issue should be mitigated through the introduction of statutory timeframes.	+

H4.4 What other options have been ruled out of scope, or not considered, and why?

We consulted on a 'bright-line' checklist approach, under which an applicant would fail the whole test if they failed to meet one criterion. This was not progressed as it would significantly reduce decision-makers' discretion, and could result in investors that, on balance, do not present material risks to New Zealand being inappropriately declined consent. This could negatively affect productivity and economic growth at the margins.

We also considered shifting the investor test from a pre-consent screening tool to a post-consent compliance and enforcement one. This would mean decision-makers would not consider an overseas investor's suitability to invest in New Zealand as part of the consent process, but would allow the OIO to take enforcement action if, post-consent, it emerged that an investor did not meet the test's criteria for investing in New Zealand.

We did not progress this option because it would limit the Government's flexibility in managing risk, reduce investor certainty, and result in very little screening of investments in sensitive business assets (these investments do not go through the benefits test, but would still be subject to the backstop national interest test).

H4.5 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

The Treasury's preferred approach is option 1 as it is likely to best address the problems identified and meet the reform objectives. Narrowing and simplifying the assessment criteria will improve efficiency and predictability for investors. Consideration of corporate character will improve the Government's ability to manage investment risks, including taking into account corporate tax offending or contraventions. The regulator has estimated that these

changes will reduce the costs of administering the investor test by around 15%. The Cabinet paper reflects Treasury's preferred approach.

The Treasury also supports the two additional Ministerial decisions to include additional factors in the investor test. These factors are likely to be more directly relevant to considering an investor's character and suitability to invest in New Zealand.

I Benefit to New Zealand test

14.1 What is the specific problem?

Overseas persons purchasing sensitive land must, in addition to satisfying the investor test, generally satisfy the benefit to New Zealand test (benefit test). If the relevant land includes non-urban land of more than five hectares, the benefits must also be, or likely be, substantial and identifiable. Rural land must also meet the elevated benefit threshold under the rural land directive (see Chapter A, section 4, above). A test similar to the benefit test (the ‘national interest test’) applies to overseas persons purchasing interests in fishing quota.⁵⁵

The benefit test is the primary driver of the time and cost involved in obtaining consent. Decision-makers must assess a prospective investment against up to 21 economic, environmental and cultural factors. Investors face significant compliance costs and uncertainty because of the number of factors and overlap between them, and the ability for additional factors to be added through regulations. The complexity of this test also results in disjointed applications that limit decision-makers’ ability to make overall assessments of proposed transactions. At the same time, there may be gaps in the test (eg, in the extent to which it takes account of national security and Māori cultural values).

Another problem with the benefit test is the counterfactual test. Decision-makers must assess benefit against what is likely to happen if the overseas investment does not proceed. The current test can be highly theoretical, particularly where the counterfactual is presumed to be a “competent and adequately-funded alternative New Zealand purchaser”. There are also difficulties in demonstrating incremental benefit in transactions involving vendors and purchasers who are both overseas persons where the assets are large and well-managed or mature. This can lead to a risk of assets being stranded — where there is no New Zealand demand, even at a lower price.

The requirement for benefits to be ‘substantial and identifiable’ recognises the special ownership value attached to non-urban land of more than five hectares. It does, however, introduce additional uncertainty, and embeds a higher standard even when it may not be appropriate (eg, obtaining a small shareholding in an entity that owns non-urban land). It may not be necessary as the OIO applies a proportionate approach to decision-making that takes account of the sensitive characteristics of the land being acquired.

There is uncertainty about whether negative impacts can be considered under the current test.

This chapter of the regulatory impact assessment considers improvements to the benefit test (H1), improvements to the counterfactual test (H2) and improvement to the ‘substantial and identifiable’ test (H3). A preferred package is presented in section H4.13. These options should be considered alongside options to embed an elevated benefit threshold for farm land (discussed in chapter A of Section 4 above).

⁵⁵ The Act incorporates the overseas investment fishing provisions in the Fisheries Act 1996, which include a ‘national interest’ test that links to and largely mirrors the benefit test.

11 Improvements to the benefit test

14.2 What options are available to address the problem?

We consulted on several options to reform the benefit test, including options to expand and/or simplify the test's factors, and clarify whether potential downsides of an investment can be considered under the test. Most stakeholders supported a simplified benefit test that retained the current range of benefits, with a 'backstop' test for higher-risk transactions, and no consideration of negative benefits.

Following consultation, two options were considered:

Option 1 includes a simplified benefit test. The benefit test would include broadly-framed economic, environmental and public access factors, and carry forward existing factors relating to historic heritage, advancing significant government policies, levels of involvement in the investment by New Zealanders, and other consequential benefits.⁵⁶ This would retain the range of benefits that could be considered under the test. The broader factors would reduce duplication while enabling a more transparent demonstration of benefits, including benefits against the factors that currently have to be listed against the 'consequential benefits' factor.

Negative impacts could not be considered, and new factors could not be added by regulation.

In addition to simplifying the application process for investors, the broadly framed economic factor could reduce the risk of stranded assets (because improved market liquidity could be registered as a benefit in a way that it cannot clearly be now). This could be supported by a 'no detriments' test for transactions involving vendors and purchasers who are both overseas persons, and/or a legislated proportionate approach that took account of the degree of change in overseas ownership. Both of these are discussed below.

The national interest test, which would complement a simplified benefit test, is described in detail above in chapter D of section 4. The elevated benefit threshold for farm land would apply alongside the simplified benefit test, as described in chapter A of section 4 above.

Option 2 mirrors option 1, but would allow decision-makers to consider a narrow set of negative effects in the benefit test. That is, negative impacts on access, water quality or sustainability. This would enable consideration of negative impacts on matters that anecdotally have a particularly high cultural value, or where there are some perceived gaps in existing, generally applicable legislation.

⁵⁶ Special land is discussed separately in section 4, chapter C.

14.3 Impact analysis

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
Option 1: Simplified benefit test with consideration of the same factors as currently, but with fewer factors. No consideration of negative benefits.	0 No impact on the Government's ability to manage risk (scope of the test is maintained). Would enable decision-maker to more easily consider an application's overall effects.	+ Simpler benefit test expected to better support investment and reduce time and cost for most applications. Clarifying that negative impacts will not be considered signals greater openness to investment. This will increase investment attractiveness, with benefits to the broader economy.	+ Expected to significantly reduce the amount of effort required to meet the test's requirements (due to the limited number of factors). Certainty also improved by removing the Government's ability to add factors by regulation.	+
Option 2: Simplified benefit test (as above) with ability to consider narrow set of negative effects in benefit test.	0 No impact on the Government's ability to manage risk given coverage is maintained. Would enable decision-maker to more easily consider an application's overall effects.	0/+ Ability to consider negative effects would have some negative impact on New Zealand investment attractiveness. Mitigated by simpler benefit test overall and the limited factors where negative impacts can be considered. There is also a risk of inconsistent decision-making across regulatory regimes (eg, the RMA).	0/- Would increase uncertainty as negative impacts would have to be weighed against positives in other factors – a complicated exercise that would be entirely case-specific (delaying the development of precedent).	0

14.4 What other options have been ruled out of scope, or not considered, and why?

Following public consultation and further engagement with the administrators of other regimes [2], we ruled out options to expand the benefit test, or allow consideration of all negative impacts.

These models would significantly increase the Act's compliance burden on investors. Most, if not all, applicants would be required to provide additional information on the potential negative effects of their investment, processing times would increase, and there would be a greater administrative burden across government. As above, any consideration of negative effects would also introduce issues in weighing the pros and cons of different types of factors. Significant negative impacts can be addressed through the backstop national interest test.

12 Improvements to the counterfactual test

14.6 What options are available to address the problem?

Stakeholders considered reform to the counterfactual test to be one of the most important ways to reduce the time and cost of applications. Many acknowledged the philosophical appeal of a test that takes account of what may occur if the proposed investment did not proceed. However, most considered it had proven unworkable due to its subjectivity and unpredictability. One submitter suggested application costs doubled after the test's introduction.

We developed three options:

Option 1 is a new 'before and after' counterfactual test involving a comparison of the applicant's plans with the current state of the land and activities on it.

Option 2 would compare an overseas person's plans with what would happen if the vendor continued to own the land. This would place greater emphasis on risk management than option 1, but do less to resolve issues associated with the current counterfactual test because it continues to rely on a hypothetical assessment.

Option 3 could complement either of the two other options, and is a 'no detriments' test for transactions involving vendors and purchasers who are both overseas persons, requiring only that the purchaser retain current benefits associated with the land. This would seek to reduce the risk of large, well-managed assets being stranded because a potential purchaser cannot demonstrate incremental benefit.

14.7 Impact analysis

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
Option 1: Replace the current counterfactual with a 'before and after' test that compares the applicant's plans to the state of the land at the time of the application	0/- In some circumstances could overstate benefits (when the benefits would likely occur anyway) or understate benefits (in an environment where the asset could be expected to deteriorate below the status quo absent the investment). Risks can be managed by adopting the proportionate approach discussed below (requiring that benefits be proportionate to the sensitivity of the investment), and the proposed national interest	+ Moving to an assessment against the current state of the land (as opposed to hypothetical future use) signals greater openness to investment. One of the most significant opportunities across the Phase 2 reform to increase	+ Significantly easier for applicants and decision-makers to identify benefits, as the hypothetical element of the existing counterfactual test would be removed, making the test less complex, speculative and time-consuming.	+

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
	test.	investment attractiveness, with subsequent effects on productivity and economic growth.		
Option 2: Replace the current counterfactual with a comparison of the applicant's plans to continued ownership by the vendor	<p style="text-align: center;">0</p> <p>Would have a neutral or small negative impact on the ability to manage risk. There would no longer be an explicit link to an alternative New Zealand purchaser. This would make it easier to satisfy the test in some cases, but is not a significant departure from the current test (which often applies the 'continued ownership by the vendor' threshold).⁵⁷</p> <p>Would continue to consider what might happen if the land was not acquired by the applicant and therefore, like the current test, seek to exclude benefits that would have arisen irrespective of the investment.</p>	<p style="text-align: center;">0/+</p> <p>Relatively small positive impact on New Zealand's attractiveness to overseas investment, but no significant departure from the current test.</p>	<p style="text-align: center;">0/+</p> <p>Relatively small positive impact on predictability and timeliness. Reduces the number of potential counterfactuals and removes the concept of a "competent and adequately-funded alternative New Zealand purchaser", which can be the most difficult to apply.</p>	<p style="text-align: center;">0/+</p>
Option 3: No-detriments test for sales between overseas persons	<p style="text-align: center;">0/-</p> <p>Minor negative impact on Government's ability to manage risk (by making it easier to satisfy the benefit test in sales between overseas persons).</p>	<p style="text-align: center;">+</p> <p>Signals openness to investment and responds to the problem of stranded assets, which has a negative impact on foreign investment.</p>	<p style="text-align: center;">+</p> <p>Improves predictability and timeliness for some transactions, but design questions introduce complexity (eg, degree of similarity required between size and nature of vendor of applicant's investments).</p>	<p style="text-align: center;">+</p>

⁵⁷ The threshold was directly applied in just under 30% of recent cases, and may be used as a proxy for the alternative New Zealand purchaser counterfactual, which is used in about 66% of cases (eg, in cases of well-run assets).

14.8 What other options have been ruled out of scope, or not considered, and why?

We also considered an option that would clarify that, where genuine market testing had shown there was no domestic interest in the relevant land, the counterfactual would not be 'an adequately funded New Zealand buyer'. This option would not make market testing mandatory, but any such testing could influence the applicable counterfactual. This option was not pursued because it had little support during consultation and would not resolve the primary problem with the existing counterfactual – its highly theoretical nature.

13 'Substantial and identifiable' threshold

14.10 What options are available to address the problem?

Stakeholders overwhelmingly supported removing the 'substantial and identifiable' threshold, because of the complexity it adds to screening. Many noted they supported risk-based and proportionate decision-making (noting that the consultation document did not seek feedback on the option of legislating a proportionate approach). Following consultation, we developed two options for dealing with this threshold.

Option 1 is to replace the 'substantial and identifiable' benefit threshold for non-urban land of more than five hectares with a new statutory requirement that decision-makers take a proportionate approach to all applications subject to the benefit test.

Option 2 is to remove the 'substantial and identifiable' threshold, and rely on the OIO's current operational practice of adopting a proportionate approach to the benefit test. The OIO already takes a proportionate approach to assessing whether the benefits of an application are sufficient to satisfy the benefit test. It takes into account matters such as the nature of the land (size, monetary value, sensitive features), and the interest being acquired (eg, temporary or permanent, minority or majority shareholding).

14.11 Impact analysis

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
Option 1: Introduce a legislative requirement that benefits must be proportionate to the sensitivity of the land and remove the “substantial and identifiable” benefit threshold	0/+ Will provide a legislative foundation for the current OIO approach, reflecting that it is a greater privilege for an overseas person to own or control more sensitive assets. Will also better reflect the cultural and ownership value attributable to different types of assets and different interests in those assets.	0/+ Will signal an openness to investment by reducing the risk of asset stranding, by allowing for greater consideration of the benefits that a transaction may have on market liquidity.	0/+ Will reduce the complexity of screening by removing the relatively blunt “substantial and identifiable” threshold for non-urban land greater than five hectares. Will also avoid potentially screening non-urban land against two elevated benefit thresholds, which would otherwise occur if the rural land directive is legislated (discussed above in section 4, chapter A).	0/+
Option 2: Remove the ‘substantial and identifiable’ benefit threshold and rely on current OIO proportionate approach	- Risk that decision-makers and courts could interpret the legislative grounds for proportionate decision-making as being implicitly removed if the ‘substantial and identifiable’ benefit threshold was removed from Act, meaning decision-making could become less proportionate and risk-based.	0 Could signal openness to investment by removing the “substantial and identifiable” threshold. Any benefit, however, is offset by the risk of a less proportionate and risk-based approach (see previous column) which could deter investment.	0/+ Will reduce complexity by removing the relatively blunt “substantial and identifiable” threshold for non-urban land greater than five hectares.	-

14.12 What other options have been ruled out of scope, or not considered, and why?

None.

I4.13 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

The Treasury's preferred reform package includes:

- a simplified benefit test, with no consideration of negative factors (option 1 in H1),
- replacing the current counterfactual with a 'before and after' test that compares the applicant's plans with the state of the land at the time of the application (option 1 in H2), and
- introducing a legislative requirement that benefits must be proportionate to the sensitivity of the land and the interest being acquired, and remove the 'substantial and identifiable' benefit threshold (option 1 in H3).

The Cabinet paper reflects the Treasury's preferred package, but also presents an option to adopt a variation of option 2 in H1 (simplified benefits test, but an ability to consider narrow set of negative effects). The option presented in the Cabinet paper would allow Ministers to consider likely or actual environmental harms relating to natural and physical resources in respect of investments in non-urban land of greater than 5 hectares, as part of the broad environmental factor proposed for inclusion in the benefit test.

J Māori cultural values

J4.1 What is the specific problem?

Consultation and media reports indicate there is a degree of public concern that the Act does not sufficiently recognise Māori cultural values. Concerns appear to relate particularly to awareness of and protection for sensitive sites, and Māori relationships with them.

The Resource Management Act 1991 (RMA) is the principal tool for managing land use. The Overseas Investment Act expressly allows Māori cultural values to be considered as part of the historic heritage factor in the benefit to New Zealand test. The OIO recommends that overseas persons consult iwi on applications that appear to involve sites of particular significance to Māori.

Stakeholders had mixed views on whether the Act should provide greater recognition of Māori cultural values. Many individual submitters supported increasing recognition of Māori cultural values, noting the special significance of land and other resources in te ao Māori and the Treaty principles of partnership and active protection. Some stakeholders suggested that the OIO or the applicant be required to consult with mana whenua in the relevant area.

Other stakeholders, particularly professional advisors, noted the importance of protecting Māori cultural values but did not consider there was evidence of a problem with investment screening. Some were concerned the proposals would further complicate the benefits test.

J4.2 What options are available to address the problem?

We developed two options to improve the Act's recognition of Māori cultural values.

Option 1 would clarify and broaden the benefit test to allow recognition of an investor's plans to protect wāhi tūpuna⁵⁸ that are listed under the Heritage New Zealand Pouhere Taonga Act 2014 or Māori reservations⁵⁹ on sensitive land, and provide access for the purposes of the stewardship of historic heritage and natural resources.

Option 2 would allow or require decision-makers to consider Māori cultural values generally as part of the benefit test.

⁵⁸ A place important to Māori for its ancestral significance and associated cultural and traditional values.

⁵⁹ As established in Te Ture Whenua Māori Act, section 338, which broadly include sites of ancestral, historical, spiritual or emotional significance to Māori.

J4.3 Impact analysis

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
Option 1: Clarify and broaden the benefit test to allow recognition of: protection for wāhi tūpuna or Māori reservations on sensitive land, and the recognition of access for historic heritage and natural resources	0/+ Support informed decision-making by raising awareness about the existence of sensitive sites and appropriate mechanisms to protect and manage access. Greater awareness and attention to relationships with tangata whenua.	0 No material impact on New Zealand's attractiveness to investment, because the relevant wāhi tūpuna and Māori reservations can be easily identified.	0 No material impact, but may require some additional time in negotiating and monitoring access arrangements.	0/+
Option 2: Allowing or requiring decision-makers to consider Māori cultural values generally as part of the benefit test.	+ Could enable a broader range of Māori cultural values to be considered, but likely to be difficult for the OIO and overseas persons to put into practice effectively given cultural values are multidimensional and vary across iwi and hapu.	- Likely to reduce attractiveness to investment due to the additional hurdle, less clear assessment criteria and likely increase in compliance costs.	- Likely to result in longer and less predictable process.	-

J4.4 What other options have been ruled out of scope, or not considered, and why?

There was some stakeholder support for introducing a legislative requirement for applicants or the OIO to consult Māori on all applications for consent, but this type of change is out of scope of the reform. However, there are operational ways to support greater awareness of Māori cultural values and sensitive sites. [33]

J4.5 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

We consider Option 1 most likely to best address the problems identified. It recognises the special significance of land and natural resources to Māori, and reflects stakeholder concerns around the identification and protection of sensitive sites. It also reflects concerns around ensuring benefit test factors are targeted and do not introduce greater uncertainty into the consent framework. We also support the operational improvements discussed above. The Cabinet paper reflects our preferred approach.

K Water extraction

K4.1 What is the specific problem?

Public concerns about overseas investments involving water extraction (particularly for water bottling for export) include the potential environmental effects, and that overseas persons may profit from a high-value resource without paying a charge.

The RMA is the principal tool for managing the environmental effects of water extraction (including water bottling). The Overseas Investment Act allows for limited consideration of the environmental impact of proposed investments involving water extraction — decision-makers can consider whether there are mechanisms in place to protect or enhance significant indigenous vegetation or fauna, for example, but not how water will be used.

The Act is not able to comprehensively address concerns about water extraction. It applies only to overseas persons' proposals involving water extraction when water will be extracted on sensitive land (and this is signalled in an investor's business plan), or a significant business asset is involved (such as an application to purchase a large water bottling company). For example, the Act is unable to screen transactions involving overseas persons seeking to bottle water from an aquifer on non-sensitive land. The Act therefore screens only a small number of water extraction proposals, and only three unique proposals involving water bottling appear to have been submitted since 2005. Water bottling is a small industry in New Zealand, and in 2016 it accounted for less than 0.02% of total water use.

We note that the Government has a range of other work underway targeted at concerns around water use, including consideration of a royalty on bottled water and *Essential freshwater: healthy water, fairly allocated*.

Stakeholders had strong and divergent views on what the Act's role should be in relation to managing water quality and sustainability. Most individual submitters supported stronger protections for water in the Act. In contrast, the business community considered that the Act was not the appropriate vehicle to deal with water issues.

K4.2 What options are available to address the problem?

We considered two possible changes in relation to water extraction, noting that the RMA already addresses relevant environmental issues and that the Act would provide for water extraction to be addressed as a part of the proposed broadly-framed environmental factor in the benefit test.

Option 1 is to include a factor in the benefit test that considers whether an investment that involves water bottling or bulk water extraction for human consumption will have a positive effect on water quality or sustainability.

Option 2 is to include a factor in the benefits test that considers whether an investment that involves water bottling or in bulk water extraction for human consumption will have a positive or negative effect on water quality or sustainability.

K4.3 Impact analysis

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
<p>Option 1:</p> <p>Include a factor in the benefit test that considers whether an investment that involves water bottling or bulk water extraction for human consumption will have a positive effect on water quality or sustainability.</p>	<p>0</p> <p>Marginal impact as will capture only a small number of applications (that is, water extraction on sensitive land) – only three unique proposals involving water bottling appear to have been submitted since the Act was introduced in 2005.</p>	<p>-</p> <p>Minor negative impact, as only a small number of applications would be captured and they would be assessed against clear criteria.</p>	<p>-</p> <p>Minor negative impact for applications captured by the new benefit test factor. May also result in decisions under the Act that are inconsistent with decisions made by consenting authorities under the RMA.</p>	<p>-</p>
<p>Option 2:</p> <p>Include a factor in the benefit test that considers whether an investment that involves water bottling, or in bulk water extraction for human consumption will have a positive or negative effect on water quality or sustainability.</p>	<p>0</p> <p>Marginal impact as will capture only a few applications as above.</p> <p>Enabling decision-makers to consider both risks and benefits would make a small improvement to the ability to manage risk.</p>	<p>--</p> <p>Although only a few applications would be captured, enabling a specific factor to be weighted negatively would send a negative signal about New Zealand's openness to investment.</p>	<p>-</p> <p>Moderate negative impact for applications captured by the new benefit test factor, as the ability to consider negative impacts would make assessing applications more complex.</p> <p>Likely to lead to decisions under the Act that are inconsistent with decisions made by consenting authorities under the RMA.</p>	<p>-/--</p>

K4.4 What other options have been ruled out of scope, or not considered, and why?

We consulted on the option of adding a broader factor to the benefit test relating to water extraction for any consumptive purpose (as opposed to focusing on bottling or bulk extraction). We did not progress this option because it would require decision-makers to consider a range of water uses, rather than focusing on those of greatest concern.

Some stakeholders suggested making water a new class of sensitive asset subject to screening under the Act. This option is outside the scope of the terms of reference, and could raise issues of consistency with New Zealand's international obligations.

K4.5 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

Our preferred approach is the status quo — for water extraction to be addressed as a part of the proposed broadly-framed environmental factor in the benefit test, rather than introducing a factor specific to water extraction. The Act cannot comprehensively address concerns about water extraction, and it already makes reasonable provisions to address economic, environmental and cultural concerns that might result from water extraction on sensitive land.

The Cabinet paper recommends option 2.

L Statutory timeframes

L4.1 What is the specific problem?

There are currently no statutory time limits for decisions made under the Act. The OIO has agreed several key performance indicators with ministers for different types of consent application, though these are not binding. Average assessment times for decisions on applications are published on LINZ's website and in its annual reports.

OIO data suggests that it takes on average around 100 working days for an application under the Act to be processed. This includes periods when the OIO has sought and is waiting to receive additional information from overseas persons, consultation with third parties and time with ministers. On average about half of this time is when the application is with the OIO.⁶⁰

This is significantly longer than application timeframes in comparable jurisdictions. For example, the Australian regime allows 30 working days to make a decision on an application, and the Canadian regime allows 45 working days.⁶¹

About half of submitters highlighted that uncertain timeframes for decisions were the Act's most serious issue. While there are several contributing factors (including complexity in the consenting framework), there was overwhelming support for the introduction of statutory timeframes. A few submitters highlighted that timeframes for decision-making have resulted in transactions that would likely benefit New Zealanders not proceeding.

For the OIO, a lack of binding time constraints can result in it entering an iterative process with applicants to ensure that their application contains sufficient information to enable a decision to be made. This is inefficient for both the OIO and applicants.

L4.2 What options are available to address the problem?

We considered two options to address this problem.

Option 1 is to introduce statutory timeframes for decisions tailored to each of the Act's consent pathways (including transactions subject to review under the proposed call-in power), with the ability to extend the deadline once by up to a prescribed period or as agreed with the applicant. The OIO would have an initial specified period (eg, 15 working days) to review an application and request any additional information before accepting it. Timeframes would not start until after the application is accepted. Decision-makers would still be entitled to seek additional information at a later stage, however doing so would not stop the clock on the relevant statutory timeframe.⁶² However, decisions will not be void if they are made outside those timeframes, and the Crown will not be liable for any loss suffered by applicants as a result of breaching a timeframe.

Option 2 is to introduce a standard timeframe for all applications (eg, 45 working days) with an ability to extend the deadline.

⁶⁰ Decisions under the Overseas Investment Act 2005: timeframes, 9 Sept 2019 (OIO working document).

⁶¹ Both regimes also allow for extensions to this time period.

⁶² This is consistent with the Canadian regime.

In addition to either approach, LINZ would be required to report annually and publicly on its compliance with statutory deadlines.

L4.3 Impact analysis

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
<p>Option 1: Tailored deadlines and an ability to extend, with an initial period for OIO to review an application and request further information before accepting an application. Compliance with timeframes to be published.</p>	<p>0 Potential marginal negative impact on the Government's ability to manage risk if timeframes do not allow sufficient time for robust decision making. Risks will be managed by ensuring timeframes are appropriately calibrated, and enabling OIO to require further information before accepting an application and to extend timeframes. OIO can also decline applications where insufficient information has been received to demonstrate that the application meets the relevant test.</p>	<p>++ Will support New Zealand's attractiveness to investment, including by bringing timeframes into line with comparable jurisdictions (which are alternative investment destinations) and through vendors and investors avoiding the economic losses caused by lengthy and uncertain processing times.</p>	<p>++ Will help to deliver more predictable and transparent processing times, and timely outcomes, giving both decision-makers and applicants a better sense of how long the process should take. Public reporting will create incentives for the OIO and decision-making ministers to comply with statutory timeframes and improve certainty for investors.</p>	<p>++</p>
<p>Option 2: Standard timeframe for all applications with an ability to extend. Compliance with timeframes to be published.</p>	<p>0/- As above, but slightly higher risk that, for some complex applications, a standard timeframe may not be long enough to complete a quality assessment.</p>	<p>+ As above, will support New Zealand's attractiveness to investment, including through investors avoiding the economic losses caused by lengthy and uncertain processing times.</p>	<p>+ Would improve investor certainty, but for some consent pathways a blanket timeframe may be longer than is necessary to process an applicant. Public reporting will create incentives for the OIO and decision-making ministers to comply with statutory timeframes and improve certainty for investors.</p>	<p>+</p>

L4.4 What other options have been ruled out of scope, or not considered, and why?

We consulted on, but have not progressed, alternative design features, including:

- timeframes beginning when an application is received, as this would create an unfair burden on the OIO if delays are caused by waiting on additional information from applicants at the outset
- pausing timeframes if additional information is required, as this would reduce predictability for investors and reduce incentives on the OIO to comply with the intent of statutory timeframes, and
- granting consent automatically if timeframes are breached, which could result in applications receiving automatic consent when they ought not to be approved, or the OIO having to decline an application in breach of its natural justice obligations, creating a risk of judicial review.

L4.5 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

Our preferred approach is option 1. Statutory timeframes will give both decision-makers and applicants a better sense of how long the process should take. The Cabinet paper reflects Treasury's recommended approach.

M Leases and other non-freehold interests

M4.1 What is the specific problem?

The screening regime currently captures leases and other less-than-freehold interests in sensitive land with terms of three years or greater. Less-than-freehold interests include legal or equitable interests such as profits à prendre and mortgages.

Leases⁶³ are generally viewed as less sensitive than freehold interests in land because they are of limited duration, and the benefit and use of land ultimately returns to the owner. This often results in an asymmetry between the cost of the screening process and the limited control that lessees generally have over land.

However, in some cases the nature of the lease can confer rights that are similar in nature to freehold transactions, particularly where the lease is long term. In these cases screening is appropriate. Setting the right threshold to balance compliance costs against the need to manage risks where leases approach ownership is the goal of this part of the reform. Most stakeholders considered that 10 years was too short a timeframe for most commercial leases, suggesting terms that ranged from 12 to 35 years.

There is an additional technical issue related to periodic leases, which have no set end date and continue until either party gives written notice to end the lease. These interests have never been screened under the Act, however changes in 2018 clarifying that periodic leases of residential land do not require screening have created uncertainty about whether periodic leases over other types of sensitive land require consent.

Most stakeholders supported extending the screening threshold for leases and other less-than-freehold interests. They noted the difficulties in demonstrating benefit in relation to shorter-term leases and where the applicant does not have full control of the asset. They also indicated these complexities could create an incentive for overseas persons to purchase land outright, rather than lease it (because compliance costs are similar).

M4.2 What options are available to address the problem?

We considered four options in relation to leases and other less-than-freehold interests.

Option 1 is to raise the screening threshold for leases to 15 years or more (including rights of renewals) for all types of land, except residential land where the threshold would remain at three years.

This approach would largely exclude commercial transactions (ie, leasing of industrial land, retail or offices), but would capture some leases of horticultural, agricultural and viticultural land.⁶⁴ The threshold for leases of residential land would remain at three years to retain alignment with the broader policy drivers for residential land changes.

⁶³ For the balance of this section, “leases” refers to both leases and other less-than-freehold interests in land.

⁶⁴ Some leases of this type may be able to be acquired by an overseas person without consent if, for example, they were only obtaining the remaining term on an existing longer term lease. The risk associated with this is low given that the activity being conducted on the land will remain largely the same and extending the lease further would require consent.

Option 2 is to raise the threshold for screening leases over sensitive assets to 10 years (but, as above, continuing to screen leases of residential land with terms of three years or more).

Option 3 (complementary to options 1 or 2) is to screen consecutive leases over sensitive assets that cumulatively result in the leasehold threshold being exceeded. This would guard against the use of consecutive leases as a way to avoid consent requirements. [1, 36]

Option 4 is an additional option, not an alternative one. It is a technical change to clarify that periodic leases are not an interest in land that requires consent under the Act. This would be consistent with current practice and the treatment of residential land.

M4.3 Impact analysis

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
Option 1: Screen leases over sensitive assets with terms of 15 years or more. Continue to screen leases of residential land with terms of three years or more.	0/- Would have a minor negative impact on the Government's ability to manage risks as it would remove a number of transactions that are currently screened from the regime, and limit the Government's ability to negotiate conditions on some investments that provide benefits to New Zealand (eg, public access). This change may increase the use of leases by some investors.	+/+ + This option would have excluded from screening approximately 7 of the 79 (9%) applications involving leases assessed over the last five years. Sends a positive signal about the desirability of productive overseas investment in New Zealand. This has positive flow-on effects for New Zealand's economy.	+ The option will deliver more predictable, transparent and timely outcomes by removing screening requirements for overseas persons seeking less-than freehold, medium-term interests in sensitive land.	+

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
<p>Option 2:</p> <p>Screen leases over sensitive assets with terms of 10 years or more. Continue to screen leases of residential land with terms of three years or more.</p>	<p>0/-</p> <p>The impact would be similar to raising the threshold to 15 years, however 2 or 3 fewer transactions would be excluded (looking at leases assessed over the last 5 years).</p>	<p>+</p> <p>The impact would be similar to Option 1, however fewer transactions would benefit from the change.</p>	<p>+</p> <p>The impact would be similar to Option 1, however fewer transactions would benefit from the change.</p>	<p>+</p>
<p>Option 3:</p> <p>Screen leases over sensitive assets that cumulatively result in the leasehold threshold being exceeded</p>	<p>0/+</p> <p>Would marginally increase the Government's ability to manage risks associated with foreign investment. Entering into a series of short-term leases with the intention of avoiding consent is arguably inconsistent with the Act's anti-avoidance provisions and as such the extent to which this increases the Government's ability to manage risk is not clear.</p>	<p>0/-</p> <p>Marginal impact as this should not affect compliant investors. Likely to impact only those who unexpectedly find themselves entering into a second lease near the end of the term, in which case screening will now be required. Likely to generally be in investors' interests to obtain longer-term leases (and go through the consent process), rather than risk losing access to their preferred site by attempting to use consecutive leases.</p>	<p>0</p> <p>Would increase certainty around screening requirements, rather than relying solely on the Act's anti-avoidance provisions to determine whether entering into consecutive leases would require consent (which would depend on the specific fact scenario for each investor and investment).</p>	<p>0</p>
<p>Option 4:</p> <p>Clarify that periodic leases are not interest in land</p>	<p>0</p> <p>Periodic leases are not an interest in land and not intended to be screened under the Act.</p>	<p>+</p> <p>Clarifying that periodic leases do not require consent will remove any investor uncertainty.</p>		<p>0/+</p>

M4.4 What other options have been ruled out of scope, or not considered, and why?

We consulted on, but have not progressed, differential screening thresholds for different types of land (eg, 10 years for non-urban land over five hectares and 35 years for other types of land). Most submitters did not see a rationale for treating leases for different types of land differently (eg, having different timeframes for non-urban land over 5ha) and preferred a uniform treatment.

M4.5 What option, or combination of options, is likely to best address the problem, meet the policy objectives and deliver the highest net benefits?

Our preferred approach is option 1, as it will support productive investment in New Zealand and deliver more predictable, transparent and timely outcomes by significantly reducing compliance costs for a small number of transactions. Medium-term leases are generally lower-risk investments, so the proposal has only a minor impact on the Government's ability to manage risk. Treasury also supports option 4.

The Cabinet paper proposes option 2 (a threshold for screening leases of 10 years rather than 15 years), combined with option 3 (screening leases over sensitive assets that cumulatively result in the leasehold threshold being exceeded), and option 4.

N Land adjoining land with sensitive characteristics

N4.1 What is the specific problem?

The Act requires screening of transactions if they involve land that adjoins land with sensitive characteristics, such as the foreshore, a lakebed, some types of conservation land, historic places and wāhi tapu (sacred places). Land with sensitive characteristics is sometimes called 'Table 2 land', referring to Table 2 in Schedule 1 of the Act.

Table 2 land also includes land that is listed by the OIO under section 37 of the Act as a reserve, a public park or other sensitive area. The section 37 list currently includes all land over 0.4 hectares that a regional plan, district plan or proposed district plan designates as a reserve or public park for recreation purposes, or as an open space. The section 37 list also includes national parks.

The current definition of Table 2 land is broader than necessary, creating unnecessary compliance costs. In particular:

- Screening includes matters that are not relevant to the risks posed to adjoining Table 2 land. The most relevant considerations are environmental, historic and cultural values, and access. However, under existing policy settings, an application for consent to acquire adjoining land must also be assessed against a range of other factors such as the transaction's economic effects. Many of the benefit test factors are also irrelevant to the land itself (ie, the land being acquired), if the land is only being screened because it adjoins land with sensitive characteristics.
- The broad definition of Table 2 land has three primary implications:
 - It includes some land of less environmental, historic or cultural sensitivity that is easily accessible. This issue is particularly relevant to some land listed under section 37. For example, consent may be required for commercial land in an industrial area because it adjoins land designated as a recreation reserve (such as a sports field) or a river that is part of the coastal marine area.
 - The way land is treated under the Act can depend on how individual local authorities designate it in their district plans. This means that land of similar sensitivity across New Zealand may not be treated equally under the Act.
 - It increases the time and complexity associated with identifying whether land is sensitive. For example, a 'sensitive land certificate' may need to be obtained, at the overseas person's expense, to determine whether the land is sensitive or not.

Stakeholders generally supported narrowing the scope of sensitive adjoining land. They agreed the current regime is too broad and that there are particular issues with the section 37 list.

N4.2 What options are available to address the problem?

We developed two options for dealing with land that adjoins land with sensitive characteristics.

Option 1 is to significantly narrow the scope of Table 2 by removing all categories of land apart from foreshore, lakebeds, some land significant to Māori and public conservation land. This would continue screening of land that adjoins land of high conservation or cultural value or sensitivity. This is consistent with RMA provisions for the maintenance and enhancement of public access to coastal marine areas and lakes, and recognises the Crown's Treaty obligations.

Option 2 is a lesser narrowing of the scope of Table 2. It would remove most section 37 land but retain the other categories of Table 2 land. Some land of higher conservation or cultural value or sensitivity currently captured by section 37 (eg, national parks, regional parks over 80 hectares, and scientific, scenic, historic or nature reserves under the Reserves Act 1977) would also be retained by being listed as categories of Table 2 land. This option would exclude from screening land that adjoins most recreation reserves, some government purpose reserves and some local purpose reserves. These are generally the reserves of the lowest environmental concern, as reflected by their status in the Reserves Act 1977, and can usually be accessed via public roads or tracks.

[1, 36]

N4.3 Impact analysis

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
Option 1: Significantly narrow the scope of Table 2, leaving only foreshore, lakebeds,	0 No impact on the Government's ability to manage risk. It would remove categories of land with no obvious sensitivities, while retaining the ability to screen land adjoining truly sensitive land (eg, foreshore and lakebeds). Any residual risk is adequately	++ Removing land from the screening regime sends a positive signal about New Zealand's openness to overseas	+ Would reduce the number of sensitive land applications (excluding transactions for residential property) by around 10–12%. It would ensure land	+/+ +

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
conservation land and some land significant to Māori	managed by the RMA, which regulates land use, including impacts on adjoining land. Would limit the Government's ability to negotiate conditions on some investments that provide additional benefits. However, environmental, cultural or access conditions are rarely applied, and are present at a much lower rate than in transactions that include land sensitive in its own right. ⁶⁵	investment. It would remove unnecessary compliance costs, and address the concerns expressed by some submitters that Table 2 land is impacting negatively on New Zealand's ability to attract investment.	is treated consistently under the Act and make it easier for investors to identify whether land is sensitive. This would provide greater certainty and predictability to investors about when the regime applies to them.	
Option 2: Remove only section 37 land from Table 2, while retaining other categories of land.	0 No impact on the Government's ability to manage the risks of overseas investment. The Government would retain greater ability to negotiate conditions on some investments that provide additional benefits to New Zealand.	+ Would signal greater openness to investment and remove some unnecessary compliance costs.	+ Would better ensure land is treated consistently under the Act and make it easier for investors to identify whether land is sensitive. Would reduce the number of sensitive land applications (excluding transactions for residential property) by approximately 7-9%.	+

N4.4 What other options have been ruled out of scope, or not considered, and why?

Some submitters suggested broadening the scope of Table 2 land, and the Department of Conservation suggested including screening of significant natural areas on public land to ensure the Act could be used to negotiate environmental benefits for this type of land. We have not progressed these options, as broadening the scope of Table 2 land is outside the scope of the terms of reference, and [36]

We considered the option of continuing to screen land adjoining public conservation land if the adjoining land is not zoned as commercial or urban land. However, we did not progress this option because it would result in inconsistent treatment of different parcels of land adjoining the same sensitive land.

⁶⁵ Most of the benefits cited in decisions where Table 2 land is the only reason for screening have no relevance to a transaction's particular risks to Table 2 land – such as “previous investments” (cited in 56% of all applications where Table 2 land is the only reason for screening).

N4.5 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

The Treasury's preference is option 1. It best addresses the problems identified, while retaining the ability to screen land that adjoins truly sensitive land. It is consistent with the RMA framework for protecting the foreshore and lakebeds, and the Crown's Treaty obligations. The Cabinet paper reflects the Treasury's preferred approach.

O Who is screened and when

O4.1 What is the specific problem?

The Act treats a range of fundamentally New Zealand entities as overseas persons, for example, companies that are majority New Zealand-owned and managed investment funds that are investing on New Zealanders' behalf.⁶⁶

It also requires overseas persons to obtain consent for often small transactions, where there is no control over the sensitive asset (the tipping point problem), or their degree of control does not change (the incremental investment problem).

These issues are a particular concern for listed entities because it is more difficult to determine the share of overseas ownership. Shareholders can change daily, meaning that screening thresholds could be triggered multiple times per day by individual investors, and target companies face a high degree of uncertainty as to whether they need consent for future purchases of sensitive assets.

The existing threshold for determining whether a non-natural person is an overseas person (that is, where the entity is 25% or more owned or controlled by overseas persons) is also not consistent with companies law requirements for what constitutes negative control (that is, more than 25% ownership or control). This inconsistency can result in entities being subject to screening when overseas persons do not have negative control (that is, they are only 25% owned or controlled by overseas persons).

There are also concerns that the Act is overly burdensome for portfolio investors making passive investments. Portfolio investors are entities that generally obtain minority interests in an entity (that is, less than 10%) and have no ability to exert material control over that entity. This type of investment is an important source of capital for New Zealand and is considered low risk. Exemption-making powers for portfolio investors and New Zealand-controlled entities can no longer be used, because these exemptions are unlikely to meet the statutory exemption criteria following changes to the Act in 2018.

There are also problems with the existing class exemption for retirement schemes. The exemption removes the need for these entities to obtain consent to purchase sensitive assets, but does not exempt them from the definition of overseas person. This means that investments in an entity by a retirement scheme can result in that entity itself being defined as an overseas person. Given that New Zealanders fund these retirement schemes, this outcome appears inconsistent with the Act's purpose.

The business community supported narrowing the definition of overseas person for New Zealand incorporated and listed entities. Stakeholders also supported exemptions for New Zealand incorporated entities and investment schemes that are majority owned and controlled by New Zealanders, and carving out smaller transactions that do not materially change an overseas persons' control over an entity. Individual submitters were generally concerned about overseas investment and did not support liberalising the regime, though few commented specifically on these topics.

⁶⁶ Under the Act, an entity is deemed to be an overseas person if it is 25% or more owned or controlled by overseas persons. This is the case irrespective of whether overseas persons could realistically exert control over sensitive assets — for example, where interests in the entity are widely held, it is unlikely that overseas persons can realistically exert control over sensitive assets.

A further policy issue was raised following consultation. The Reserve Bank of New Zealand (RBNZ) has developed a standardised residential mortgage backed security (RMBS) — a residential mortgage obligation (RMO). RMOs are intended to be simple and transparent, and therefore easier for private banks, non-bank deposit takers (NBDTs), trustees and the RBNZ to price and trade than other types of RMBSs. RMOs are expected to begin being traded in early-2020.

Compliant RMOs will:

- count towards the originator (that is, a registered bank or NBDT) meeting liquidity requirements under its prudential regulation by the RBNZ, and
- count as collateral in market operations with the RBNZ, allowing the originator to quickly borrow from the RBNZ, using the RMOs as collateral, in a 'lender of last resort' situation.

RMOs are not an asset screened under the Act because they are a form of debt security like a bond. However, in order for a trustee to issue RMOs, the trustee must acquire a parcel of loans (residential mortgages) from an originating bank. In some circumstances, the originating bank may also have to purchase these back from the trustee. These loan transfers will often require consent under the Act given that their value is expected to generally exceed \$100 million (that is, they will be a 'significant business asset'). These consent requirements could serve as a partial barrier to market adoption of RMOs and undermine the RBNZ's prudential policy objectives.

Options to resolve each of these problems are presented in the following three sections.

O1 Screening fundamentally New Zealand entities

O4.2 What options are available to address the problem?

We have developed a range of options to remove screening of fundamentally New Zealand entities.

In respect of bodies corporate, we considered:

Option 1: A New Zealand incorporated and listed body corporate (A) would be an overseas person where overseas persons:

- have 50% or more of A's total equity securities (the ownership limb); or
- where holdings of 10% or more of any class of A's securities collectively have:
 - the power to control the composition of 50% or more of A's governing body; or
 - the right to exercise or control the exercise of more than 25% of the voting power at a meeting of A (the control limb).

Option 2 (alternative option): A slightly tighter set of criteria than under Option 1, with the control limb determined with reference to overseas persons with holdings of 5% or more of any class of A's securities, rather than 10% or more.

Option 3 (a complementary option to Option 1 or 2): Allowing other New Zealand-incorporated bodies corporate to apply for an exemption from the definition of overseas person provided they do not meet the ownership or control limb in Option 1 or 2 (if adopted), and no foreign government (or its associates) hold a 10% or greater interest in the entity.

Before the exemption could be granted, the Minister would also be required to consider the entity's compliance with the law and, where relevant, the degree of control that a foreign government or its associates has in the entity. This latter requirement recognises that sometimes investors can obtain large access and/or control rights despite only having a small ownership interest.

These additional criteria cumulatively recognise that non-listed entities are subject to less stringent conduct and governance regulation than publicly-listed entities.

In respect of investment funds (including retirement schemes, such as KiwiSaver funds) that are beneficially owned by New Zealanders, we considered:

Option 4: Introducing a class exemption for managed investment schemes (MISs; regulated under the Financial Markets Conduct Act 2013) from the definition of overseas person where:

- 50% or more of the scheme's funds are invested on behalf of non-overseas persons;
- overseas persons that each hold 10% or more of voting power do not collectively control more than 25% of voting power at a meeting of scheme participants; and
- less than 10% of the scheme's funds are invested on behalf of a foreign government (alone or with its associates).

Before granting an exemption, the Minister would be required to consider the scheme's compliance with the law and where relevant, the degree of control that a foreign government or its associates has in the scheme.

This option would also require amendments to the definition of overseas person to clarify that a MIS is an overseas person where:

- the manager is an overseas person, or
- more than 25% of the value of the scheme's managed investment products is held by overseas persons.

This change would modernise the Act to reflect New Zealand's financial markets legislation, and result in time savings for the OIO (this time would otherwise be spent determining how a managed investment scheme is caught in the definition of overseas person).

[36]

Option 5 (alternative option): Allow MISs to apply for an exemption from the definition of overseas persons if they meet the criteria detailed in Option 4 and if the Minister is satisfied with the MIS's compliance with the law and, where relevant, the degree of control that a foreign government or its associates has in the scheme.

This option would also require the definition of overseas person to be amended to clarify that a MIS is an overseas person in the same way as under Option 4.

Option 6 (complementary option): Increase the general threshold for non-natural persons being deemed an overseas person under the Act to more than 25% (rather than 25% or more). This is to align the general threshold with the proposed amendment (to avoid confusion), and reflect that a more than 25% holding is required to exert negative control.

Option 7 (complementary option): Exempt registered retirement schemes from the definition of overseas person, rather than only from consent requirements (as occurs currently).

[1, 36]

O4.3 Impact analysis — screening fundamentally New Zealand entities

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
<p>Option 1: New definition of “overseas person” for New Zealand incorporated and listed bodies corporate. The aggregation threshold for determining whether the ‘control limb’ of the definition was breached would be 10%.</p>	<p>0/- No material effect on the Government’s ability to manage risks because these are fundamentally New Zealand entities. However, this option could increase the risk of avoidance through the use of associates (because it would be easier to build cumulative holdings that allow for negative control than under the current rules), placing additional pressure on the OIO’s monitoring and enforcement capabilities. This risk is mitigated by additional regulatory requirements on listed entities (eg, Financial Markets Conduct Act</p>	<p>+/+ + Listed entities would be able to attract additional capital before being deemed to be an overseas person. This should, all other things being equal, improve economic growth. Would reduce compliance costs for listed entities that are owned and controlled by New Zealanders (as they would no longer need to interact with the Act at all).</p>	<p>++ Investors would have greater certainty and predictability about when the regime will apply to them.</p>	<p>+</p>

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
	and NZX listing rules). ⁶⁷			
Option 2: New definition of “overseas person” for New Zealand incorporated and listed bodies corporate. The aggregation threshold for determining whether the ‘control limb’ of the definition was breached would be 5%.	0 As above, however the lower aggregation threshold for determining whether an entity is subject to control by overseas persons places less pressure on the OIO’s monitoring and enforcement capabilities. The 5% aggregation threshold would require five people to act in concert to collectively exercise negative control over an entity, which is unlikely to occur without detection.	+ Listed entities would be able to attract <u>some</u> additional capital before being deemed to be an overseas person. This would reduce compliance costs for listed entities that are owned and controlled by New Zealanders (as they would no longer need to interact with the Act at all). This should, all other things being equal, improve economic growth.	++ Investors would have greater certainty and predictability about when the regime will apply to them.	+
Option 3: Applied for exemption for New Zealand-incorporated companies that are majority owned and controlled by New Zealanders	0 No material impact on the Government’s ability to manage investment risks, because fundamentally New Zealand entities are not the regime’s principal targets. [1]	++ Would allow exempted entities to receive additional capital before being deemed an overseas person. This would reduce the regulatory burden imposed on entities that are strongly connected to New Zealand, although gains are somewhat offset by the need for entities to apply for the exemption.	+ Investors that apply for and obtain an exemption will have greater certainty and predictability about when the regime will apply to them.	+

⁶⁷ For example, listed bodies corporate are required to disclose when a person has a substantial holding (that is, a holding of 5% or more of a class of securities) and when that person’s holding changes in size or nature. This mitigates the risk of an overseas person building a controlling stake in a company without authorities being notified. This requirement does not apply to unlisted bodies corporate.

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
<p>Option 4:</p> <p>Class exemption from the definition of overseas person for New Zealand MISs that are majority funded by New Zealanders and overseas persons cannot exercise control of the scheme. MISs would be defined as overseas persons where the manager is an overseas person or 25% or more of the funds were invested on behalf of overseas persons.</p>	<p>0/-</p> <p>In general terms, no material impact on the Government's ability to manage risks because these are fundamentally New Zealand entities. However, this option could increase the risk of avoidance through the use of associates, placing additional pressure on the OIO's monitoring and enforcement capabilities. Other existing regulatory requirements on MIS will mitigate some of these risks.</p>	<p>++</p> <p>Would better support investment by New Zealanders within New Zealand. Would remove compliance costs for MISs that do not meet the new definition of overseas person.</p>	<p>+/++</p> <p>Investors would have greater certainty and predictability about when the regime will apply to them.</p>	<p>+</p>
<p>Option 5:</p> <p>Same as Option 4, but MISs would be required to apply for the exemption and ministers would also be required to consider the MIS's compliance with the law and the degree of foreign government involvement in the scheme.</p>	<p>0</p> <p>No material impact on the Government's ability to manage investment risks, because fundamentally New Zealand entities are not the regime's principal targets. [1]</p>	<p>++</p> <p>Would better support investment by New Zealanders within New Zealand. Would reduce compliance costs for exempted MISs, although gains would be somewhat offset by the need for entities to still apply for the exemption.</p>	<p>+</p> <p>Exempted MISs would have greater certainty and predictability about when the regime will apply to them.</p>	<p>+</p>
<p>Option 6:</p> <p>General increase in the threshold for non-natural persons being overseas persons to 'more than 25%'</p>	<p>0</p> <p>No impact on the Government's ability manage risks. 25% ownership or control does not constitute negative control.</p>	<p>0/+</p> <p>Marginal increase in the amount of foreign capital a New Zealand entity can attract before being deemed to be an overseas person.</p>	<p>+</p> <p>Aligning the threshold for becoming an overseas person across the Act would increase the Act's coherence for investors.</p>	<p>+</p>

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
Option 7: Amended class exemption for retirement schemes	0 The Act already exempts retirement schemes from consent requirements. While this change would allow retirement schemes to invest in an entity (B) to a higher degree without B being deemed an overseas person, this would not increase risks because the beneficial owners are New Zealanders.	+ Minor positive impact, clarifying that retirement scheme investments would not contribute to target entities becoming an overseas person. This will allow the target entity to receive additional capital before being deemed to be an overseas person, supporting investment by New Zealanders within New Zealand.	+ Would improve certainty and predictability for retirement schemes, and for the companies in which they invest.	+

O4.4 What other options have been ruled out of scope, or not considered, and why?

We consulted on additional options to amend the definition of overseas person for bodies corporate. This included just focussing on the degree of foreign ownership (that is, majority New Zealand ownership was sufficient to not be an overseas person), and just focussing on the degree of foreign control (that is, not having substantial product holders cumulatively hold 25% or more of the entities securities was sufficient to not be an overseas person). These options were not progressed because they were inconsistent with the Act's purpose, which recognises that it is a privilege to own or control sensitive New Zealand assets.

We consulted on a general exemption for portfolio investors. This was not progressed for several reasons, including that portfolio investors do not usually require consent under the Act (because they tend to take interests of less than 10%), and our recommended changes to the tipping point (below) mean that portfolio investors with interests of less than 10% will never require consent to invest in New Zealand incorporated and listed entities.⁶⁸

O2 Transactions that do not materially change overseas persons' level of control over sensitive assets

O4.6 What options are available to address the problem?

As noted above, the Act requires overseas persons to obtain consent for often small transactions where there is no control over the sensitive asset (the tipping point problem) or their degree of control does not change (the incremental investment problem).

⁶⁸ This is because only interests of 10% or greater would be used to determine whether listed bodies corporate are subject to overseas control, and the control limb is the only relevant threshold for the tipping point provisions.

Incremental investment problem

We considered three options in this area.

Option 1: Overseas persons would require consent only if they increased their holding in a sensitive asset up to or above a control limit (25, 50, 75 or 100%). The existing exemptions for small incremental investments would also be removed. Currently an overseas person can increase an existing interest by up to 10% unless it breaches a control threshold, or by up to 5% of their existing holding (by number of shares), without the need to obtain consent, subject to certain other technical conditions.

[1, 36]

Option 2: An alternative to option 1 is to make the following technical amendments to the existing exemptions under the Act:

- allow overseas persons that have a 25% interest in the consent-holder, or that the consent-holder has a 25% interest in to increase their interest by any amount less than 10% without requiring consent under the Act,
- allow overseas persons that hold sensitive assets that were not sensitive at the time of acquisition to increase their interest by any amount less than 10% without requiring consent under the Act,
- remove the time limit on the exemption, and
- remove the 90% control limit so that overseas persons may increase their interest by any amount less than 10%, regardless of whether the 90% control limit is breached.

Tipping point

Option 3:

This option is complementary to options 1 and 2. It would require overseas persons to get consent to invest in New Zealand-incorporated and listed bodies corporate only if the investment results in the target entity breaching the control limb of the definition of overseas person (see section N4.2 above).

O4.7 Impact analysis — incremental investment

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
<p>Option 1:</p> <p>No screening for incremental investments within control range</p>	<p>0/-</p> <p>Small increase in risk that a material change in control of sensitive assets will not trigger consent requirements (eg, if an entity's constitution grants different levels of control between legislated control limits). Would allow overseas persons who invested in a sensitive asset without requiring consent to increase their investment within the control thresholds.⁶⁹ However, the risk is small because increases within a control limit are unlikely to result in a material change in control of a company. Consent would be needed to increase an investment beyond a control threshold.</p>	<p>++</p> <p>Better supports initial investment. Would significantly improve investors' ability to increase investments for which they already have consent. This will improve capital market function by facilitating reinvestment.</p>	<p>++</p> <p>A number of small and medium-sized investments will be exempted from the application process. Reduces the risk of inadvertent breaches of the Act (eg, where an investor's interest increases because of actions outside of its control, such as when other shareholders participate in a share buyback).</p>	<p>++</p>
<p>Option 2:</p> <p>Technical amendments to existing exemptions</p>	<p>0</p> <p>While this would remove the ability to subject overseas persons to screening in narrow circumstance, this would not increase risk. Small increases of 10% or less within control limits do not materially change control (or risks associated with control) of sensitive assets.</p>	<p>+</p> <p>Overall, this option would support investment by exempting certain small investments from the regime. For example, it would remove some of the unnecessary compliance costs that have emerged, especially in relation to the accommodation industry, because residential land is now sensitive land. It would better enable existing investors to inject additional capital.</p>	<p>+</p> <p>These amendments would reduce complexity and provide greater certainty to investors, including, as with Option 1, by reducing the risk of inadvertent breaches of the Act.</p>	<p>+</p>

⁶⁹ This could occur in two ways:

Amendments to the Act (eg, the 2018 expansion of the Act to cover residential land) mean that consent is now required to acquire the interest in an asset; or

Changes to the nature of an asset (eg, an interest in a company now worth more than \$100 million was acquired when it was worth less than \$100 million) mean that consent is now required to acquire an interests in that asset.

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
Option 3: 'Control-only' tipping point for New Zealand incorporated and listed entities	0 Acquisition of non-controlling stakes does not place assets at risk. Not screening such transactions does not undermine the Act's intent. Listed entities are subject to additional regulatory and reporting requirements, mitigating any residual risk.	+ Better supports investment by reducing compliance costs for investors investing in listed entities. Supports maturation of securities markets, by facilitating investment in listed entities. However, it does not resolve the problem for the majority of entities subject to screening under the Act because it is limited to listed entities.	+ Promotes certainty and predictability around consent requirements for listed entities and their investors.	+

O4.8 What other options have been ruled out of scope, or not considered, and why?

To resolve the tipping point problem, we considered replacing the provisions with a general anti-avoidance provision to prohibit a person delaying a transaction that would result in an entity becoming an overseas person, in order to allow the entity to buy sensitive land without obtaining consent. This option was ruled out after consultation because it would have limited value in addition to the existing anti-avoidance provisions, and detecting this kind of misconduct and taking appropriate enforcement action would be difficult.

We also considered adopting a more expansive option 3 that would amend the rules for unlisted entities as well as listed entities. This was not progressed because:

- the problem is concentrated in investments in listed entities, where it is less clear to an investor where they may be required to obtain consent and transactions that require consent could happen many times a day, and
- the less transparent nature of investments in unlisted entities increases the risk of avoidance relative to the status quo.

O3 Trade in residential mortgage obligations

O4.9 What options are available to address the problem?

We developed only one option for exempting trades in loans that are necessary to support RMO issuance from the Act's consent requirements.

This is to legislate, whether in the Act or in the Regulations, to exempt the acquisition of permitted security arrangements, for the purposes of issuing or managing RMOs, from the need to obtain consent as a 'significant business transaction'. This exemption would be available only to registered banks, non-bank deposit takers, and qualifying trustees (those licensed under the Financial Markets Supervisors Act 2011 and managing a trust established in New Zealand under New Zealand law). This exemption would be subject to conditions to

ensure that it is no wider than necessary to facilitate the adoption of RMOs, including requirements that the transaction be entered into in good faith and in the ordinary course of business.

04.10 Impact analysis — trade in residential mortgage obligations

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
Option 1: Legislate to exempt certain transactions involving RMOs	0 Given the existing exemption for trade in permitted security arrangements over sensitive land and the narrow nature of the proposed exemption (it will only be available to entities regulated in New Zealand for purposes related to issuing or managing RMOs), this option does not affect the Government’s ability to manage risks of overseas investment.	+ Supports the adoption of RMOs to support the RBNZ in achieving its financial stability objectives. Reduces impediments for banks, NBDTs and trustees trading in RMOs.	+ Will provide additional certainty for originators and trustees, confirming that certain transactions involving RMOs will not require consent.	+

04.11 What other options have been ruled out of scope, or not considered, and why?

We considered whether the Act’s existing exemption-making power would allow the Government to issue either a class exemption for trades involving permitted security arrangements to support the issuance and management of RMOs between registered banks, NBDTs and qualifying trustees. [36]

We also sought advice on whether the Government could issue individual exemptions to registered banks, NBDTs, and qualifying trustees to trade in these security arrangements for these purposes. [36]

04.12 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

Treasury’s preferred package includes:

- narrowing the definition of overseas person for New Zealand-incorporated and listed entities that are majority owned and controlled by New Zealanders, and including managed investment schemes (N1, option 1)

- new exemptions for New Zealand incorporated entities and managed investment schemes that are majority owned and controlled by New Zealanders (N1, option 3 and option 5)
- an amended ownership and control threshold for investments in non-natural persons, that is, more than 25% rather than 25% or more (N1, option 6)
- an amended exemption for retirement schemes (N1, option 7)
- no screening for incremental investments within control limits (N2, option 1),
- a 'control only' tipping point for New Zealand incorporated and listed entities (N2, option 2), and
- an exemption for transactions involving permitted security arrangements to support the issuance or management of RMOs from consent requirements, subject to meeting a range of conditions (N3, option 1).

The above package of reforms is designed to work coherently to address the identified problems identified above.

The Cabinet paper reflects Treasury's preferred approach, with the exception that it proposes option 2 in section N2 (that is, improvements to the operation of existing exemptions for incremental investments rather than allowing investments within control thresholds without the need to obtain consent), rather than option 1.

P Fees

Addendum: Offsetting surpluses and deficits through fees

Context

The Overseas Investment Office (OIO's) operational funding is largely recovered from applicants through fees. However, the OIO has accumulated a significant deficit, with fees not keeping pace with costs. The OIO's deficit was \$8.48 million as at 30 June 2020, largely a result of historic under-collection, costs incurred in operationalising recent rounds of reforms, and COVID-19 which has reduced application volumes.¹

Problem definition

Until recently, it was thought that the current legislative settings allowed deficits and surpluses to be offset through fees. [36]

If the Act does not in fact allow the recovery of such costs, the provisions are out of step with the *Treasury's Guidelines for Setting Charges in the Public Sector* because they do not:

- provide certainty that fees may recover the full cost of the OIO's operations from fee payers,
- allow fees to be set to manage "unders and overs" between financial periods, to the extent that the estimated actual cost of OIO's operations used in setting the fees differs from the actual cost,
- clearly allow deficit spending incurred for the benefit of new fee payers (for example, an enhanced IT system) to be recovered from those fee payers, and
- create incentives for the regulator to minimise the difference between the fees collected and its actual cost.

Without change, this would mean that the Act would inadvertently continue to shift the burden of any under-recovery or benefits of over-recovery in the overseas investment regime to the Crown on an enduring basis.

In any case, the uncertainty of the current position should be resolved to ensure that applicants and the Crown are aware of the scope of the fees provisions.

Options

As the status quo is now uncertain, we consider that there are two viable options: clarify that the settings can operate consistently with *Treasury's Guidelines for Setting Charges in the Public Sector* (with additional incentives to align costs and fees) or clarify that deficit recovery cannot occur (i.e. do not amend the existing settings).

¹ In February 2021, the OIO commenced public consultation on a new fees structure to better ensure that fees reflect the true costs of assessing applications.

Any future changes to fees levels or their structure will be subject to the full cost recovery impact assessment process, including public consultation and endorsement by Cabinet. The changes proposed here are only to the legislative settings and are therefore not subject to these requirements.

Option 1- Clarify that deficit recovery can occur

Option 1 would clarify that deficit recovery is possible, as was previously understood, and bring the provisions into line with the Treasury’s guidelines. This would require amendment to the Act to specify that:

- the government can set fees to recover the OIO’s total costs and distribute under or over-collections from the prior four financial years among future fee payers, and
- require fees to be reviewed at least once every four financial years.

This will help ensure that fees keep pace with costs, and that the Government can attribute costs incurred for the benefit of future fee payers to those fee payers. It also brings the provisions into line with other fees provisions such as those in the Food Act 2014 and the Biosecurity Act 1993.²

Option 2- Clarify that deficit recovery cannot occur

Option 2 would not amend the existing settings, with the new understanding that they do not operate as previously understood (and therefore the concerns in the problem definition section would not be addressed).

Impact analysis (compared to taking no action)

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
Option 1- Clarify that deficit recovery can occur	+ Better ensures the OIO’s funding stability which enables it to meet its statutory functions.	0 Investors may be concerned that these changes will result in substantial fee increases. However, the amended provisions do not allow unfettered recovery of costs through fees and any subsequent decisions on fees would still be expected to be consistent with the Government’s cost recovery policy.	++ Will increase certainty for investors by prescribing regular fees reviews (at least once every four financial years).	+

² <https://www.legislation.govt.nz/act/public/2014/0032/latest/DLM2995811.html> and <https://www.legislation.govt.nz/act/public/1993/0095/latest/DLM314623.html>.

	Manages the risks of overseas investment	Supports overseas investment in productive assets	Delivers more predictable, transparent and timely outcomes	Overall assessment
Option 2- Clarify that deficit recovery cannot occur	0 No change in the Government's ability to manage risk.	0 Some investors may support not allowing deficit recovery, as this limits the costs that can be passed on to them through an increase in fees. However, tax payers may be concerned that fee payers will not be liable for the full costs of the overseas investment regime and social licence for foreign investment may erode, if costs for foreign investment need to be met through general taxation.	0 No improvement in predictable, transparent or timely outcomes.	0

What other options have been ruled out of scope, or not considered, and why?

All other options that were considered allowed past deficit/surpluses to be offset through fees. However, we did consider requiring fees reviews more frequently, than at least once every four financial years (as discussed in option 1).

We found that four financial year's strikes the right balance between the administrative burden of conducting a fees review and reducing the risk fees come out of alignment with the costs of administering the regime. It also brings the provisions into line with long term fiscal plan requirements by requiring a fees review approximately once a parliamentary term. Importantly, this requirement would not preclude more regular fees reviews, where necessary to respond to changes in activity or costs.

What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

The Treasury's preferred approach is option 1 as it enables deficit recovery, as was previously considered the case and is consistent with our cost recovery guidance.

Section 5 Conclusions

5.1 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

Our preferred approach for each element of the reform package is covered in Section 4, above. We have thought carefully about how the different elements interact when aggregated into Treasury's recommended package, to ensure that the Act is simpler, better manages risk and operates coherently. We consider that overall that package would simplify the decision-making process for most transactions and improve the Government's ability to manage high-risk investment.

Strengthening some consent criteria will make significant improvements to the Government's ability to manage the risk of overseas investment

Under Treasury's recommended package, the proposed national interest test and call-in power will significantly enhance the Government's ability to manage risk. This reflects the fact that overseas investment can pose significant risks to New Zealanders' wellbeing, and balances some of the proposed streamlining discussed below. These tests would allow consideration of particularly sensitive investments, enabling ministers to decline them if they are judged overall to be contrary to New Zealand's national interest (eg, if there were national security concerns). The inability to do this is a significant failing of the current regime.

The national interest test and call-in power will result in less predictable, transparent and timely outcomes for a few applications. This is outweighed by the Treasury's proposed changes to other parts of the framework, which significantly improve the process for most applications by narrowing and simplifying the consent criteria.

Allowing greater consideration of Māori cultural values will help ensure that overseas investment in sensitive assets is consistent with New Zealanders' values.

A new consenting framework, and introducing decision-making timeframes, will have the biggest impact

Proposed changes to the consent framework are the most significant part of the recommended reform package. The Act's complexity and uncertainty would be significantly reduced by proposals to:

- narrow and simplify the investor test to focus on the most relevant risks to investing in New Zealand;
- streamline the benefits test (while maintaining the range of benefits that can be considered), and
- alter the threshold for satisfying the benefits test, to an assessment against the current use of the land rather more theoretical benchmarks that are used currently (eg, use of land by an adequately-funded New Zealand purchaser).

Proposals to simplify the process for the Crown acquiring special land would also support overseas investment and support the Government in achieving its broader policy objectives

in the forestry sector (special land offer back requirements are significantly delaying many forestry transactions).

These changes would in turn support overseas investment in productive assets and encourage more predictable, transparent and timely outcomes.

Statutory timeframes would significantly improve the predictability of the application process. They would require operational changes to how ministers and the OIO assess applications and manage their workloads, but will also create incentives for applicants to improve application quality, reducing the need for additional information requests during the decision-making process. While the changes to simplify the consent framework should offset some of the resourcing demands related to timeframes, consideration may need to be given to OIO resourcing when setting timeframes.

The proposals to reduce the screening of lower-risk transactions will support overseas investment in productive assets

Many of the Treasury's preferred options aim to reduce overreach and remove low-risk transactions from screening. This includes changes to remove the requirement to screen some fundamentally New Zealand entities, land of limited sensitivity and transactions that do not increase an overseas person's level of control. The result would be fewer transactions captured by the Act.

These changes would allow the regime to focus on higher-risk transactions. This will support high-quality overseas investment and result in more predictable, transparent and timely outcomes.

Removing screening where the entities involved are effectively New Zealand-entities or the transaction does not increase an overseas person's control over sensitive assets will not reduce the Government's ability to manage risk.

The current scope for requiring transactions to be screened only because the land adjoins land with sensitive characteristics results in significant overreach. Reducing the types of land being screened will only marginally reduce the Government's ability to manage the risks of overseas investment. This is because the Act currently requires the screening of land that adjoins land with low or no environmental, cultural or access sensitivities, and the risks associated with the purchase of land that adjoins land with sensitive characteristics are not specific to overseas investment.

Similarly, reducing the scope for screening short-term interests in land would remove regulatory overreach without increasing risk, as the ownership of the underlying asset does not change (and control of the asset is time-limited).

Cabinet paper proposals

The Cabinet paper reflects the Treasury's preferred approach, with the exceptions noted below. These exceptions generally reflect a greater weighting on managing the risks of overseas investment and protecting the high ownership value of certain sensitive New Zealand land.

The exceptions are as follows:

- embedding in the Act a higher threshold for the purchase of farm land, rather than continuing to rely on the rural land directive
- strengthening, rather than removing, the farm land advertising requirements
- an option for making the offer back of special land to the Crown mandatory (rather than voluntary), in addition to improving the offer back process
- the decision-making framework for the national interest test (that is, no prescribed factors for the minister to consider in determining whether a prospective investment is contrary to the national interest)
- the decision-making framework for the call-in power (that is, no explicit requirement to consider economic or other benefits associated with a transaction before determining whether it should be blocked)
- the definition of media entities subject to the call-in power (that is, including aggregators in the definition of media entities subject to the power)
- [1]
- a slightly lower threshold of 10 years (as opposed to the recommended 15 years) for screening non-freehold-interests in land (except residential land)
- technical, instead of significant, changes to existing consent requirements for incremental investments, and
- requiring applicants to disclose information on their tax structure to Inland Revenue (this decision was made under delegated authority following the Cabinet paper but was inconsistent with Treasury (but not Inland Revenue, the joint author of the tax advice).

As noted above, the Cabinet paper proposals reflect a higher weighting of the need to manage risks of overseas investment for the specific issues noted above. There is a risk that the agri-business community may view them as a tightening of the regime. However, proposals to reduce red tape and complexity will encourage other types of foreign investment.

5.2 Summary table of costs and benefits of the package recommended to Cabinet

Financial implications of the reform fall into two broad categories:

- costs for the OIO to implement the core Phase Two reforms, which largely involve streamlining and speeding up current processes and removing low-risk transactions from the regime, and
- costs to implement the proposed national interest test and call-in power, which would fall largely on the OIO and the security agencies.

The estimated financial implications for each of the above components is set out below. .
The Act already authorises the Minister to set fees to recover the costs of administering the regime and no regulatory changes are proposed to modify this.

Currently the OIO operates largely on a full cost-recovery basis, with the exception of some time-limited Crown funding to support enforcement and litigation. The impact on fee levels of the reform will be determined by LINZ through a fees review and will be analysed in accordance with Cabinet’s requirements for regulatory impact assessment of cost recovery proposals at that time. The fees review will be conducted in two stages: the first stage will focus on the fees for the current regime with the intention of introducing new fees in 2020/21.

Following this, a second fees review will be undertaken in relation to the proposals in the Phase Two reform package. This second review will need to balance any reduction in costs to the OIO from the simplifications made to the overseas investment regime with those that are expected to require more resource (such as the national interest test and capabilities to meet statutory timeframes).⁷⁰

Savings accrue to both the regulated community and the regulator principally from streamlining the consent framework and removing the need to screen low-risk transactions.

Additional costs of Cabinet paper proposal, compared with taking no action ^[33]

Affected parties	Comment	Impact	Evidence certainty
Regulated parties: Investors (overseas persons intending to invest in New Zealand assets covered by the Act)	Farm land benefit: <ul style="list-style-type: none"> higher threshold for investors to meet less predictable outcomes. 	Medium: compliance costs for investors who continue to make applications (noting that the overall number of applications may fall).	Medium
	National interest test with guidance: <ul style="list-style-type: none"> some uncertainty for investors possible detrimental impact on New Zealand’s openness as an investment destination, but this is mitigated by the fact that such a test is not unusual globally productive investments may be declined. 	Low: estimated to apply automatically to around 20 transactions per year. Many of these will not pose material risks and the test should not therefore impose significant additional costs on investors.	Low
	Information-sharing for anti-money laundering and countering financing of terrorism.	Zero: linking in to an existing enforcement regime.	High
	National security/public order call-in power: <ul style="list-style-type: none"> notification. 	Low: estimated 300 notifications per year.	Low

[33]

	<p>National security/public order call-in power:</p> <ul style="list-style-type: none"> providing any information required for full screening. 	<p>Low: estimated 6 transactions subject to full screening per year. Investors will incur costs for professional advisors.</p>	<p>Low</p>
	<p>New enforcement powers: Additional costs for some investors, but only if they have breached the requirements of the Act or their consent.</p>	<p>N/A Investors are expected to comply with their legal obligations.</p>	<p>N/A</p>
	<p>Screening leases that cumulatively result in the leasehold threshold being exceeded.</p>	<p>Low: there are likely very few investors who currently obtain less-than-freehold interests in land who would legally be able to enter consecutive leases that cumulatively total 10 years or more. Entering such arrangements with the intention of avoiding screening is in breach of the law.</p>	<p>Low</p>
	<p>Application fees may increase because of reduced number of applications processed by the OIO (loss of economies of scale), and impact of statutory timeframes.</p>	<p>Unknown: where costs fall depends on cost-recovery decisions.</p>	<p>–</p>
	<p>Application fees may increase to cover OIO's increased costs from new functions (national interest test and call in power).</p>	<p>Unknown: where costs land depends on cost-recovery decisions, as above.</p>	<p>–</p>
	<p>Recognition of protection for wāhi tūpuna or Māori reservations on sensitive land, and recognition of access for stewardship of historic heritage and natural resources.</p>	<p>Low: some additional time required to negotiate and monitor access arrangements if investors choose to show benefit against this factor.</p>	<p>High</p>
	<p>Disclosure of tax information</p>	<p>Low: applicants are likely to already have the information being requested and the information required will depend on the nature of the application (e.g. applications involving significant business assets will be required to disclose more tax information (than is currently required) and applications involving residential land only will not be required to disclose any tax information additional to what is already required)</p>	<p>Medium - High</p>

<p>Regulated parties: Vendors (New Zealand or overseas persons intending to sell an interest in New Zealand assets covered by the Act)</p>	<p>Farm land benefit threshold:</p> <ul style="list-style-type: none"> continued restrictions on access to foreign capital may lower sale prices and increase time to access capital may reduce farmers' access to overseas capital to support the transition to lower-impact land uses. 	Medium.	Low-medium
	<p>Farm land advertising: clarified requirements.</p>	Low to zero.	High
	<p>Special land: option requiring special land to be offered to the Crown.</p>	Low. Many vendors already offer special land back to the Crown.	High
<p>[33]</p>			

Expected benefits of Cabinet paper proposal, compared with taking no action

Affected parties	Comment	Impact	Evidence certainty
Regulated parties: Investors (overseas persons intending to invest in New Zealand assets covered by the Act)	Streamlined consent framework will reduce costs for applicants (applying for consent can cost more than \$100,000 excluding application fees): <ul style="list-style-type: none"> simplified and narrower investor test will reduce costs for all applications streamlined benefits test will reduce costs for most sensitive land applications (with a small number subject to additional screening under the national interest test). 	Medium–high.	Medium
	Statutory timeframes: will make timeframes more predictable. Likely to reduce costs associated with uncertainty around consent timeframes (eg, capital sitting idle while consent decisions pending).	Medium.	High
	Special land: process improvements will reduce the complexity of the special land process, reducing costs for vendors and applicants. If Cabinet agrees to clarify that it is voluntary to offer special land to the Crown, some applicants may choose not to offer this as a benefit, thereby removing the costs of this process.	Medium	High
	Removing the need for screening short-term leases.	This would have removed from screening around 4 of the 79 applications involving leases assessed over the past five years. ⁷² Assuming applicants' costs of \$50,000–\$100,000, ⁷³ this should amount on an annualised basis to savings of around \$40,000 - \$80,000/yr.	Medium

⁷² This is an estimate only as, for around a quarter of applications involving leases, the OIO did not hold data on lease term. This means that the number of applications likely to be removed is potentially higher than presented here.

⁷³ This is an estimate of the broader costs of making an application, including internal business costs and the use of professional advisers. It excludes the OIO application fee, which can range from around \$2,000 to \$54,000 for new consents. Given this range we have not included fees in the costings above.

	Removing the need for screening some categories of land that adjoins land with sensitive characteristics.	This would have removed around 60 transactions assessed over the past five years. Assuming applicants' costs of \$50,000–\$100,000, this should amount on an annualised basis to savings of around \$0.6–\$1.2m/year.	High
	Removing the requirement to screen some fundamentally New Zealand entities. Will allow some fundamentally New Zealand entities to attract additional capital before being deemed an overseas person. Exemptions for MISs and retirement schemes better support New Zealanders investing within New Zealand.	This would have removed around 28 applications in the last five years. Assuming applicants' costs of \$50,000-\$100,000 this should amount to savings of around \$280,000-\$560,000 on an annualised basis.	Medium-high
	Removing the requirement to screen transactions that do not materially change overseas persons' level of control. Will improve investors' ability to increase investments for which they already have consent. Somewhat reduced compliance costs and increased certainty for New Zealand incorporated and listed entities.	Medium	Medium
	Removing the requirement to screen trade in residential mortgage obligations: Slight improvement in attractiveness and timeliness.	Medium. This will remove transaction costs for up to an estimated 20 entities each year.	Medium
Regulated parties: Vendors (New Zealand or overseas persons intending to sell an interest in New Zealand assets covered by the Act)	More speedy access to capital (apart from farm land) May increase asset values at margins and reduce risk of stranded assets as complexities associated with screening are reduced.	Low – medium	Medium
	Special land: process improvements will reduce the complexity of the special land process, reducing costs for vendors and applicants. If Cabinet agrees to clarify that it is voluntary to offer special land to the Crown, some applicants may choose not to offer this as a benefit, thereby removing the costs of this process.	Medium	High
[33]			

	[33]		
Other parties	The overall package of changes to the investor and benefit to New Zealand tests is likely to improve investment attractiveness, with flow-on benefits to economic growth.	Medium–high. It is difficult to estimate impacts on investment flows given the number of different factors influencing investors' decisions.	Low–medium
	General benefits to New Zealanders arising from the Government's increased ability to manage investment risks, including risks to national security and public order.	High	High
[33]			

Costs and benefits of the Treasury's recommended approach

The Treasury's recommended approach would have fewer costs than the Cabinet paper proposal, as it would not incur costs associated with the farm land benefit threshold, clarifications to the farm land advertising requirement, or the option to require the offer back of special land (rather than that offer being voluntary).

Treasury's recommended approach would also have some additional benefits from:

- removing screening requirements for leases with terms less than 15 years, as opposed to 10 years (likely \$30,000 - \$60,000/yr, based on data from the last five years),
- removing screening requirements for incremental investments within control bands (resulting in some additional compliance cost savings), and
- a narrower scope for the call-in power (not subjecting media aggregators to the regime).

5.3 What other impacts is this approach likely to have?

Encourages more predictable, transparent and timely outcomes

Streamlining the consent framework, and focussing on assessing material risks will support New Zealand's ranking as one of the easiest countries in the world to do business. It will help to signal New Zealand's openness to productive foreign investment.

Managing the risk of overseas investment to New Zealand's national interest, including national security and public order

There are expected to be significant benefits to New Zealand generally from an enhanced ability to assess an overseas investment's impact on New Zealand's national interest.

New Zealand is also an outlier among comparable jurisdictions in being unable to address national security and public order risks. Introducing a specific national interest test and call-in power will address any reputational risks arising from that gap.

5.4 Is the option being recommended to Cabinet compatible with the Government's 'Expectations for the design of regulatory systems'?

In general, the package presented in the Cabinet paper is compatible with the Government's 'Expectations for the design of regulatory systems'. It achieves clear objectives and should improve certainty for investors while improving the Government's ability to manage risks associated with overseas investment.

A particular design feature of the call-in power has required consideration against the Legislation Guidelines. The proposal is that if transactions subject to a voluntary notification regime are not notified at the point the transaction takes place, they may be called-in at a later point and, in rare occasions, the transaction may need to be unwound. The Legislation Guidelines state that "the Government should not take a person's property without a good justification, rigorously fair procedure is required, and compensation should generally be paid". We consider that there is good justification for unwinding transactions where they pose a material risk to New Zealand's national security and public order. The Act already has provision for transactions to be unwound for breaches of the Act, and the call-in power will be designed to be used in narrow circumstances, and will follow a robust and fair process that is subject to judicial review. Such powers are a common feature of national security screening regimes globally to ensure that they are effective.

Section 6 Implementation and operation

6.1 How will the new arrangements work in practice?

Legislative changes

The proposed package requires amendments to the Overseas Investment Act 2005 and the Overseas Investment Regulations 2005.

The proposed package also requires amendments to the Fisheries Act 1996 (the 'Fisheries Act'), which requires overseas investors to obtain consent to acquire an interest in fishing quota. The consent requirements are similar to those in place for the purchase of sensitive land (that is, investors must satisfy the investor test and a test similar to the 'benefit to New Zealand' test, which in the Fisheries Act is called the 'national interest test'). The legislative provisions setting out these consent requirements are split between the Fisheries Act and the Act. To ensure that the process to obtain consent to fishing quota remains consistent with the process for purchasing sensitive land (excluding farm land), equivalent changes will be made to the Fisheries Act:

- any changes to the investor test in the Act will be reflected in equivalent provisions of the Fisheries Act
- the factors in the Fisheries Act's 'national interest test' (which mirror the economic factors in the Act's 'benefit to New Zealand test') will be aligned with the broad economic factor to be included in the benefit to New Zealand test
- the Fisheries Act's 'national interest test' will be renamed the 'benefit to New Zealand test', to harmonise it with that test in the Act, and
- the Fisheries Act will make clear that the proposed national interest test in the Act can be applied to prospective investments in fishing quota.

Amendments will also be required to the AML/CFT Act, and may be required to the Corporations (Investigations and Management) Act 1989.

[33] with the changes coming into force at a later date (to enable preparation for implementation). The implementation period is likely to be 12 months (with the potential for more straight-forward changes to come into force earlier), but exact timing will be confirmed on introduction of the legislation to Parliament.

Institutional arrangements

The Treasury will continue to administer the Act (which incorporates relevant sections of the Fisheries Act) and the Regulations.

The OIO will remain responsible for the ongoing operation of New Zealand's overseas investment regime, including enforcement of the Act and Regulations. It will be supported, as required and consistent with its current approach to granting consent, by other relevant agencies in the administration of the proposed new national interest test and call-in power. The New Zealand Security Intelligence Service and Government Communications Security

Bureau will play an important role in providing advice to support the national interest test and call-in power.

6.2 What are the implementation risks?

Implementing the Phase 2 reforms will come hard on the heels of the Phase 1 reforms. This comes at a time when the OIO is also shifting how it operates as a regulator, improving processes and culture, and enhancing its regulatory activities.

Many of the Phase 2 changes will require the OIO to change the way it operates. Some will simplify assessment of overseas investment transactions, while others may require strengthening procedures (such as enhancement of the pre-application screening process to ensure the OIO has all of the information required to assess the application within statutory timeframes).

Removing low-risk applications will reduce the number of applications handled by the OIO, which will reduce revenue and may affect economies of scale. As part of the funding decision for the Phase One amendments, LINZ committed to undertake a comprehensive review of the OIO fees model within two years. LINZ plans to undertake a two stage fees review. The first stage will focus on the fees for the current regime with the intention of introducing new fees in 2020/21. [33]

One of the most significant challenges for the OIO is to implement the call-in power and national interest test, as they are new and relatively complex regulatory functions. This will require interaction with parties potentially subject to the new functions but who have no knowledge or experience of being regulated under the Act.

We have discussed these challenges with the OIO in making our assessment of which agency should be responsible for implementing these functions. We are reasonably confident that the OIO understands these challenges and, based on the work it has already undertaken and is continuing to undertake, will be able to build the capacity and culture necessary to deliver the Government's objectives.

In particular, the OIO has established strong governance arrangements, including a board of senior executive advisors, with two external members (Chief Executive of the Commerce Commission and Assistant Commissioner, State Services Commission), that will provide guidance and support to the OIO including on the implementation of the Phase 2 reforms.

In light of the recommendation that the OIO implements the call-in power and national interest test, we have suggested, and the OIO agrees, to consider an expansion of the Board's functions and membership to include oversight of the national interest and national security work. The Treasury will also have a role in the governance arrangements to ensure that implementation reflects the policy and legislative intent. This should provide Ministers with additional assurance that the OIO is readily able to access expertise and advice from 'critical friends' with a diverse range of skills and expertise to draw on in implementing, and the on-going management of, the proposed new powers.

Other implementation risks include:

- Ensuring that regulated parties are familiar with the OIO and the overseas investment regime. Overall, LINZ is confident that the OIO has the skill and resources required to develop a good communications plan, including education materials, to support the reform. This will build on its current work to increase proactive engagement with regulated parties.
- Phase 2 provides for new and enhanced regulatory powers. The OIO has only recently begun to improve its understanding of risk and steps required to become an effective regulator. It will need to continue this work, and expand it to meet the challenges of Phase 2.
- [1]

We have assumed for the purpose of this assessment that regulated parties generally use professional advisors.

Section 7 Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?

The objectives of the Phase 2 reform are to ensure the overseas investment screening regime:

- provides a clear pathway for consent for investments that support a productive, inclusive and sustainable economy, and create opportunities for regions and businesses to grow and connect internationally,
- provides appropriate protection against the risks to New Zealand associated with the overseas ownership of sensitive assets, particularly in ensuring that New Zealand's national interest is sufficiently protected, and
- ensures that compliance and administrative costs imposed are proportionate to the risks associated with the investments.

Monitoring, evaluation and review will be against those objectives.

Current monitoring and evaluation of implementation and operational issues

The OIO holds data on numbers and types of applications, approval rates and processing times since 2009, which can be broken down by application type. There are limitations in the use of this data.

There has been some ad-hoc external monitoring and evaluation of implementation and operational issues. For example, in 2016/17, the Auditor-General reviewed the OIO's use of information within the context of the governing legislation and policy, to determine whether the Office was collecting and using the right information at the right time to support good decisions. The review⁷⁴ concluded that the OIO does provide the decision-maker with the right information to recommend whether consent for an investment should be granted. The files reviewed showed that the OIO demonstrated effective judgement but also demonstrated that it could sometimes benefit from more ready access to specialist advice.

In August 2019, the OIO initiated a customer survey to find out how investors, vendors and their lawyers felt about the process of dealing with the OIO. All applicants will be sent a link to the survey after a decision has been issued, and there has been a public invitation for any applicants who have dealt with the Office over the past year to also record their views. How the information will be compiled is still to be determined but the OIO's intention is to use the information to inform a continuous improvement programme. It can also provide a partial baseline to support future evaluation.

⁷⁴ Controller and Auditor-General (2018) [How the Overseas Investment Office uses information](#).

Current monitoring and evaluation of system-level impacts of the overseas investment regime

There are two main sets of data collected in relation to overseas investment:

- Statistics New Zealand collects high-level data on overseas investment in New Zealand, including country of origin and industry. This data is not specific to the implementation of the Act (reflecting the fact that the Act screens only a subset of foreign investment in New Zealand) but it is useful in relation to the new restriction on overseas ownership of residential property.
- Some of the OIO's operational data can be used to support analysis of the system-level impacts of the Act's administration. This includes numbers and types of application, approval rates and processing times. The data collected has some limitations: for example, the term of a leasehold consented in an application under the Act is not recorded. Subject to funding approval, a revised case management system will be implemented by the OIO that will enable a richer set of data to be captured in future.

Monitoring of the Phase 2 reform

The review of the Phase 2 reform described below will require the collection of new information about the overseas investment regime's operation. During the implementation phase, the OIO (in consultation with Treasury) will plan how this information is gathered, so it can be also used to support ongoing monitoring as well as the five-year review (discussed below). The OIO is now scoping a more appropriate IT system to assist it to implement the reforms.

Aspects to be monitored include:

- efficiencies gained by more focussed screening (eg, by excluding less-sensitive assets, implementing a more targeted definition of 'overseas person' and using an improved benefit test)
- operation and effectiveness of the national interest test
- operation and effectiveness of the call-in power
- ongoing compliance with statutory timeframes, and
- new enforcement powers.

LINZ reports routinely to its Minister on aspects of the overseas investment regime, and publishes an annual report.

7.2 When and how will the new arrangements be reviewed?

As part of its monitoring of the impact of the new arrangements (section 7.1 above), the OIO will continuously monitor operational processes.

The Treasury will commence a review of the new call in power three years after implementation, and the balance of the Phase 2 reforms five years after their implementation.

This staggered review timeframe will provide an early opportunity to review the most significant addition to the Act. For the remaining reforms, it will allow the new regime to bed in, suitable data to be collected, and monitoring and evaluation. It will also give certainty to the regulated community that significant changes will not be made in the early days of the new regime's operation.

Appendix 1 Terms of reference

The Associate Minister of Finance, the Honourable David Parker, has requested that the Treasury lead a review of the Overseas Investment Act 2005 (the Act) and the associated Overseas Investment Regulations 2005. This review is to build on the Government's recent amendments to the Act to rationalise the screening regime for forestry assets and certain other profits à prendre and generally require overseas persons to obtain consent to acquire residential land.

Purpose

The review's aim, having regard to the Act's purpose "that it is a privilege for overseas persons to own or control sensitive New Zealand assets", is to:

- enable the Government to effectively manage overseas investment, while
- ensuring that the Act operates efficiently and effectively, and
- supporting overseas investment in productive assets.

Context and rationale

Open capital markets and foreign direct investment can offer a number of economic advantages, including enhanced productivity, greater competition, and stronger and more diverse international relationships. However, they can also present risks and may conflict with both our cultural identity and the view held by some New Zealanders that sensitive New Zealand assets should generally be owned and controlled by New Zealanders.

New Zealand has a number of pieces of legislation in place to mitigate such risks, including the Act. Consistent with the Act's purpose (Section 3) ("that it is a privilege for overseas persons to own or control sensitive New Zealand assets"), the Act provides Ministers with a mechanism to screen investments by overseas persons in sensitive New Zealand assets to ensure that these investments are of benefit to New Zealand.

While the Act is effective in screening investments, there is a perception among some domestic and international stakeholders (particularly the Organisation for Economic Co-Operation and Development) that it is overly restrictive and operates too slowly (particularly in relation to non-controversial transactions). For example, critiques of the Act include that:

- the application process is too complex and that both the criteria for consent and the conditions imposed after receiving consent are more onerous than necessary, the level of discretion in the Act both creates unnecessary uncertainty for investors and for decision makers and can result in significant delays in decision making,
- the Act could do more to attract investment to productive sectors of the economy, and
- the Act is not clear enough on the grounds for which a prospective investment in sensitive New Zealand assets would be declined.

Negative perceptions may reduce New Zealand's attractiveness as a foreign investment destination, with potential costs for economic strength and resilience. Given that there was nearly \$5 billion in new foreign investment between July 2016 and June 2017 and that processing times for consent applications have considerably reduced over the last 18 months, these risks do not appear to have materialised. However, they are worth monitoring and addressing in light of both: the significant stock of foreign investment in New Zealand (\$103.9 billion as at 30 June 2017, including investment in property and other real estate)⁷⁵ and the fact that New Zealand receives proportionately lower levels of foreign direct investment than many other small advanced economies⁷⁶.

There is also a counter view that the Act does not sufficiently protect New Zealand's national interest. The Act is much less developed than those in many comparable jurisdictions – including Australia and Canada – in relation to screening investments on a holistic basis to ensure that they are consistent with New Zealand's national interest. For example, under the criteria available under existing consent pathways New Zealand has limited ability to:

- screen investments in infrastructure assets with monopoly characteristics on competition grounds, or
- to consider the importance of New Zealand companies with international distribution systems to New Zealand's broader participation in global value chains.

Reviewing the Act will aim to ensure that it strikes the appropriate balance between the need for high-quality investments to be efficiently approved, against:

- the need to restrict investments that may be unproductive, unbeneficial to New Zealand, or otherwise inconsistent with New Zealand's national interest, and
- the view held by some stakeholders that New Zealanders should retain ownership and control of sensitive domestic assets and the Act's purpose "that it is a privilege for overseas persons to own or control New Zealand assets".

Objectives for the review

The review will seek to ensure that New Zealand's screening regime for overseas investment:

- provides a clear pathway for consent for investment that supports a productive, inclusive and sustainable economy and creates opportunities for regions and businesses to grow and connect internationally,
- provides appropriate protection against risks to New Zealand associated with the overseas ownership of sensitive assets, with particular consideration of whether New Zealand's national interest is sufficiently protected, and
- imposes compliance and administrative costs (as distinct from fees and other direct costs of applying for consent) that are proportionate to the risks associated with overseas investments.

⁷⁵ Stats NZ: Global New Zealand International trade, investment, and travel profile, year ended 30 June 2017.

⁷⁶ Landfall strategy group: Foreign direct investment in small economies (August 2018).

Further, any proposed changes to the regime should:

- improve predictability and transparency around the process and decision making (by both Ministers, and where relevant, the Overseas Investment Office) wherever possible, and
- ensure that discretionary powers appropriately balance the need to both create certainty for investors while reserving the ability to decline investments that are not beneficial to New Zealand.

In working to achieve these objectives, the Act is to remain consistent with the Treaty of Waitangi obligations as well as our international obligations, including Free Trade Agreements and commitments at the World Trade Organisation.

Finally, if national interest considerations were to be more explicitly accounted for when screening investments following the conclusion of this review, the intention is that consent would only be refused on national interest grounds rarely, with the goal of supporting confidence in New Zealand as a foreign investment destination.

Scope

Consistent with the objectives listed above, the review will consider whether the following are appropriate:

- the definition of ‘overseas persons’ as it relates to bodies corporate,
- the factors underpinning the existing generic “benefits to New Zealand” test (including whether water extraction, Māori cultural values as they related to the physical and historical characteristics of the relevant sensitive land and tax residency should be among the positive and negative factors considered when assessing applications made under that test),
- the extent that any ‘negative benefits’ of a prospective investment can be considered under the “benefits to New Zealand” test and, if necessary, whether there needs to be additional legislative guidance on how ‘benefits’ and ‘negative benefits’ should be balanced under that test,
- the investor test, with particular regard to whether the requirements are appropriate and provide sufficient certainty to overseas persons,
- existing levels of Ministerial discretion, with particular regard to whether the appropriate balance is struck between: creating certainty for overseas persons, and
- allowing for adequate consideration of the implications of foreign direct investment on New Zealand’s national interest (that is, consideration of the need for a ‘national interest’ test similar to those in place in Australia and Canada, and under consideration in the United Kingdom),
- the treatment of land adjoining other types of sensitive land (that is, land as described in Table 2 in Schedule 1 of the Act), and
- any minor technical amendments required to resolve unintended consequences associated with the implementation of the Phase 1 reforms.

Out of scope

This is not a ‘first principles’ review of the Act — whether the Act is required is out of scope.

Further, this review will not reconsider the Crown’s right to make final decisions on consents for overseas investments in sensitive New Zealand assets, exercising its sovereignty under Article One of the Treaty of Waitangi.

The review will not revisit substantive issues associated with the recently passed Overseas Investment Amendment Act (for example, requiring purchases of residential land and forestry rights over sensitive land by overseas persons to be screened).

Constraints

The review is not intended to result in the screening of investments that are not currently screened (or those that will not be screened following the commencement of the Overseas Investment Amendment Act).

Only policies consistent with New Zealand’s international obligations will be developed.

Process

Treasury will lead the review. It will be undertaken in two broad, concurrent, work streams:

1. **a stronger OIA**, which will consider whether the Act adequately protects New Zealand’s national interest, and
2. **a better and more efficient OIA**, under which all other issues within the scope of the review will be considered.

In conducting the review, Treasury will work collaboratively with other agencies and external stakeholders as appropriate. Key government agencies including the Overseas Investment Office, the Ministry of Foreign Affairs and Trade, the Ministry for Business, Innovation and Employment, New Zealand Trade and Enterprise, Te Puni Kōkiri, the Ministry for the Environment, the Office for Crown-Māori Partnership and the Department of Prime Minister and Cabinet. In addition to consultation within Government, Treasury will consult with users of the regime, Māori and iwi groups, and the general public throughout the review.

It is expected that the Government will commence consultation on options to amend the Act in the first quarter of 2019, with a view to legislating reforms by the middle of 2020.

Appendix 2 Detailed design of elements of the call-in power

We considered options for design of the call-in power, including:

- the scope of asset classes potentially subject to the call-in power,
- definitions of those asset classes,
- thresholds of overseas investment above which the call-in power could be used,
- mechanisms for notifying the regulator of investments potentially subject to the call-in power, and
- a decision-making framework to be applied to investments that are called in.

Element 1: Scope of asset classes

[36]

Consistent with this, options we have considered for inclusion in the call-in power are:

- military and dual-use technology,
- critical direct suppliers to security and defence agencies,
- sensitive data,
- media, and
- certain 'high risk' critical national infrastructure.

Element 2: Definitions of these asset classes

For each asset class we developed narrow, middle and wide definitions, with the wide definition capturing more transactions than the others.⁷⁷

⁷⁷ Only narrow and wide definitions were considered for military and dual-use technology. The definition of high-risk critical national infrastructure was developed on its own, without a range of options.

Asset or entity class	Narrow definition	Middle definition	Wide definition
Military and dual-use technology	Entities that research, develop, produce or maintain military or dual use technologies subject to export controls.	N/A	Same as the narrow definition, but also include entities that research, develop, produce or maintain military or dual use technologies listed in regulations (eg, emerging technologies).
Critical direct suppliers to defence and security services	Entities that supply essential goods or services to the New Zealand Defence Force, NZSIS or GCSB where no alternative suppliers can be put in place quickly for reasons of the supplier's capability or capacity, or for security reasons.	Same as the narrow definition but includes critical direct suppliers to the Ministry of Defence.	Same as the middle definition but includes critical direct suppliers to the New Zealand Police.
Media	Entities that regularly publish or broadcast news, information and opinion and have a significant impact on the plurality of news, information and opinion available to: a particular public audience in New Zealand or a particular area or locality of New Zealand.	Same as the narrow definition but also includes media aggregators.	Same as the middle definition but removes the requirement for the entity to have an impact on the plurality of news, information and opinion.
Sensitive data	Entities that hold, produce, maintain or otherwise have access to particularly valuable personal data such as health, genetic, biometric and financial data.	Same as the narrow definition but includes entities with access to official information relevant to the maintenance of public order or national security.	Same as the middle definition but includes all entities with access to any personal information (eg, contact information).
Critical national infrastructure^[1]		High-risk critical national infrastructure, including: significant ports and airports; electricity generation and distribution businesses; water infrastructure; telecommunications infrastructure; and systemically-important financial institutions and market infrastructure.	

[1]

Element 3: Thresholds of investment

We developed three options for the minimum interest being sought before a transaction would be subject to the call-in power.⁷⁹

Option	Threshold	Impact
1	Acquisition of more than 25% ownership or control of the entity's governing body or voting power.	This is the same threshold as used in the Act. It is more likely to be effective at managing control risks than access risks.
2	Acquisition of more than 5% ownership or 25% control of the entity's governing body or voting power.	This will capture more transactions that present potential access risks than option 1 but imposes less regulatory burden than option 3.
3	Acquisition of any ownership or control interest (that is, all investments in a covered entity can be screened).	This best manages control and access risks, and is also the simplest option to understand and comply with.

We developed options for a different threshold for transactions involving listed equity securities, because a range of regulatory mechanisms (including the Companies Act 1993, the Financial Markets Conduct Act 2013, and NZX listing rules) mean that they are very unlikely to grant disproportionate access or control rights to an investor (significantly decreasing risk) and are traded daily (increasing regulatory cost).

Option	Threshold	Scope
1	Voluntary notification for all transactions that result in an investor holding less than 10% of publicly-listed equity securities in an entity covered by the call-in power.	Guidance used to encourage notification of transactions that result in access to specified sensitive information, or influence in the governing body or specified sensitive decisions. ⁸⁰
2	Exclude from the scope of the call-in power transactions that result in acquisition of less than 10% of publicly-listed securities, with one exception.	Transactions of any size that result in access to specified sensitive information, or influence in the governing body or specified sensitive decisions would still be covered by the call-in power.
3	Exclude from the scope of the call-in power transactions that result in acquisition of less than 10% of publicly-listed securities.	No exception.

The threshold for investments in media entities becoming subject to the call-in power would remain at 25% or greater, irrespective of whether it is publicly listed.

Element 4: Notification mechanism

We developed three options for possible notification mechanisms.

⁷⁹ References to the entity's governing body and voting power are consistent with the construction of thresholds or 'trigger points' in the Act.

⁸⁰ Defined as if the equity securities acquired granted: access to any material non-public information or sensitive data; membership or observer rights on the board of directors or equivalent governing body, or the right to nominate an individual to a position on such a body; or any involvement, other than through the voting of securities, in substantive decision-making of the business regarding the use, development, acquisition, access to or release of dual-use or military technology or sensitive data, use of or access to high-risk critical national infrastructure, or supply of goods or services to NZDF, GCSB or NZSIS.

Option	Scope
Voluntary notification	All overseas investors within scope of the call-in power would voluntarily notify the Government of a transaction.
Mandatory notification	All overseas investors within scope of the call-in power would be required to notify the Government of a transaction.
Mixed notification	Mandatory notification for some asset classes, and voluntary for others.

Element 5: Decision-making framework

The responsible agency would call-in a transaction for further assessment using a risk-based assessment, completed on a case-by-case basis.

We considered two options for determining when the Government could block or unwind a transaction that has been called in.

Option	Framework
1	Ministers would be able to intervene in any called-in transaction that presented significant risks to New Zealand's national security or public order, where: <ul style="list-style-type: none"> • doing so was consistent with New Zealand's international obligations, and • risks could not be mitigated through the imposition of conditions.
2	Ministers would be able to intervene in any called-in transaction that presented significant risks to New Zealand's national security or public order, where: <ul style="list-style-type: none"> • doing so was consistent with New Zealand's international obligations, and • risks could not be mitigated through the imposition of conditions, but • would also have to consider any economic or other benefits associated with an investment.

Experience from other countries

Comparable jurisdictions screen foreign investment on national security grounds, including Australia, Canada, European Union (EU) member states, Japan, the Republic of Korea and the United States of America. Most can also assess risks to public order.⁸¹ Screening regimes vary considerably — many have thresholds for screening, but some (eg, Canada and Japan) have no thresholds for screening on national security grounds at least for designated sectors.

Broad national security/public order foreign investment screening regimes are becoming more common. An OECD survey⁸² in 2019 of 62 advanced and emerging economies showed that 87% had at least some policy (eg, sector-specific ownership caps) to manage national security or public order risks associated with foreign investment, though only 10% of jurisdictions had broader, industry-wide policies to address such risks. Though the latter proportion is small, it includes those economies that attract the most foreign investment globally. In 2018, more than 70% of global FDI entered countries with broad screening regimes for managing security risks, almost twice the share that prevailed in the 1990s.

⁸¹ The exact terminology used varies.

⁸² OECD (2019) [Acquisition- and ownership-related policies to safeguard essential security interests. New policies to manage new threats. Research note on current and emerging trends.](#)

The scope of such screening regimes is evolving too. From a focus on defence assets and then to critical infrastructure, some countries are also bringing into scope advanced technology, dual-use goods, network technology and personal data enterprises. The EU and its member states (such as the UK, France, Germany and Italy) and the USA are at the forefront of this trend.