Coversheet: Refinements to the incoming regime for screening overseas investment in residential land

Advising agencies	*The Treasury*
Decision sought	*This analysis and advice has been prepared for the purpose of informing final decisions to be taken by Cabinet regarding the Overseas Investment Amendment Bill.*
Proposing Ministers	*Hon David Parker (Associate Minister of Finance)*

This version was prepared following submissions on the Overseas Investment Amendment Bill were received by Parliament's Finance and Expenditure Committee for consideration by Cabinet on 3 April 2018 to aid the Treasury's preparation of a Departmental Report for the Committee.

Summary: Problem and Proposed Approach

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

This RIS considers six areas for refinement raised by submitters to the Finance and Expenditure Select Committee on the Overseas Investment Amendment Bill. Submitters considered there was potential to maximise the workability of the regime and ensure it targets only the transactions the government aims to capture. For the issues to be resolved, changes would need to be made to the Bill.

Proposed Approach: How will Government intervention work to bring about the desired change? How is this the best option?

The opportunities for refinements include less costly pathways than the benefits test for certain activities requiring residential land:

- a new streamlined test for the use of residential land for non-residential purposes and residential purposes incidental to core business;
- class exemptions from OIO screening for:
    - utilities network infrastructure; and
    - overseas persons obliged to acquire residential land as part of an existing RMA requirement.

Additional flexibility is also proposed for the new builds test to allow for developments that could increase the supply of rental accommodation, i.e.

- To allow large developers to rent out, or maintain under shared equity arrangements, units in large developments
- To allow large developers to pre-sell units in large apartment developments to overseas buyers without requiring the buyer to on-sell.

The sixth proposal is to refine the obligation on conveyancers in order to better balance cost and compliance within the enforcement regime.

Section B: Summary Impacts: Benefits and costs

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

Benefits will fall on the following groups:

New Zealand communities will benefit from:

- the continued supply of network utilities in a responsive manner due to the proposed class exemption for network utilities
- the provision of other infrastructure that complements residential areas, e.g. supermarkets, through the proposed new streamlined pathway for non-residential use of residential land
- more apartments being built and rented through changes to the new builds test.

Overseas owned/controlled businesses benefit from:

- reduced costs in applying for non-residential use of residential land due to the new streamlined pathway
- their ability to use residential land for residential purposes incidental to business due to the new streamlined pathway
- less cost involved in providing network utility infrastructure on residential land
- certainty of complying with obligations under the RMA.

The Overseas Investment Office will benefit from:

- reduced volume of applications through the two proposed class exemptions
- a swifter process for evaluating proposed non-residential uses of residential land through the new streamlined pathway.

Conveyancers will benefit from lower costs associated with the proposal in this RIS compared to the provisions of the Bill as introduced.

Where do the costs fall?

The costs will fall on the following groups:

The Overseas Investment Office will face new costs from implementing the new pathways for non-residential use of residential land and the proposals for altering the new builds test. It will be able to charge fees to this end.

Conveyancers face a cost which they are likely to pass on to purchasers.

The costs faced by businesses, including large property developers, are lower under the proposals in this RIS than they are under the provisions of the Bill as introduced.

Some of the proposals help to facilitate use of residential land for residential purposes by overseas persons. This is likely to be a cost to New Zealand-based buyers in that it undermines the primary aim of the Bill, i.e. to create a housing market with prices shaped by New Zealand-based buyers. However, these proposals may facilitate greater quantities of apartments being built and rented, which supports the secondary objective of the Bill.

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

The main risks stem from the very tight timeframes under which this analysis has been prepared. As a result, there are a number of implementation risks, these include:

- some of the design choices may be sub-optimal or have unintended consequences;
- the Overseas Investment Office will only have limited time to operationalise the policy; and
- limited time to educate real estate agents, conveyancers and the general public.

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

n/a

Section C: Evidence certainty and quality assurance

Agency rating of evidence certainty?

The Treasury has assessed the proposals against the criteria of policy effectiveness, compliance with New Zealand's international trade obligations, and minimising compliance and administration costs. Due to the reduced timeframe, detailed analysis has not been undertaken on all options. Analysis undertaken primarily relies on intuitive qualitative assessments rather than quantitative data.

Quality Assurance Reviewing Agency:

The Treasury[1]

Quality Assurance Assessment:

The Regulatory Quality Team at The Treasury considers that this Regulatory Impact Statement partially meets the quality assurance requirements.

Reviewer Comments and Recommendations:

This analysis is supplementary to the analysis contained in the earlier Regulatory Impact Statement Screening Overseas Investment in Sensitive Residential Land. As was the case for that RIS, this present analysis is constrained by tight time frames and a lack of scope to consider a broader problem definition or alternative approaches. The compounded uncertainties and risks arising from these constraints are clearly acknowledged.

Subject to that, the specific issues arising from the Select Committee process are clearly set out and the proposed means of addressing them well explained, including the likely impact on administrative and resourcing requirements. The monitoring arrangements described should enable early observation of any unintended consequences, for example in terms of negative impacts on overseas funding of new housing supply, of the revised arrangements as a whole.

[1] Regulatory Quality Team

Impact Statement: Screening Overseas Investment in Sensitive Residential Land

Section 1: General information

Purpose

The Treasury is solely responsible for the analysis and advice set out in this RIS, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing final decisions to proceed with a policy change to be taken by Cabinet.

Key Limitations or Constraints on Analysis

The key limitations and constraints applying to this analysis are as follows:

Time constraints: This RIS has been prepared for Ministers to consider before the Finance and Expenditure Select Committee delivers its report back on the Bill. Accordingly, this analysis has been prepared under tight time constraints. This has meant that there has not been any opportunity to consult with private sector organisations or the general public, beyond considering the content of submissions to Select Committee.

Assumptions underpinning impact analysis: Analysis on the likely impact of this policy is constrained by a lack of empirical data, including around current levels of overseas investment in the housing market. Similarly, it is difficult to assess the extent and nature of the behavioural responses that will result from this policy. This RIS considers improvements on a Bill, i.e. new options are presented against a counterfactual that has never been implemented.

Responsible Manager (signature and date):

Thomas Parry
International, Economic System
The Treasury

15 March 2018

Glossary

CER	*New Zealand - Australia Closer Economic Relations*
CPTPP	*Comprehensive and Progressive Agreement for Trans-Pacific Partnership*
LINZ	*Land Information New Zealand*
MBIE	*Ministry of Business Innovation and Employment*
OIA	*Overseas Investment Act 2005*
OIO	*Overseas Investment Office*

Section 2: Problem definition and objectives

2.1 What is the context within which action is proposed?

The Government has made a commitment to deliver on a number of policy objectives within the first 100 days following the 2017 election. As part of this plan, the Government committed to "*ban overseas speculators from buying existing houses.*"

The Overseas Investment Amendment Bill was introduced to implement this commitment in December 2017 and referred to the Finance and Expenditure Select Committee. The Committee received 213 submissions which we have analysed. This RIS considers issues raised by submitters. We recommend the Committee adopt these proposals. Issues raised by submitters that are not in this RIS are considered in the Departmental Report which will be available on the Parliament website: https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_75755/overseas-investment-amendment-bill.

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

The Overseas Investment Amendment Bill will establish a regime to stop overseas persons buying residential land unless there are clear benefits for New Zealand. The Bill amends the OIA. The proposals in this document would amend the Bill as introduced. This subsection covers the following features of the regime background to the proposals in this document:

1. Overview of the Bill
2. The benefits test
3. The new builds test
4. Exemptions
5. The role of conveyancers in the compliance regime

I. Overview of the Bill

Foreign investment in New Zealand is regulated by the OIA. The Act requires prior approval for overseas investment in sensitive land. Sensitive land is defined in the Act, and currently includes the foreshore and seabed, non-urban land over 5 hectares, land over 0.4 hectares on certain offshore islands (including Waiheke Island), as well as reserves and historic areas, along with some adjoining land. Under the existing regime, some residential land will also be sensitive land, for example if it is 0.2 hectares or larger and adjacent to the foreshore. The Bill classifies residential land as sensitive land and creates a regime that restricts the availability of residential land to overseas persons.

The Bill will ensure that overseas persons who are not resident in New Zealand will generally not be able to buy existing houses or other pieces of residential land. This will lead to a housing market with prices shaped by New Zealand-based buyers.

New Zealand and Australian citizens will be exempt from the policy irrespective of where they live. All other nationalities ("overseas persons") will be subject to screening unless they:

- hold a New Zealand residence class visa (including New Zealand and Australian permanent residents);
- have been resident in New Zealand for the past 12 months; and
- lived in New Zealand for more than 183 days during that period.

Companies, trusts or partnerships that are 25% or more owned or controlled by "overseas persons" will also qualify as overseas persons.

The Bill provides three pathways for overseas persons to acquire land:

- The benefits test
- The new builds test pathway
- The commitment to New Zealand pathway.

II. The benefits test

A. The benefits test in the OIA applies to sensitive land

The current screening process under the OIA involves assessing an application against a number of criteria. Applicants must meet the "investor test" and either the "benefit to New Zealand test" or a test of intention to reside in New Zealand indefinitely:

- **"Investor test":** investors must demonstrate that they have business experience and acumen, have financial commitment to the investment, are of good character, and comply with certain sections of the Immigration Act 2009.[2]
- **"Benefit to New Zealand test":** investors must demonstrate that the investment will benefit New Zealand. This is assessed against a number of factors including the creation of jobs, increasing processing of primary products and export receipts, and a range of environmental and other factors. If the land is non-urban land over 5 hectares, the benefit must be substantial and identifiable.

The OIO assesses applications to make sure they meet the criteria in the OIA. Consent is granted if all of the criteria are met. Consents are granted subject to conditions that are monitored to ensure compliance. The consent process takes five months to complete on average.

Sensitive land applications are determined by the Minister of Finance and the Minister for Land Information. Certain decisions are also delegated to the OIO for determination.

B. The Bill as introduced, adds mandatory conditions to consents granted under the benefits test for residential land

In addition to the investor test and benefit to New Zealand test outlined above, where the sensitive land includes residential land, the Bill provides that at least one of three mandatory conditions will need to be applied to each part of the land:

1. a condition that:
   - additional residential dwellings are added to the land and the land is on-sold; or
   - a long-term accommodation facility is constructed or extended, and operated, on the land; or
2. a condition that, within a specified period, the relevant overseas person retains no relevant interest in the residential land; or

[2] Sections 15 and 16 of the Immigration Act prohibit visas being issued to people with serious criminal convictions, or connections with terrorist groups.

3. a condition that, for so long as the relevant overseas person has a relevant interest in the residential land, the residential land will not be used for residential dwellings or long-term accommodation facilities.

III. The new builds test

The "increased housing on residential land test", also known as the "new builds test", is another way for an overseas person to acquire residential land.

This test is met if Ministers are satisfied that if consent were granted that one of the mandatory conditions that would be attached to the consent would be, or would likely be, met. These conditions are:

- Increased residential use and on-sale; or
- Construction or extension, and operation, of a long-term accommodation facility.

For dwellings, the policy intent is to allow overseas persons to add to housing supply if they then sell the dwellings thereby not adding to housing demand. The implications of this are considered in section 3.

IV. The framework for exemptions

The OIA provides the existing regime for exemptions. Exemptions can be handled on a discretionary or a standing basis.

The framework for discretionary exemptions is set out in the Overseas Investment Regulations 2005. Under Regulation 37, the "relevant Minister or Ministers may…exempt any transaction, person, interest, right, or assets from the requirement for consent or from the definition of overseas person or associate or associated land". The Minister can apply terms and conditions as necessary.

This is delegated to the OIO in practice. Regulation 38(2) makes it clear that exemptions granted have a precedent effect.

A standing exemption for a class of activities could be written into the legislation. A standing exemption would mean a class of overseas persons did not need to apply to the OIO to acquire residential land for a class of activity.

V. The role of conveyancers in the compliance regime

New section 51A in the Bill aims to improve compliance with requirements to obtain OIO consent. It creates a new obligation on conveyancers to certify to the best of their knowledge that a purchaser will not contravene the OIA by giving effect to the transaction.

2.3 What is the policy problem or opportunity?

This document considers six issues raised by submitters with the regime in the Bill and considers options to address these issues against the Government's policy objectives:

A. The use of residential land for non-residential purposes and residential purposes incidental to commercial purposes
B. The provision of essential utility networks
C. Overseas persons with obligations under the Resource Management Act to acquire residential land
D. Could the on-sell requirement be made more flexible to provide for more investment in apartments?
E. Should the Bill provide the ability to let through the new builds test?
F. Obligation on conveyancers to best balance cost and compliance

Each is outlined in conjunction with the options analysis in section 3.

Other issues raised by submitters are considered in the Departmental Report which will be available on the Parliament website: https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_75755/overseas-investment-amendment-bill.

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

It is still the Government's overall intention to proceed with the Bill. Thus, this analysis has been prepared on the basis that the decision to restrict overseas persons' ability to purchase residential land has already been made. This analysis is focused only on refinements to the Bill as introduced. Any broader considerations of the overseas investment regime or housing policy are out of scope.

The commitments under New Zealand's existing trade agreements provide a constraint for decision makers. In addition, certain changes to New Zealand's domestic investment settings (including changes to the scope of investments screened under the OIA) need to be passed prior to the CPTPP agreement coming into force.

2.5 What do stakeholders think?

The Treasury has consulted the following departments in the development of the advice: LINZ, MBIE, Ministry of Foreign Affairs and Trade, Ministry of Justice, Inland Revenue, Parliamentary Counsel Office and Te Puni Kōkiri. Due to the short timelines that this advice has been prepared under, there has been no consultation with private sector organisations or the public, beyond the reading of submissions received by the Select Committee.

Any issues raised that have not been covered in this document will be covered in the Departmental Report for the Bill. Submissions and the Departmental Report will be available at: https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_75755/overseas-investment-amendment-bill.

Section 3: Options identification and analysis

I. This section considers options for the six opportunities for refinement set out above

G. The use of residential land for non-residential purposes and residential purposes incidental to commercial purposes
H. The provision of essential utility networks
I. Overseas persons with obligations under the Resource Management Act to acquire residential land
J. Could the on-sell requirement be made more flexible to provide for more investment in apartments?
K. Should the Bill provide the ability to let through the new builds test?
L. Obligation on conveyancers to best balance cost and compliance

We identify and discuss options to address each issue, and then evaluate these options against set criteria.

II. Criteria

Options to address the first five issues are evaluated against the following criteria:

- **Policy effectiveness:** The policy is effective, has the coverage intended, minimises any unintended consequences, and provides a mechanism for overseas investors to build new houses for sale where this supports increasing the housing supply without adding to demand.
- **Compliance with New Zealand's international obligations:** Obligations in a number of existing trade and investment agreements include the obligation not to discriminate between investors on the basis of nationality.
- **Minimising compliance and administration costs:** The policy is supported by clear and simple rules that fit in with existing regulatory frameworks and land sale processes.

Options to address the sixth issue are evaluated against the following criteria:

- **Effectiveness in preventing non-compliance:** The proposal is effective in deterring or catching non-compliance.
- **Minimising the number of land transactions that fail because of the screening regime:** helping ensure that overseas persons do not enter into agreements to purchase sensitive land only to find that the purchase cannot be completed.

A. The use of residential land for non-residential purposes and residential purposes incidental to commercial purposes

Issue – non-residential purposes: Businesses, including overseas persons, require residential land for non-residential purposes, e.g. to build premises or acquire untenanted "buffer land" around a facility to protect neighbouring dwellings from negative amenity effects such as noise. It is important the Bill allows for this and that the pathway for this is carefully considered so it does not entail unnecessary time delay, financial cost and uncertainty of outcome for commercial developments on residential land.

This issue is considered in conjunction with the associated issue below.

Issue – residential purposes that are incidental to business purposes: Businesses also require residential land for residential purposes that are important but incidental to core business purposes, e.g. staff accommodation and tenanted buffer land around airports. If the Bill does not provide for this it could impact on the viability of some desirable commercial investments.

For both these issues the OIA currently provides the "benefits test" for sensitive land. It is not proposed to change this. The options below are for residential land that is not otherwise sensitive.

Option A1: *Rely on the benefits to New Zealand test for residential land as set out in the Bill as introduced*	• This option entails leaving the Bill as introduced. Overseas persons would apply to the OIO, be required to meet the benefits test and meet at least one of the three mandatory conditions which will be applied to the consent. They would also need to meet the investor test. • It would ensure any OIO-consented non-residential uses would provide benefits to New Zealand as defined by the benefits test and the outcomes reflected in the mandatory conditions.

Option A2: *Introduce a new pathway to provide for simplified screening of proposed non-residential uses*	• This option would involve a simplified screening process for non-residential and incidental residential uses of residential land, similar to the "Increase housing on residential land" pathway (i.e. the New Builds test). It would only apply to "residential (but not otherwise sensitive) land". Residential land that was sensitive for another reason would need to go through the benefits test.
	• Safeguards would be built in to ensure that this process was only available where the overseas person could demonstrate that the residential land would be used for:
	  ◦ non-residential purposes as shown by a change to the District Valuation Roll; or
	  ◦ residential purposes that were incidental to a core business purpose, as demonstrated by:
	  ▪ the proximity of the land to the core business;
	  ▪ whether the acquisition of residential land for the intended purpose was part of the "ordinary course of business" for the applicant; and
	  ▪ whether a reasonable alternative existed to the purchase of residential land by the applicant; and
	• The investor test would also apply.
	• The counterfactual test would not apply to these transactions.
	• The OIO would be required to impose conditions to ensure the mandatory outcomes (i.e. a non-residential use or a residential use incidental to a core business purpose) were achieved within an appropriate specified period.

Preferred – Option A2: On balance, we favour option A2 – introducing a new pathway to provide for simplified screening of proposed non-residential uses, given that it upholds the effectiveness of the policy while being simpler to implement over time and allowing greater flexibility to provide for typical business practices.

We consider that Option A2 provides the best balance against the three policy criteria:

- *Policy effectiveness:* Option A2 provides a simplified basis for overseas investors to purchase residential land in circumstances that do not directly impact on achievement of our policy objectives for the Bill. With option A2 the OIO retains oversight through screening and the ability to impose conditions on consents to ensure that the new test does not undermine our objectives.
- *International obligations:* Option A2 is consistent with New Zealand's international obligations. Changes to the Bill that aid certainty and simplicity for investors, and reduce compliance costs, will be positively viewed by trading partners and can also encourage investment in productive sectors of the economy (i.e. non-residential sectors). Therefore option A2 is preferred on this criteria.
- *Minimising compliance and administrative costs:* Option A2 would entail a short term cost to the OIO of implementing a new pathway. Overseas persons attempting to acquire residential land for the non-residential purposes and residential purposes incidental to commercial purposes would face reduced compliance costs.

B. The provision of utility networks

Issue: Network utility operators obtain parcels of residential land for the purpose of operating their networks. They can be "overseas persons" under the OIA because they are at least 25 percent owned or controlled by overseas persons. This includes prominent telecommunications operators, electricity distributors, and gas distribution and transmission businesses. Under the Bill as introduced, network utility operators would require consent under the benefits test which could entail additional time delay, financial cost and uncertainty of outcome for the development of network infrastructure.

Option B1: *Require network utility operators to apply for consent through the benefits test.*	• The Bill as drafted would require utilities companies to seek consent through the benefits test for every purchase or lease of three-years or more of even a small parcel of residential land.
Option B2: *Introduce an exemption from screening for network utilities companies.*	• This option entails drafting a new class exemption so that telecommunications network operators, electricity distribution businesses, and gas distribution and transmission businesses would not need to seek consent to own or lease residential (but not otherwise sensitive) land used for the purpose of their business. • Officials propose that exemptions be connected to existing statutory definitions in the Resource Management Act and Utilities Access Act of "network utility operator" and "utility operator"), which reference the Electricity Act, Gas Act and Telecommunications Act (the core statutes regulating these industries). • Network operators would still need to apply through the benefits test to use sensitive land for network infrastructure.

Preferred – Option B2: On balance, we favour adopting option B2 which would allow network utility operators to acquire land to establish essential infrastructure as necessary without facing the additional costs entailed in applying for consent from the OIO.

We consider option B2 to be the strongest option when assessed against the policy criteria established for this policy:

- *Policy effectiveness:* Allowing utility companies easier access to the very small amount of land they need to operate networks is complementary to expanding the housing supply and upholding New Zealanders' quality of life. Option B1 would result in essential network, distribution and transmission infrastructure not being developed, developed over a slower time period or with significant additional cost.

- *International obligations:* Our trading partners and the overseas persons who invest in New Zealand's utility networks would view Option B2 more favourably. This can facilitate beneficial investment in infrastructure.

- *Minimising compliance and administrative costs:* Option B2 is less time-consuming and costly for both the OIO and applicants. The cost of option B1 is greater than it needs to be given the clear benefits to society of utility networks.

C. Overseas persons with obligations under the Resource Management Act to acquire residential land

Issue: We are aware that councils have imposed conditions under the Resource Management Act that require overseas owned/controlled businesses to purchase residential land from property owners that wish to sell in order to mitigate against the business's amenity effects.

The Bill as introduced would require the business to apply for OIO consent through the benefits test for purchases of residential land required to comply with its RMA commitments. However, even if it obtained consent, the mandatory conditions for residential land mean it could not allow the houses to be occupied, e.g. for staff accommodation.

Option C1: *Require businesses with RMA obligations to apply for OIO consent using the benefits test pathway*	• The status quo may constrain an overseas person's chances of meeting their RMA obligations in regard to acquiring residential land by subjecting them to the financial and non-financial costs of a test of which the outcome could be uncertain, or may only be able to be met with the application of conditions that make it hard to continue to operate.
Option C2: *Amend the Bill to provide a class exemption for businesses with obligations to acquire residential land under the RMA.*	• This option involves amending the Bill to provide for any overseas person seeking to acquire residential land in accordance with existing RMA requirements to be able to do so without being subject to OIO screening.
Option C3: *Provide for this through discretionary exemptions.*	• This option entails Ministers using their discretion to grant an exemption under Regulation 37. The Regulation states that the "relevant Minister or Ministers may…exempt any transaction, person, interest, right, or assets from the requirement for consent or from the definition of overseas person or associate or associated land". The Minister can apply terms and conditions as necessary. Exemptions granted have a precedent effect.

Preferred – Option C2: On balance, we favour adopting option C2 as it is the option that fully meets the policy objective with the least compliance and administration cost.

We consider option C2 to be the strongest when assessed against the policy criteria established for this policy:

- *Policy effectiveness:* The C2 exemption provides for pre-existing requirements only, meaning it will have limited scope and cannot be used in a future case to undermine the Government's objectives for the Bill.

- *International obligations:* Overseas investors will receive a clear signal in the Bill that existing RMA obligations can continue to be met more favourably.

- *Minimising compliance and administrative costs:* Option C2 is the most cost effective to implement while achieving policy effectiveness. Option C2 avoids the cost to an overseas person of applying for a discretionary exemption and the cost to the OIO of processing a discretionary exemption.

D. Could the on-sell requirement be made more flexible to provide for more investment in apartments?

Issue: Large-scale, multi-unit, residential developments currently rely on large numbers of presales to obtain finance. Overseas persons are active purchasers of units "off-the-plans". The Bill as introduced requires overseas buyers who cannot meet the commitment to reside in New Zealand test to sell units once construction is complete. Submitters' view is that it is possible that this could have a chilling effect on overseas investment in these types of developments. This may have an impact on the viability of these new developments.

Option D1: *Maintain the on-sell condition in the Bill as introduced*	• As noted, the Bill as introduced requires overseas buyers who cannot meet the commitment to reside in New Zealand test to sell units once construction is complete. The policy intent is that overseas persons (who cannot meet the commitment to reside test) can acquire residential land if they add to the supply of dwellings and sell them to New Zealanders.
Option D2: *Allow larger apartment developments to sell 20 percent of units to overseas persons with no on-sell requirement, with a regulation-making power to alter this share over time between zero and 30 percent.*	• This option would allow a developer to sell 20 percent of units to overseas persons but with a regulation-making power that would allow this to be re-set at any time at some level between zero and up to a maximum of 30 percent. • Purchasers of these units and their associates would not be allowed to occupy them. • This approach aims to reduce the initial impact of this Bill on the Government's housing supply objectives by allowing some share of units in large developments to continue to be sold to overseas persons. • This approach would allow government to be able to respond more rapidly to housing and financial market conditions to increase or decrease the share of housing that could be sold to overseas persons in order to support further housing development, rather than making these changes through legislation. • We propose this pathway only be available to developments over 50 units.
Option D3: *Retain flexibility by introducing a regulation making power to allow option D2 to be implemented in the future*	• This option would provide the same regulation-making power for government as outlined in D2, but with the current share of units that could be bought by overseas persons without an on-sell requirement being set initially at zero. • This approach would be more aligned with the objective of having New Zealanders be the owners of New Zealand housing. However, it could delay action that would contribute to our objective to increase housing supply. • This approach would allow us to gather information on the impacts of the Bill and introduce flexibility to allow us to take action if we consider that the Bill is impacting on the viability of large apartment developments.

Preferred – Option D2: On balance, we favour option D2. This option is the best balance between the primary objective to have a housing market that is shaped by New Zealand-based buyers and the secondary objective of allowing overseas investment in residential land where it adds to housing supply without creating demand. It may have less of a negative initial impact on growth in the housing supply than the original proposal, and there is flexibility to alter the share of sales to overseas persons with no on-sale requirement as more information is gathered over time.

We consider option D2 to be the strongest option when assessed against the policy criteria established for this policy:

- *Policy effectiveness:* We consider option D2 to be mostly aligned with the objective of having New Zealand housing be owned by New Zealanders, even though it does provide an avenue for overseas persons to own New Zealand housing. This concession is aimed at avoiding the unintended consequence that the Bill could restrict the availably of housing for New Zealanders. This approach still restricts the extent to which overseas persons can own apartments, but allows some larger projects to still have a degree of overseas investment which could be helpful towards developing further units for New Zealanders. The regulation-making power also leaves government with sufficient flexibility to rapidly curtail or expand the degree to which overseas investment can be active in the sector, which will be useful to tailor the policy to current housing and financial market conditions as more information is gathered over time.

- *International obligations:* The creation of more flexible arrangements for overseas investors to purchase land – under options D2 or D3 – would be viewed by trading partners as an improvement on the Bill as proposed. These options are more focused on enabling overseas investment which enables further growth in the availability of housing for New Zealanders, rather than as a restriction on overseas investment.

- *Minimising compliance and administrative costs:* Options D1 and D3 would have the same administration and compliance costs unless the proposed regulation in option D3 was activated.

  For option D2, or option D3 if activated, a developer would apply for a certification from the OIO which would allow them to sell some share of units to overseas person with no on-sell requirement for these buyers. To acquire this certification, developers would need to demonstrate:

  - How they plan to market and sell these units to New Zealanders;
  - Timeframes and schedules for property development; and
  - How any relevant owners have complied with previous housing developments enabled under this certificate.

  This would entail a cost to the OIO which would be passed on to developers through fees.

E. Should the Bill provide the ability to let through the new builds test?

Issue: Some submitters noted that the requirement to on-sell units after a development has been completed may prevent overseas firms from developing new, large-scale developments under a build-to-rent, rent-to-own, shared equity or other innovative development model. These models are already being used in some parts of New Zealand (e.g. Hobsonville, Whenuapai, and Queenstown) and are popular in other parts of the world.

The existing approach in the Bill is that any new developments would need to be on-sold to New Zealand-based buyers, prioritising home ownership by New Zealanders over other models for provision of long-term residential accommodation. However, the on-sell requirement in the Bill as drafted may make it more difficult for overseas firms to provide rental and shared equity housing. The impact of this is exacerbated by the way the OIA captures some New Zealand-based companies that are more than 25% overseas owned or controlled are "overseas persons" under the Act. This could prevent companies such as Fletchers from developing new housing (on land it owns) to rent out.

Given the above, we have considered whether the on-sell requirement should be applied more flexibly to facilitate the supply of rental properties.

Option E1: *The Bill as introduced*	• The Bill as introduced does not allow overseas persons to build a new dwelling and hold on to it for renting. • The Bill as introduced provides for a special rule for long-term accommodation facilities – these could be operated directly by an overseas person. Operating such a facility is a form of 'letting', though the type of legal interest or licence an occupant has can vary greatly across different facilities. • However, the developer's ownership interest in the land could not be freely traded in an international market, as on-sale (and leases for longer than three years) to an overseas persons would be screened under the OIA.

Option E2: *Allow limited flexibility to enable large–scale investors and property management firms to develop and maintain an equity interest in new residential dwellings to rent under special conditions with a special rule for operating long-term accommodation facilities*	• Under this option large-scale investors and property management firms that are in the business of providing rental housing or housing through shared equity arrangements would be able to buy residential land for development into additional dwellings under the New Builds test. They could retain units after the development is complete to rent out or maintain an equity interest pending complete buy-out by a New Zealand-based buyer.
	
	• Safeguards would be built in to ensure that this option is only available following screening through the New Builds test where Ministers (or OIO, under delegation) are satisfied that:
	
	  ○ the developer is in the business of providing rental accommodation or housing through shared equity arrangements and is seeking consent to develop at least 50 new residential rental units;
	
	  ○ the developer would use the land for rental accommodation or shared equity housing as evidenced by:
	
	  ▪ demonstrated or demonstrable ability to provide rental accommodation or shared equity housing (including based on track record and experience); and

	▪ plans to actively market and ensure units are occupied; and o the developer is committed to maintaining the properties as rental properties or under a shared equity model. • The "investor test" would apply but there would not be any "counter-factual" analysis of comparing the developer's proposals with those of another hypothetical developer. • Developers providing rental accommodation would be required to sell units if they cease to maintain them as rental properties. • In addition, the special rules for operating long-term accommodation facilities in the Bill as currently introduced would apply.

Preferred – Option E2: On balance, we favour adopting option E2. This option would allow large-scale investors to develop residential housing to rent or sell under shared equity arrangements. We consider this to be the best balance between allowing overseas developers to buy residential land for development, without adding to demand for being housed, and minimising compliance and administration costs. This option continues to allow developers of long-term accommodation facilities (such as retirement villages, aged care facilities and student accommodation) to operate these directly or lease them to others.

We consider option E2 to be the strongest option when assessed against the policy criteria established for this policy:

- *Policy effectiveness*: As per the status quo, Option E2 will reduce the risk that of overseas person assigning a tenancy to a related party, residing in the house (unless they could meet the Commitment to Reside pathway) or leaving it vacant. It reduces these risks by targeting large developers. It also does not impede the broader objective of increasing the supply of residential housing, as it incentivises investment in residential housing by developers providing rental and shared equity housing, and provides for operation of long-term accommodation facilities that people use as primary place of residence. Additionally, this approach would allow foreign capital to be leveraged to increase the availability of professionally-provided rental properties and affordable shared-equity housing. It would support the provision of new units into the rental sector.

- *International obligations*: New Zealand's trade obligations in free trade agreements and at the World Trade Organisation will need to be taken into account in designing conditions that apply to large-scale rental housing and shared equity developments, and long-term accommodation facilities.

- *Minimising compliance and administrative costs*: Compared to Option E1, this may increase screening volumes for the OIO, and thereby add to administration costs. There would also be additional enforcement and monitoring costs compared to Option E1, but these would be limited because enforcement efforts would be focused on a limited number of large professional firms.

F. Obligation on conveyancers to best balance cost and compliance

Issue: The Bill proposed an obligation on conveyancers to certify to the best of their knowledge that the purchaser will not contravene the OIA. It is arguably unclear from this how active conveyancers needed to be in investigating the eligibility of purchasers. This compelled officials to reconsider options for the obligation put on conveyancers in the Bill. Options for the form of these obligations are considered below.

The potential level of non-compliance with residential land requirements is uncertain. However, there is a risk that OIO monitoring and enforcement by itself may not adequately manage compliance risks. Establishing some sort of upfront obligation on conveyancers at the time of purchase would support greater compliance and reduce the number of failed transactions.

Option F1: *The Bill as introduced, i.e. Conveyancer certifies to the best of their knowledge that the purchaser will not contravene the OIA*	• Conveyancers would need to certify that the land is not residential and/or the purchaser is not covered by the screening regime. The standard would be 'to the best of their knowledge' and therefore they would not be required to review reliable documentary evidence to verify the assurances given by their client.
Option F2: *Require conveyancers to certify that they have informed the purchaser about the screening regime*	• Conveyancers would need to certify that they have informed the purchaser about the screening regime.
Option F3: *Require conveyancers to certify that the purchase is not inconsistent with the screening regime*	• Conveyancers would be required to make enquiries as to the status of the land and purchaser, and would only be able to complete the transaction if they were satisfied. They could not rely on assurances given by their client, but would need to review reliable documentary evidence that established the position.

Option F4: *Require conveyancers to sight a declaration from the purchaser stating they comply with the OIA*	• Purchaser's Declaration: A purchaser would be required to provide a signed declaration stating they, and anyone on whose behalf they are purchasing the property, comply with the OIA. The declaration form would be supported with guidance on OIA requirements.
	• Conveyancer's Obligation: A conveyancer must not proceed with a transaction unless both:
	  ○ the purchaser has provided a Purchaser's Declaration that the purchaser (and anyone on whose behalf they are purchasing the property) complies with the OIA; and
	  ○ the conveyancer's reliance on the Purchaser's Declaration is reasonable.

Option F5: *Reactive regime that includes a knowledge offence for third parties*	• Conveyancers would not be subject to any certification requirements. However, there would be a knowledge offence for those who knowingly assist a person who breaches the Act.

Agency preferred – Option F4: There is a trade-off between effectiveness in ensuring compliance and minimising compliance costs. The potential level of non-compliance and ability of reactive enforcement to address non-compliance is uncertain. Option F4 would promote compliance by requiring purchasers to identify whether they comply with the OIA. Compliance costs would be low for most purchasers.

There are number of different factors that need to be considered when evaluating the three options against the objective of *ensuring compliance with the screening regime.*

- Option F1 – we anticipate that requiring certification to the best of the conveyancer's knowledge will operate similarly to options F2 and F3, depending on the circumstance. Cautious conveyancers may be unwilling to make this certification without making due enquires about the compliance with the screening regime, meaning it will operate similarly to option F3 (and therefore be costly in some cases). On the other hand, less cautious conveyancers may adopt a "don't ask, don't tell" approach, making no efforts to ascertain the status of the person. In this case, it would operate similarly to option F2.

- Option F2 – requiring the conveyancer to certify that they have informed the purchaser would help compliance with the regime from some overseas persons. However, it would not by itself prevent committed foreign investors from buying in contravention of the screening regime. Nevertheless, where a conveyancer was involved, it would eliminate any opportunity for a person in contravention of the screening regime to claim they were unaware of the screening regime (a helpful fact at the enforcement stage, and may also mean that a court is better prepared to impose penalties). It may also persuade more cautious investors to seek further advice to ensure their purchase is compliant. At the same time, it may cause unnecessary concern for those who are not covered by the screening regime (e.g. NZ citizens), as they will need to be informed of the screening regime even though it does not apply to them.

- Option F3 – in terms of ensuring compliance with the screening regime, requiring conveyancers to certify that the purchase does not contravene the screening regime would be the most effective. The problem with option F3 is that it would increase the cost of all property transactions – including transactions involving New Zealand citizens and permanent residents. While in the case of individuals this verification may be straight forward[3], this will not be the case where the purchaser is a company or a trust – potentially substantial investigation would be required.

- Option F4 – compared to Option F1 or F2, Option F4 is expected to be more effective at promoting compliance, because a purchaser could not avoid requirements by concealing information about their compliance, unless they expressly made a false statement. A purchaser who provides a false or misleading statement would be subject to offence and penalty provisions, and a conveyancer carrying out a transaction would need to obtain a purchaser's declaration upon which they can reasonably rely. Compliance costs would be low for most purchasers, who would only need to identify that they are a New Zealand citizen, a permanent resident who is ordinarily resident in New Zealand, or have consent from the OIO. For most purchasers, Option F4 may also have lower compliance costs than Option F1, because it would be faster and cheaper for them to complete a form stating they are a New Zealand citizen or ordinarily resident in New Zealand, compared to conveyancer certifying they have informed the purchaser about the OIA regime.

[3] Even in the case of New Zealand citizens, they may not have a valid passport so may find proving this difficult. A transaction could be delayed while suitable evidence was obtained, even where there was no suggestion that a foreign buyer was involved.

- Option F5 – this option would address non-compliance where a conveyancer has knowingly assisted someone in a breach of the Act. Option F5 would be the least expensive option in terms of increased compliance costs. It would be more targeted towards overseas buyers, and would not impact the majority of house buyers. This option would also be a similar approach to that taken in Australia and Ontario, Canada.

Minimising the number of land transactions that fail because of the screening regime: None of these options would be effective at minimising the number of land transactions that fail because of the screening regime, without allowing some non-compliant transactions. Since conveyancers are often only involved once an unconditional agreement has been entered into, if a problem arises once a conveyancer has been engaged (e.g. the conveyancer discovers the purchaser is unable to purchase the land because of the screening regime) then it is almost certain the transaction will fail. The vendor will have to go back to market and seek a new purchaser.

Section 4, Impact Analysis, is intentionally omitted as the impact analysis is incorporated above.

Section 5: Conclusions

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

The proposals in this RIS are relatively discrete. They do not form a package from which total costs and benefits to parties could be totalled in a logical way. The costs and benefits of the proposals on relevant parties are set out in the previous sections.

Overall, we recommend the following approaches to address the six issues considered in this RIS. The issues listed below are independent of each other and therefore decisions can be taken separately. All proposals require amendments to the Overseas Investment Amendment Bill.

- Introduce a new pathway to provide for simplified screening of proposed non-residential uses and residential uses incidental to core business purposes.
- Introduce an exemption from screening for network utilities companies
- Introduce a class exemption for businesses with obligations to acquire residential land under the RMA.
- Introduce a provision to allow larger apartment developments to sell a set share to overseas persons with no on-sell requirement starting at 20 percent (with a cap of 30 percent), with the regulation-making power to alter this share over time.
- Introduce a provision to allow limited flexibility to enable large–scale investors and property management firms to develop and maintain an equity interest in new residential dwellings to rent under special conditions with a special rule for operating long-term accommodation facilities
- Amend the obligation on conveyancers to require them to sight a declaration from the purchaser stating they comply with the OIA.

Section 6: Implementation and operation

6.1 How will the new arrangements work in practice?

Giving effect to the preferred options

Legislative process: The preferred options would need to be given effect through amendments to the Overseas Investment Amendment Bill. They could either be adopted by the Finance and Expenditure Select Committee through its report back, or introduced by a Government supplementary order paper.

Commencement: The provisions necessary to prepare for the full commencement of the regime (e.g. new regulation-making powers) come into force immediately after Royal Assent. The commencement date for the other provisions is no later than 60 days after Royal Assent, with the actual commencement date set by Order in Council so, if necessary, that date can be brought forward.

The new screening requirements will not have a retrospective effect.

Education: The OIO will undertake to provide education for real estate agents and conveyancers on the new regime and their obligations under the regime, as this will be critical to ensure compliance. In addition, it is recommended that others involved in land transactions, including banks, financial advisors, accountants and immigration advisors are educated on the changes. Lastly, it is important that the public is aware of the new requirements.

Role of the Overseas Investment Office and other parties

Once implemented, the OIO will hold the primary responsibility for the ongoing operation and enforcement of all new arrangements as a result of the Bill. The role of the OIO and other parties in regard to the full set of amendments in the Bill is set out in the original RIS and will not be repeated here.[4]

The proposals in this RIS are separate and each will have different implications for the OIO. Three of the proposals entail an implementation cost for the OIO:

- applicants using the new, simplified pathway to provide for non-residential uses of residential land and residential uses incidental to core business purposes
- applicants using the new provision to allow larger apartment developments to sell a set share to overseas persons with no on-sell requirement starting at 20 percent (with a cap of 30 percent), with the regulation-making power to alter this share over time
- applicants using the new provision to allow limited flexibility to enable large–scale investors and property management firms to develop and maintain an equity interest in new residential dwellings to rent under special conditions with a special rule for operating long-term accommodation facilities.

Overseas buyers will be eligible to seek approval from the OIO to acquire land through these new pathways. The OIO will need to update their current IT system to accommodate new types of applications. There are three key components of this expanded role:

Detailed screening regime: New types of applications will be screened to ensure that overseas persons are in fact eligible to purchase the sensitive land. Screening will determine if the applicants meets the tests.

[4] http://www.treasury.govt.nz/publications/informationreleases/ria/pdfs/ria-tsy-srl-dec17.pdf

Compliance and monitoring system: Overseas buyers granted consent under the new pathways will have conditions attached to their consents. This will require the OIO to undertake activities to ensure compliance.

Targeted monitoring will need to be carried out to check that transactions do not breach the screening regime and any certification requirements are being properly complied with. If the screening regime is to be seen as robust and effective, surveillance will also need to be undertaken to detect avoidance schemes (such as the use of associates) to get around the screening regime.

Enforcement regime: In order for the policy to be successful, the OIO must have the tools available to investigate possible breaches of the screening regime. The types of things that will need to be investigated include checking situations where people do not get consent when needed, do not comply with conditions imposed on consent, mislead the OIO or adopt avoidance mechanisms to get around the Act. Engagement with overseas persons and their advisors will be required. The fact that the people will often be overseas, and will often involve exchanges with people in a range of languages, increases the time and costs involved. In addition, the OIO must have the ability to take legal action against overseas persons, otherwise the enforcement aspect of the regime will be seen as weak.

The two proposals for class exemptions would entail the OIO receiving fewer applications:

- the class exemption from screening for network utilities operators
- businesses with obligations to acquire residential land under the RMA.

A network utility company can need a reasonably large number of small parcels of residential land. Spark, for example, owns or leases 1,300 different properties across the country to house key network equipment. These include mobile cell sites, data centres, network exchanges, and backhaul or transport fibre access points and associated infrastructure. Many of these pieces of infrastructure are housed on residential land through the necessity of having infrastructure close to customers. Consequently, the class exemption for network utility operators could make a reasonable reduction in applications received by the OIO.

As noted above, we are only aware of one business with existing RMA obligations to acquire residential land so the reduction in resource cost to the OIO as a result of this proposal is small.

In accordance with the Government's preferred option, conveyancers will have formal obligations under this policy, which will require them to sight a declaration from the purchaser stating they comply with the OIA.

It is proposed that a breach of the requirement to certify the purchase will entail a civil pecuniary penalty. The alternative, that there be no penalty or that other general offence provisions apply (including section 45 of the OIA, and potentially section 107 of the Crimes Act 1961), would be uncertain and unsatisfactory. It would be an offence under the OIA for a purchaser to make a false or misleading declaration.

It is also possible that the Registrar-General of Land might, in future, impose the conveyancer certification as an additional statutory requirement for the transfer instrument. The effect of this is that the conveyancer would be required to formally confirm, in the course of the transaction, that the requirement to certify had been met.

Immigration NZ will play a role in providing information about visa status and/or time spent in New Zealand to the OIO, conveyancers and/or prospective buyers.

6.2 What are the implementation risks?

As noted, this analysis has been prepared under very tight timeframes. The Government has also indicated that it wants this regime to come into effect relatively quickly. As a result, there are a number of implementation risks, including:

- some of the design choices may be sub-optimal or have unintended consequences, e.g. the proposed new pathways and exemption may have loopholes;
- the OIO will only have limited time to operationalize the policy (this will involve recruiting and training staff, designing application forms and systems, and upgrading IT systems); and
- limited time to educate real estate agents, conveyancers and the general public.

Where possible, the OIO will seek to mitigate some of these risks by commencing the work required to operationalize the policy as soon as possible, upon receiving funding. They will also seek to begin the education campaign for the revised regime once the Bill has had its final reading in the House.

Fiscal implications will likely arise through these proposals. The OIO is assessing costs associated with administering these new proposals and exploring options for cost recovery, including appropriate fees.

Section 7: Monitoring, evaluation and review

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

As noted above, this RIS compares new options with the provisions of the Overseas Investment Amendment Bill as introduced, so the "status quo" options have never been implemented. Therefore monitoring and evaluation of the options will allow them to be compared with the OIA as it stands.

The OIO will monitor the revised regime through the applications it receives, the consents granted, as well as information it gathers through enhanced compliance, monitoring and enforcement functions.

One of the challenges is that there is no mechanism for the OIO to collect information about transactions involving overseas persons purchasing sensitive land that were not captured by the screening regime (either due to avoidance or because the investor fits within an exemption). Enhancing the compliance and enforcement functions therefore will be one mechanism which the OIO can use to monitor whether the revised regime is having its intended effect with respect to residential land.

One of the aims of this policy is to not impede the broader objective of increasing the supply of residential property. By monitoring compliance with consents granted on the basis of increasing the supply of housing on residential land, the OIO will collect information about the progression of the developments, but will also be able to collect information about the impact of this policy on the stock of housing and long-term accommodation facilities.

It will be harder to evaluate, particularly in the short term, whether there will be broader system-level impacts from this policy around moderating foreign capital flows into the housing markets during periods when the housing market is out of equilibrium.

7.2 When and how will the new arrangements be reviewed?

The Government has committed to undertaking a broader review of New Zealand's overseas investment regime. While there are no plans for review of this policy currently, it is expected that this is something that will be considered as part of the broader work. Once this revised regime is implemented, an assessment of the most appropriate time to review the policy will be made. It is likely that this would occur earlier if the impacts of the regime were materially different to what is anticipated.