Overseas Investment Amendment Bill (No 3)

Government Bill

As reported from the Finance and Expenditure Committee

Commentary

Recommendation

The Finance and Expenditure Committee has examined the Overseas Investment Amendment Bill (No 3) and recommends that it be passed with the amendments shown.

We recommend all amendments unanimously, except for an amendment to clause 8 (new section 16A(1D)), two amendments to clause 9 (new section 17(2)(b)(i) and (ii)), and an amendment to clause 10 (new section 20(1)), which are recommended by majority.

Introduction

The Overseas Investment Amendment Bill (No 3) is the second of two omnibus bills introduced in 2020 to amend the Overseas Investment Act 2005. The bills have come from the Government's Phase Two Reform of the Overseas Investment Act. They aim to ensure that risks posed by foreign investment can be managed effectively, including heightened risks during the ongoing economic fallout from COVID-19. They also aim to ensure that high quality, productive investment could more easily proceed.

The first of the bills gained Royal assent in June 2020 as the Overseas Investment (Urgent Measures) Amendment Act 2020. This bill proposes other measures that are less time-sensitive.

The Government's overall policy intention for the bill is two-fold. First, the bill would grant the Government powers to effectively manage the risks posed by foreign investment. Various provisions in the bill have been designed to do this, by the following means:

- embedding a higher threshold for acquiring farm land, and ensuring that farm land is advertised in a way that best ensures New Zealanders have a chance to acquire it
- enabling decision-makers to consider the effects on sustainability of investments that involve water bottling or bulk water extraction
- requiring investors to disclose information relating to their proposed investment structure and tax treatment to Inland Revenue
- better recognising Māori cultural values. For example, the bill would require decision-makers empowered by the regime to take into account an applicant's plans to protect or enhance wāhi tūpuna, wāhi tapu areas, and Māori reservations.

Second, the Government intends to reduce the burden that the overseas investment regime imposes on investors and the regulator. The bill would achieve this by:

- no longer screening non-residential leases of less than 10 years
- allowing investors that have previously been screened and approved to use a streamlined consent process for future investments
- streamlining the process for determining whether an investment in sensitive land will benefit New Zealand
- no longer requiring a large range of low-risk transactions to get consent. For example, the bill would no longer require consent for decisions on investments in less sensitive land that is only screened because it adjoins sensitive land, nor for transactions involving fundamentally New Zealand-listed entities (transactions that currently receive "standing consents" under the Urgent Measures Act).

Legislative scrutiny

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. We had some initial concerns relating to clauses 8 and 16 in Part 1, and clauses 4 and 5 of new Schedule 5.

After an explanation by our advisers, we are satisfied that our concerns have been addressed.

Proposed amendments

This commentary largely covers the main amendments we recommend to the bill as introduced. They largely cover two main areas. First, we recommend amendments that would help ensure that screening of an investment is done in a way that is proportionate to the risk.

Second, we recommend amendments that would reduce barriers to productive developments in farm land.

Finally, we also recommend various amendments to support the bill's clarity, functionality, and coherency.

We do not discuss the majority of minor or technical amendments.

Ensuring that the screening of investments is proportionate to the risk

Allowing investors to make additional incremental investments without consent

Currently, the Overseas Investment Act requires overseas persons to gain consent before they can increase an already consented-to holding. Consent is required regardless of the size of the increase, or whether the increase has any effect over the degree of control that an investor has over the holding. The same rules will apply to the national security and public order call-in power once it commences (discussed in more detail later)–that is, small incremental investments are potentially subject to screening.

There are exemptions to the consent requirement. The exemptions are narrow, but they were expanded following the passage of the Urgent Measures Act. However, despite the expansion of exemption criteria, submitters have told us that the exemptions still do not allow them to do everything they would like to do. The complexity of the exemption regime is also an issue.

We acknowledge that a regime based on individual exemptions does not help reduce the administrative burden on investors. Applying for an exemption has many of the same costs for investors as applying for consent. To address these issues, we believe a new approach is needed.

Therefore, we recommend removing the consent requirement (or in the case of the call-in power, notification requirement) for investors who only make additional, incremental investments that do not result in a material change in ownership or control. A material change would be defined by whether an investment exceeds an ownership or control limit. The ownership or control limits would be more than 25; 50; 75; and 100 percent, and they align with concepts in the Companies Act 1993. The limits reflect the point at which an investor at a general meeting can: block a special resolution, block an ordinary or special resolution, pass an ordinary or special resolution, or obtain total control of the company.

Our amendment would decrease the regulatory burden of the regime, which is consistent with the Government's overall policy intent of recent changes to the overseas investment regime. By reducing regulatory costs on additional investments, we believe that our amendment would increase New Zealand's attractiveness for productive investments, and that this would benefit New Zealand's economy.

Although our amendment would reduce the Government's ability to screen some small changes in ownership, it would not increase the risks associated with overseas investment. Those risks would remain well managed because:

- investors who make additional investments have already gone through the consenting process, and have been deemed suitable to invest in New Zealand (or made a notification under the call-in power)

- significant changes in ownership would remain subject to review
- investments in strategically important assets would still be subject to review if the investment granted disproportionate access or control (such as a board seat). A review would be required even if a control limit was not breached.

The over-application of the national interest test

The Urgent Measures Act introduced a national interest test for overseas investment. The policy intention behind the test is that it should be used only where necessary to protect New Zealand's core national interests.

However, to help provide investors with certainty, the national interest test automatically applies to certain investments that may warrant greater scrutiny.

This includes certain investments made by foreign governments, whether in their own right or through an investment vehicle, such as a trust or a company. Those investments warrant greater scrutiny because they pose a greater level of risk. For example, a foreign government may use investments to gain control over sensitive New Zealand assets in order to further strategic objectives. In an attempt to manage those risks, the test is meant to automatically apply to investments by foreign governments where they are obtaining a degree of control over sensitive New Zealand assets.

However, both submitters and the regulator have told us that the test is routinely capturing investments that do not pose risks to New Zealand's national security or national interest. For example, if a number of foreign governments seek to invest in the same thing but none have a degree of control in their own right, the test would still automatically apply. This is contrary to Parliament's intent.

In addition, the Act does not distinguish between active and passive government investors, so the test is applied to both. For example, many pension funds are not controlled, directed, or influenced by a foreign government and therefore will often be passive foreign government investors. Such investments pose no strategic risk.

Applying the national interest test in such cases is imposing disproportionate costs, complexity, and delays on otherwise productive investments. For example, a potential investor would need to pay a $52,000 fee when the test is applied to an investment. This undermines the policy intent of the reforms to the regime, which is to attract low-risk investments from sources of overseas capital.

To address this issue, we recommend inserting clause 10A, section 20A. Our amendments would mean that the national interest test only applied automatically to transactions that genuinely warrant greater scrutiny. For example, it would automatically apply if a single foreign government held more than a 25 percent interest in an investor that was seeking to acquire sensitive land or a sensitive New Zealand asset. Currently, that threshold is 10 percent.

Finally, we recommend empowering the Minister to exempt passive foreign government investors from automatic application of the test (clause 10B new section 20AA). The criteria for such exemptions would be set by regulations.

We believe that, even with these changes, the regime would still be effective at managing risks through the national interest test. The Minister would still have discretion to apply the test when relevant risks are identified. In addition, the test will continue to automatically apply to investments by foreign governments in strategically important businesses (SIBs).

Conditions could be imposed on transactions

The Minister making a national interest assessment has no explicit ability to impose conditions on the subsequent transaction.

The bill would enable the Minister to decline to give consent for transactions that are not in the national interest (clause 10C, section 20C). We believe that it is important to enable Ministers who are making a national interest assessment to take a graduated approach to managing risk when approving such transactions.

We recommend amending the bill to enable the Minister who is making a national interest assessment to impose conditions on a transaction (clause 10C, section 20C(3)).

Scope of transactions subject to the call-in power

The Urgent Measures Act added a national security and public order call-in power to the overseas investment regime. The call-in power enables the Government to screen overseas investments in SIBs, and to target investments that would not otherwise be screened. The Government could then impose conditions on, or in extreme cases block, investments that pose a significant national security or public order risk.

The call-in power is due to come into effect once the temporary emergency notification regime (ENR), a key provision of the Urgent Measures Act, is repealed. The Urgent Measures Act stipulates that the ENR must be repealed when the effects of the COVID-19 pandemic no longer justify it.

Some submitters are concerned that the scope of the call-in power is too broad. They have told us that the call-in power will inadvertently capture transactions which were never intended to be covered by the provision. We heard from submitters that this will include, for example, routine purchases that are retail in nature.

We recommend amending the bill to limit the scope of the call-in power. By limiting its scope, we believe that the power would only apply to transactions that actually pose a risk to New Zealand's national security.

The call-in power would target transactions in SIBs that actually pose risk

The call-in power would only empower the Government in respect of acquisitions of property most likely to give rise to national security or public order risks (clause 20A, section 82). In general terms, that is the acquisition of property that would make the buyer a strategically important business in their own right (for example, significant electricity generation capacity or large volumes of sensitive information). This would mean that the purchase of intellectual property that allowed the development of mili-

tary or dual-use technology would be subject to screening; however, publicly available software from the same entity would not be screened.

Exceptions to the limitation on the call-in power

There would be only two exceptions to this. The call-in power would apply when property is purchased from critical direct suppliers (CDS) when the CDS considers that the acquisition may affect its ability to provide contracted services (clause 20A, section 82(2)(b)(i)). If so, the CDS must notify the investor of its obligation to notify the transaction.

In respect of media businesses, the call-in power would only apply when an overseas investor intends to purchase the value of 25 percent of all property owned by a media business (clause 20A, section 82(2)(b)(ii)). This is consistent with the threshold for screening indirect investments in media businesses (such as share purchases) under the call-in power.

Power to reinstate an emergency notification regime

The ENR in force currently requires overseas investors to notify the Government of their intention to make controlling investments in businesses or assets. As previously stated, the current ENR must be repealed once the effects of the COVID-19 pandemic no longer justify it.

However, the bill would empower the Minister to reinstate an ENR through regulations (clause 18, new section 60A).

Some submitters believed that an ENR should be reinstated only by an Act of Parliament. They did not think that it would be appropriate for an ENR to be reinstated by the use of regulations. Rather, they maintained that reinstating an ENR by primary legislation would attach a greater level of scrutiny to the reinstatement. Those submitters believed that an ENR warrants more scrutiny because it would be a substantive policy change.

We believe that a future emergency could mean that the Minister needed to quickly reinstate an ENR. Relying on the parliamentary process would risk undue delays that could hamper the effectiveness of a timely ENR reinstatement.

However, given the significant implications of reinstating an ENR, we recognise the importance of providing a high degree of certainty and transparency regarding any future use of this mechanism.

We therefore recommend amending the bill to include additional safeguards and constraints on ENRs. Our recommended amendments would stipulate that:

- before reinstating an ENR, the Minister must consult the Minister of Foreign Affairs
- the Minister must be satisfied that the regulations used are no wider than is necessary to manage the risks to New Zealand's national interest
- any regulations that reinstate an ENR must be accompanied by a statement setting out the specific reasons for the reinstatement

- any regulations made under the empowering provision are reviewed every 90 working days.

We also recommend an amendment to make it clear that an ENR may only be used for the specific purpose intended in the Urgent Measures Act. That is, an ENR's only purpose is to require an overseas investor to notify the Government of any investments which would otherwise not require consent.

In addition, the bill would clarify that, after an ENR has been reinstated, a Minister's power in respect of an ENR would be limited to transactions that are contrary to New Zealand's national interest.

Minimising barriers to productive development in farm land

The application of the benefit to New Zealand test

The bill stipulates that an overseas investment in farm land would be subject to a more stringent set of requirements than would otherwise be applied. A Ministerial directive letter already sets out more stringent requirements for overseas investments in farm land. The bill would embed those requirements in legislation.

The bill would require the Minister, when considering a potential investment in farm land, to give high regard to the potential economic benefits of the investment. As a part of this consideration, the Minister must have regard to whether the investment involves the participation of New Zealanders or the creation or retention of jobs, introduction of technology or business skills, increased exports, or increased processing of primary products (clause 8, new section 16A(1C)).

The bill's more stringent requirements for investments in farm land are in recognition of the high value, both economic and cultural, that New Zealanders place on farm land.

Some submitters, however, expressed concern that the Overseas Investment Act's definition of farm land includes land that is not productive for farming. We believe that embedding the more stringent requirements that would be applied to farm land under the bill would not be necessary where the land in question is not productive for farming. Restricting investments in unproductive farm land would not to serve the policy intention of the bill. In order to be subject to the more stringent requirements, the land must be used principally for agricultural, horticultural, or pastoral purposes, or for the keeping of bees, poultry, or livestock. For example, the bill may restrict investments in land that has been used for temporary grazing, and is not otherwise suitable, or used, for agricultural purposes.

We recommend amending the bill so that the Minister need not always apply the more stringent benefit test of clause 8, new section 16(1C). The Minister would not be required to apply this test if the land in question is not productive for farming, and the land is likely to be promptly used for commercial, industrial, or large residential developments (20 or more new dwellings) (clause 8, section 16A(1D)(c)).

We encourage the Minister, when assessing whether an investment qualifies under clause 8, section 16A(1D)(c), to ensure that the provision does not apply in a way that

creates a perverse incentive. We do not believe it would be appropriate to incentivise vendors to diminish the productive capability of farm land in order for the land to fulfil the criteria of this provision.

The regulator, through the imposition of conditions on the acquisition of farm land by overseas persons, and the Resource Management Act 1991, both provide other mechanisms to protect against land being eroded in this way and should continue to be used.

The requirement to advertise farm land transactions

The bill stipulates that farm land must be advertised in New Zealand before an agreement to sell the land to an overseas person is entered into (clause 7, section 16(1)(f)). This would slow down transactions and impose advertising costs on vendors.

We believe that in some circumstances this provision would be unnecessary. For example, if the land is defined as farm land for technical rather than substantive reasons and is not productive as farm land, we believe that there may be good reasons for that land not to be advertised. Therefore, we recommend amending the bill by allowing the Minister to take into account the nature of the land when considering an exemption from the farm land advertising requirements.

The bill as introduced would empower the Minister to consider the nature of an investment and the investor when granting an exemption from the advertising requirements, but not the nature of the land itself. Therefore, to prevent unnecessary costs on relevant transactions, we recommend that the Minister also be able to take the nature of the land into account when determining whether an exemption from the farm land advertising requirements is warranted (clause 10, section 20(1)(a)).

Other proposed amendments to the bill

Clarifying the operation of the benefit to New Zealand test

The benefit to New Zealand test is designed to ensure that investments in sensitive land and fishing quota will benefit New Zealand. It does so by focussing on the benefits of a transaction, rather than requiring a holistic cost–benefit assessment.

During the time this bill has been before Parliament, the issue of whether the benefits test allowed a holistic cost–benefit assessment was the subject of judicial review proceedings (*Coromandel Watchdog of Hauraki v Minister of Finance & Others* [2020] NZHC 2345). The judgment confirmed that under the Act's current drafting, a holistic cost-benefit assessment is not possible. The bill is designed to reach the same position as this judgment, with the exception of the new factor that relates to investments in water bottling.

To ensure that the position reached in this case is maintained, we recommend that the benefit to New Zealand test include examples of the types of matters that can be assessed and how that assessment will occur. These amendments will provide greater certainty for investors and the regulator on the Act's operation.

Offsetting surpluses and deficits through fees

The operational funding of the Overseas Investment Office (OIO) is intended to be recovered from applicants through fees. However, that has not been the case and the OIO has accumulated a significant deficit in recent years. The accumulated deficit is at least partly attributed to the Act's current fee provisions.

We recommend amending the bill to better ensure that fee payers bear the true cost of the work involved in assessing applications. To do this, we recommend two amendments to the bill. The first amendment would require the Minister to conduct regular fee reviews (clause 19, section 61(4)). The second amendment would expressly provide that fees and charges can be set to meet any under-recovery, or to allow for any over-recovery, in the preceding 4 financial years (clause 19, section 61(1)(e)). This is known as a surplus and deficit recovery fee model.

The changes we recommend also confirm that the existing deficit can be recouped through fees that are set after commencement, to the extent that the deficit arose in the preceding 4 financial years (Schedule 1, clause 40A). This would provide an option for some of the current deficit to be paid for by future fee-payers, rather than taxpayers.

This provision is intended to enable the regulator to spread the costs of infrastructure expenditure (for example, new systems to operationalise this bill) to future fee payers who will benefit from that expenditure and smooth fees over the four year cycle. The provision is not intended to enable the OIO to make up for losses on expenditure that they have not appropriately charged previous fee-payers for. While the provision is intended to allow some smoothing of fees over the cycle, it would be inappropriate if it was used by the regulator to regularly over-charge future fee payers for their services because it has not previously set fees at a sufficient level.

Information sharing

The Urgent Measures Act established a regime for agencies to exchange information on transactions that could give rise to national security or public order risks.

However, the regime could unintentionally restrict other lawful means to exchange this information, such as through the Privacy Act 2020. The regime is also restrictive in the sense that it prevents agencies from accessing or using this information to undertake activities related to managing those risks.

In addition, the intelligence community has submitted that restrictions in the Act on information sharing have the potential to place New Zealanders at risk. The information sharing regime prevents the New Zealand intelligence community from using information to support their other mandated functions. Those functions include protecting New Zealand's national security and international relations.

We recommend amending the bill to address these issues. Our amendments aim to ensure that the regime does not impose any restrictions on agencies' use of lawful means for sharing personal and non-personal information.

We recommend making it clear that agencies that receive information can use it for purposes in connection with national security and public order (clause 20C, section 126(3)(a)).

Finally, we recommend making it clear that agencies within the New Zealand intelligence community may use relevant information in performing their other statutory functions (clause 20C, section 126(3)(a)).

The scope of "standing consent"

The Overseas Investment Act allows for investors to obtain "standing consent" to acquire multiple pieces of sensitive land for residential or forestry activities (section 20A). The intention behind this provision is to not hinder additional investments by investors who have already received consent.

We are concerned that the standing consents could be used to acquire land used in carrying on a SIB without scrutiny, in a manner that could undermine New Zealand's national interest.

We recommend amending the bill to limit the scope of standing consents to acquire land for forestry or residential purposes. Our amendment would stipulate that standing consents could not be used to acquire land or assets used in carrying on strategically important business (clause 10E, section 23A(3)).

Definition of "overseas person"

Limited partnerships

The Overseas Investment Act does not address whether limited partnerships are covered by the definition of an overseas person. We heard from submitters that this is causing significant uncertainty about whether limited partnerships are partnerships for the purposes of the Act. We are concerned that this uncertainty may result in non-compliance with the Act, because an overseas person may not be aware they are covered by the relevant definitions.

For the avoidance of doubt, we recommend that a provision be inserted that specifically defines whether a limited partnership would be an overseas person (clause 5, section 7(2)(i) and (j)). Our amendment would stipulate that a limited partnership would be an overseas person if it is an overseas limited partnership within the meaning set out in section 4 of the Limited Partnerships Act 2008.

Our amendment would also stipulate that any other limited partnership registered under that Act would be considered an overseas person where:

- a general partner of the limited partnership is an overseas person
- more than 25 percent of the persons having the right to control the composition of the governing body of the limited partnership are overseas persons
- more than 25 percent of the partnership interest is held by an overseas person
- an overseas person can control more than 25 percent of the voting at a meeting of the partners of the limited partnership.

Managed investment schemes

The Urgent Measures Act established standing consents for managed investment schemes that are New Zealand listed issuers. The consents would expire 42 days after this bill has been granted Royal assent.

Submitters are concerned that the removal of consent would affect managed investment schemes that are fundamentally New Zealand entities. Those entities would then need to obtain consent, when listed bodies corporate of a similar nature would not.

We recommend inserting clause 5, section 7(2)(ga). Our amendment would incorporate the standing consent for managed investment schemes into the bill.

These managed investment schemes that are eligible for standing consent are fundamentally New Zealand entities in nature, and so are not targets of the regime.

Transitional provisions

We recommend amending the bill to make it clear that the rules of the existing overseas investment regime would apply to all applications received by the regulator before the commencement of this bill. The bill would apply to all other transactions, including transactions entered into but not yet given effect (clause 36(2)(b) and (c), new Part 5, Schedule 1AA).

We also recommend adding a provision which stipulates that only interests in land obtained after the bill takes effect should be counted when determining the total term of interest in land (clause 37A, new Schedule 1AA). This would ensure that the provisions for calculating the total terms of interest in land do not have retrospective effect.

Interests in land that do not pose risks

The Overseas Investment Act applies to all interests in land that are not specifically exempted. There are, however, some interests in land that are low risk and should not be subject to screening under the Act. For example, covenants are currently subject to the Act, despite them posing little risk. On the other hand, we recognise that covenants can theoretically be used to obtain an interest in land similar to that which would require consent.

To manage these risks, we recommend amending the bill to empower the Minister to recommend regulations that would exempt estates or interests in land on either an individual or class basis from the need to obtain consent (clause 19A, section 61B(c)(ix)).

Removing the power to grant an exemption for entities that have a strong connection to New Zealand

Section 61B(c)(viii) of the Act allows the Minister to exempt from the requirement for consent entities that are fundamentally New Zealand owned or controlled, or have a strong connection to New Zealand.

On reflection, we consider that the third limb of this provision is redundant and should be removed. To do this, we recommend inserting clause 19A, section 61B(c)(viii) into the bill.

Without change to the empowering provision, exemptions could be granted that were inconsistent with the Act's purpose. This is because the Act is clear that the degree of New Zealand ownership and control is what determines whether an entity is an overseas person and should be subject to consent requirements, not other matters such as New Zealand employees or having headquarters in New Zealand.

Differing view of the New Zealand National Party

The New Zealand National Party is disappointed that the Government has not taken the opportunity in this revision of the overseas investment rules to address the issue of overseas investors being able to buy forestry rights with few restrictions. By way of example, we are opposed to allowing overseas investors to continue to buy up to 999 hectares of forestry rights per calendar year to be generally exempt from scrutiny. At present, in excess of 70 percent of all land with forestry rights is believed to be owned by overseas investors. With the increasing move to "farming carbon credits" it seems only logical that this issue be dealt with in this bill.

Differing view of the Green Party of Aotearoa New Zealand

The Green Party supports most of the proposed amendments to the bill as introduced, but opposes three significant changes proposed by the select committee. These are: the proposed widening of the Minister's exemption powers for overseas persons seeking to purchase farm land; an associated widening of an exemption which would mean sales of so called "non-productive" farm land would not have to advertised; and the exclusion of negative impacts of a proposed overseas investment from Ministerial consideration and assessment of the "benefits" of the investment under clause 17.

The Green Party opposes the proposed amendment to clause 20 (1)(a) which would expand the Minister's powers to exempt rural land and farm land from the more stringent benefit test of clause 8, new section 16(1)(c), if the farm land is "non-productive" and is not used principally for agricultural, horticultural, or pastoral purposes.

It is a privilege for overseas persons to own land in Aotearoa/New Zealand and the widening of exemption powers is opposed. The proposed amendment takes an unreasonable and solely economic view of what makes land valuable. Non-productive farm land can be valuable and strategically important for many reasons other than its use for farm production. Farm land and rural land generally can have significant landscape, recreational, amenity, and ecosystem services values which make the land important to retain in New Zealand ownership. This can be so even if the land has a low carrying capacity for stock, is unsuitable for horticulture or viticulture, and generates little annual income for the existing owner. South Island pastoral leases, for example, have been bought by overseas persons for their landscape and amenity values and as trophy properties, rather than for their capacity to generate income from

farm production. The Minister's powers to exempt sales of farm land from scrutiny should be very limited and not expanded to so-called "non-productive" land.

We oppose the related amendment to expand the exemption in relation to advertising of farm land in clause 7, new section 16(1)(f), as it would increase secrecy, reduce public scrutiny and knowledge, and remove opportunities for New Zealanders, rather than an overseas person, to be aware of the opportunity to buy the land. Advertising of the proposed sale of land at Middlemarch, Otago helped alert the public to the potential loss of Foulden Marr, an internationally important fossil site to an overseas company Plaman Resources Ltd for mining of diatomite. This led to public discussion about the future of Foulden Marr, and additional information about its significance being provided to the Overseas Investment Office, which could have assisted a decision on the application if it had proceeded and not been withdrawn.

Waiving advertising requirements further skews the regime in the Overseas Investment Act towards alienation of land to overseas interests. Concerns about vendors facing advertising costs are not a legitimate reason for the proposed change.

Finally, the proposed amendment to clarify the operation of the benefit to New Zealand test to prevent the Minister from considering any non-directly comparable aspect of the counterfactual, or any negative impact that is not directly comparable, is opposed. It also further biases the Act in favour of alienation of businesses and land to overseas persons. Ministers should be able to make an overall broad judgement and weigh the benefits such as increased export receipts against impacts such as loss of local jobs from more mechanised processing, for example.

The bill is an opportunity to improve the principal Act to implement a more logical holistic approach, rather than continue the narrow and contrary to common sense approach in the High Court's decision in *Coromandel Watchdog v Minister of Finance* [2020] NZHC 2345. When the Ministerial directive and repeated statements by the Associate Minister of Finance responsible for the Act have emphasised that overseas ownership of land in Aotearoa/New Zealand is a privilege, not a right, it is inappropriate for the benefit test to be applied to only consider benefits and not the negative effects of any proposed land purchase or investment. It is contrary to the normal cost–benefit analysis and it creates a barrier to Ministers protecting the long-term interests of New Zealanders. The bill is an opportunity to clarify and improve the current law, and it is disappointing it is not being used to do this.

Appendix

Committee process

The Overseas Investment Amendment Bill (No 3) was referred to the Finance and Expenditure Committee of the 52nd Parliament on 14 May 2020. On 26 November 2020 the bill was reinstated with the Finance and Expenditure Committee of the 53rd Parliament.

The closing date for submissions on the bill was 10 December 2020. We received and considered 51 submissions from interested groups and individuals. We heard oral evidence from 16 submitters at a hearing in Wellington.

We received advice on the bill from the Treasury and Land Information New Zealand. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting. The Regulations Review Committee reported to us on the powers contained in clause 18.

Committee membership

Dr Duncan Webb (Chairperson)

Andrew Bayly

Barbara Edmonds

Ingrid Leary

Anna Lorck

Greg O'Connor

Damien Smith

Chlöe Swarbrick

Helen White

Nicola Willis

Hon Michael Woodhouse

Key to symbols used in reprinted bill

As reported from a select committee

text inserted by a majority

text inserted unanimously

~~text deleted by a majority~~

~~text deleted unanimously~~

Hon David Parker

Overseas Investment Amendment Bill (No 3)

Government Bill

Contents

Part 2
Amendments to other Acts

Subpart 1—Amendment to Fisheries Act 1996

Subpart 2—Amendment to Tax Administration Act 1994

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Overseas Investment Amendment Act (No 3) **2020**.

2 Commencement

(1) This Act comes into force on the 42nd day after the date on which it receives the Royal assent.

(2) **Subsection (1)** applies with the following exceptions:

(a) the following provisions come into force on a date appointed by the Governor-General by Order in Council or, if not earlier brought into force, 6 months after the date on which this Act receives the Royal assent:

(i) **section 7** (which relates to farm land advertising):

(ii) **sections 8(3) and (4), 20, and 26** (which relate to special land/fresh or seawater areas):

(iii) **section 10** (which relates to farm land advertising):

(iv) **section 12** (which relates to automatic conditions for fresh or seawater areas):

(b) **sections 8(1) and (2) and 9** (replacement of sections 16A(1) and 17 (which relate to the benefit test) and **subpart 1 of Part 2** (fisheries) come into force on a date appointed by the Governor-General by Order in Council or, if not earlier brought into force, 1 year after the date on which this Act receives the Royal assent.

(3) In **subsection (2)(a) and (b)**, 1 or more orders may be made appointing different dates for different provisions and for different purposes.

(4) In this section, **provision** includes any item, or any part of an item, in any of the schedules.

(5) An Order in Council made under this section is secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements).

Part 1
Amendments to Overseas Investment Act 2005

3 Principal Act

This Part amends the Overseas Investment Act 2005 (the **principal Act**).

4 Section 6 amended (Interpretation)

(1) In section 6(1), insert in their appropriate alphabetical order:

director, in the case of a limited partnership, includes any general partner

fresh or seawater area has the meaning set out in **clause 2 of Schedule 5**

fresh or seawater interest has the meaning set out in **clause 2 of Schedule 5**

kaitiakitanga has the meaning set out in section 2(1) of the Resource Management Act 1991

natural environment includes land, water, air, soil, all forms of plants and animals (whether native to New Zealand or introduced), and ecosystems and their constituent parts

securities of the same class means securities that have attached to them identical rights, privileges, limitations, and conditions, and securities of a **different class** has a corresponding meaning

(2) In section 6(1), definition of **excluded accommodation facility**, replace paragraph (b) with:

(b) any TLtP premises as defined in **clause 5** of Schedule 3 (which relates to premises used, or intended to be used, in the course of business principally for providing temporary lodging to the public); or

(3) In section 6(1), definition of **farm land**, after "livestock", insert "(which, to avoid doubt, do not include forestry activities within the meaning of section 16A(9))".

(3A) In section 6(1), definition of **governing body**, after paragraph (c), insert:

(ca) in relation to a limited partnership, the general partner or partners:

(3B) In section 6(1), definition of **governing body**, paragraph (d), replace "a partnership," with "any other partnership, an".

(4) In section 6(1), replace the definition of **historic heritage** with:

historic heritage has the meaning set out in section 2(1) of the Resource Management Act 1991

(4A) In section 6(1), definition of **New Zealand listed issuer**, after "incorporated in New Zealand", insert "or, in the case of a managed investment scheme, established under New Zealand law".

(4B) In section 6(1), definition of **relevant government enterprise**, after paragraph (a), insert:

(aa) a limited partnership (**LP**), if—

(i) a general partner of LP is a relevant government investor; or

(ii) more than 25% of the persons having the right to control the composition of the governing body of LP are relevant government investors; or

(iii) more than 25% of the partnership interests (as defined in the Limited Partnerships Act 2008) of the partners of LP are held by relevant government investors; or

(iv) a relevant government investor or investors have the right to exercise or control the exercise of more than 25% of the voting power at a meeting of the partners of LP; or

(4C) In section 6(1), definition of **relevant government enterprise**, paragraph (b), replace "a partnership" with "any other partnership".

~~(5) In section 6(2)(a)(iii), after "New Zealand", insert "(*see* subsection (2A))".~~

(5) After section 6(4)(c), insert:

and references to other ownership or control interests (for example, of 10% or more) have a corresponding meaning.

(6) After section 6(9), insert:

(10) A person has **disproportionate access to or control of** a strategically important business (**A**) if the person has 1 or more of the following:

(a) access to—

(i) information that would not otherwise be available to the person, but that is information that is material to an assessment of the value of shares or other financial products issued by A or a related company; or

(ii) sensitive information held by A or its subsidiaries:

(b) membership or observer rights on the governing body of A:

(c) any involvement, other than through the voting of securities, in the substantive decision-making of A regarding—

(i) research, development, production, or maintenance of military or dual-use technology or sensitive information; or

(ii) the use of, or access to, the assets of A; or

(iii) the supply of goods or services to an intelligence or security agency.

5 Section 7 amended (Who are overseas persons)

(1) Repeal section 7(1).

(2) Replace section 7(2) with:

(2) In this Act, **overseas person** means—

(a) an individual who is neither a New Zealand citizen nor ordinarily resident in New Zealand; or

(b) a body corporate that is incorporated outside New Zealand or is a more than 25% subsidiary of a body corporate incorporated outside New Zealand; or

(c) a body corporate—

(i) that is a New Zealand listed issuer; and

(ii) that meets the ownership test in **subsection (3)(a)**, or the control test in **subsection (3)(b)**, or both; or

(d) a body corporate (**A**) (other than a New Zealand listed issuer) if an overseas person or persons have—

(i) more than 25% of any class of A's securities; or

(ii) the power to control the composition of more than 25% of A's governing body; or

(iii) the right to exercise or control the exercise of more than 25% of the voting power at a meeting of A; or

(e) a partnership, unincorporated joint venture, or other unincorporated body of persons (other than a trust or unit trust or managed investment scheme or limited partnership) (**A**) if—

(i) more than 25% of A's partners or members are overseas persons; or

(ii) an overseas person or persons have a beneficial interest in or entitlement to more than 25% of A's profits or assets (including on A's winding up); or

(iii) an overseas person or persons have the right to exercise or control the exercise of more than 25% of the voting power at a meeting of A; or

(f) a trust (**A**) (other than a managed investment scheme) if—

(i) more than 25% of A's governing body are overseas persons; or

(ii) an overseas person or persons have a beneficial interest in or entitlement to more than 25% of A's trust property; or

(iii) more than 25% of the persons having the right to amend or control the amendment of A's trust deed are overseas persons; or

(iv) more than 25% of the persons having the right to control the composition of A's governing body are overseas persons; or

(g) a unit trust (**A**) (other than a managed investment scheme) if—

(i) the manager or trustee, or both, are overseas persons; or

(ii) an overseas person or persons have a beneficial interest in or entitlement to more than 25% of A's trust property; or

(ga) a managed investment scheme—

(i) that is a New Zealand listed issuer; and

(ii) that meets the ownership test in **subsection (4)(a)**, or the control test in **subsection (4)(b)**, or both; or

(h) a managed investment scheme (other than a New Zealand listed issuer) if—

(i) the manager or the trustee (as the case may be) is an overseas person; or

(ii) more than 25% of the value of the investment products in the managed investment scheme is invested on behalf of overseas persons~~—~~; or

~~where terms in this paragraph have the same meanings as in the Financial Markets Conduct Act 2013.~~

(i) an overseas limited partnership within the meaning set out in section 4 of the Limited Partnerships Act 2008; or

(j) any other limited partnership registered under the Limited Partnerships Act 2008 (**A**) if—

(i) a general partner of A is an overseas person; or

(ii) more than 25% of the persons having the right to control the composition of the governing body of A are overseas persons; or

(iii) more than 25% of the partnership interests (as defined in that Act) of the partners of A are held by overseas persons; or

(iv) an overseas person or persons have the right to exercise or control the exercise of more than 25% of the voting power at a meeting of the partners of A.

(3) For the purpose of applying **subsection (2)(c)(ii)** to a New Zealand listed issuer that is a body corporate (**A**),—

(a) the **ownership test** is that an overseas person has, or 2 or more overseas persons cumulatively have, a beneficial entitlement to, or a beneficial interest in, ~~more than~~ 50% or more of A's securities:

(b) the **control test** is that—

(i) at least 1 overseas person (alone or together with its associates) has a beneficial entitlement to, or a beneficial interest in, 10% or more of any class of A's securities that confer control rights; and

(ii) when the interests of each overseas person to which **subparagraph (i)** applies are added together, those overseas persons cumulatively have the right to—

(A) control the composition of 50% or more of A's governing body; or

(B) exercise or control the exercise of more than 25% of the voting power at a meeting of A.

(4) For the purpose of applying **subsection (2)(ga)(ii)** to a New Zealand listed issuer that is a managed investment scheme (**A**),—

(a) the **ownership test** is that 50% or more of the value of the managed investment products in A is invested on behalf of overseas persons:

(b) the **control test** is that more than 25% of the managed investment products in A that entitle holders to vote are beneficially owned by or on behalf of overseas persons who each beneficially own 10% or more of those products (alone or together with their associates).

(5) Terms used in **subsections (2)(h) and (4)** have the same meanings as in the Financial Markets Conduct Act 2013 unless otherwise defined in this Act.

6 Section 12 replaced (What are overseas investments in sensitive land)

Replace section 12 with:

12 What are overseas investments in sensitive land

(1) An **overseas investment in sensitive land** is the acquisition by an overseas person, or an associate of an overseas person, of all or any of the following (a **section 12 interest**):

(a) an estate or interest in land if—

(i) the land that the estate or interest relates to is sensitive land under Part 1 of Schedule 1; and

(ii) the estate or interest acquired is—

(A) a freehold estate; or

(B) if the land that the interest relates to is residential land, any interest in land (other than an exempted interest) for a total term (as calculated in accordance with **Schedule 1A**) of 3 years or more; or

(C) if the land that the interest relates to is sensitive (but not residential) land, any interest in land (other than an exempted interest) for a total term (as calculated in accordance with **Schedule 1A**) of 10 years or more:

(b) rights or interests in securities of a person (**A**) if A owns or controls (directly or indirectly) an estate or interest in land described in **paragraph (a)** and, as a result of the acquisition,—

(i) the overseas person or the associate (either alone or together with its associates) has a more than 25% ownership or control interest in A; or

(ii) the overseas person or the associate (either alone or together with its associates) has an increase in an existing more than 25% ownership or control interest in A~~; or~~ that—

(A) results in an ownership or control interest in A that equals or exceeds their ownership or control interest limit as set out in **subsection (2)**; or

(B) is in securities of A of a different class to the class in which their existing interest is held; or

(C) gives the overseas person or the associate (either alone or together with its associates) any or more disproportionate access to or control of a strategically important business; or

(iii) A becomes an overseas person in ~~either~~ any of the following circumstances:

~~(A) A is a New Zealand listed issuer and the tipping point for New Zealand listed issuers is met; or~~

(A) A is a body corporate that is a New Zealand listed issuer and meets the control test in **section 7(3)(b)**:

(AA) A is a managed investment scheme that is a New Zealand listed issuer and meets the control test in **section 7(4)(b)**:

(B) A is not a New Zealand listed issuer.

(2) The ownership or control interest limits are as follows:

(a) if their existing ownership or control interest in A amounts to more than 25% but less than 50%, their ownership or control interest limit is 50%:

(b) if their existing ownership or control interest in A amounts to 50% or more but less than 75%, their ownership or control interest limit is 75%:

(c) if their existing ownership or control interest in A amounts to 75% or more, their ownership or control interest limit is 100%.

~~(2) In this Act, the **tipping point for New Zealand listed issuers**, for the purposes of **subsection (1)(b)(iii)(A)**, is met in respect of a New Zealand listed issuer if—~~

~~(a) at least 1 overseas person (alone or together with its associates) has a beneficial entitlement to, or a beneficial interest in, 10% or more of any class of A's securities that confers control rights; and~~

~~(b) when the interests of each overseas person to which **paragraph (a)** applies are added together, those overseas persons cumulatively have—~~

~~(i) the power to control the composition of 50% or more of A's governing body; or~~

~~(ii) the right to exercise or control the exercise of more than 25% of the voting power at a meeting of A.~~

6A Section 13 amended (What are overseas investments in significant business assets)

In section 13(1)(a)(i), after "an increase in an existing more than 25% ownership or control interest in A", insert "of a type referred to in **section 12(1)(b)(ii)**".

7 Section 16 amended (Criteria for consent for overseas investments in sensitive land)

Replace section 16(1)(f) with:

Additional criteria if land includes farm land

(f) if the relevant land is or includes farm land, before a transaction is entered into with the relevant overseas person, the farm land or section 12 interest has been offered for acquisition on the open market to persons who are not overseas persons as required by the regulations (but *see* **section 20**):

8 Section 16A amended (Benefit to New Zealand test)

(1) Replace section 16A(1) with:

Outline

(1AA) This subsection shows the ways in which the benefit to New Zealand test can be met, but it is a guide only to the general scheme and effect of this section.

Pathway	Which subsections apply	Which counterfactual applies
General test	**Subsections (1)**, **(1A)**	**Subsection (1A)(a)**
Modified benefit test if relevant land is or includes farm land described in **subsection (1C)**	**Subsections (1)**, **(1A)**, **(1C)**, **(1D)**	**Subsection (1A)(a)**

Pathway	Which subsections apply	Which counterfactual applies
Modified benefit test for things described in subsection (2) (forestry activities)	Subsections **(1)**, (3), (7), (9)	Subsection (3)
Special benefit test relating to forestry activities	Subsections (4) to (9)	N/a

General test

(1) The benefit to New Zealand test is met if both of the following are met:

(a) the overseas investment will, or is likely to, benefit New Zealand (or any part of it or group of New Zealanders) to the extent required by this section, as determined by the relevant Ministers under **section 17**; and

(b) if the relevant land is or includes residential land, the relevant Ministers are satisfied that the conditions that the relevant Ministers will impose on the consent in accordance with section 16B will be, or are likely to be, met.

(1A) For the purposes of **subsection (1)(a)**, the relevant Ministers—

(a) must assess the benefit to New Zealand (or any part of it or group of New Zealanders) by comparing the likely result of the overseas investment against the existing state of affairs as at the time the overseas investment transaction is entered into or the time the application is made, whichever occurs first (**counterfactual**); and

(b) must take a proportionate approach to whether the benefit test is met, by taking into account whether that benefit is proportionate to the following:

(i) the sensitivity of the land (for example, the importance to New Zealand of the purpose for which the land is used, the size and value of the land, any sensitive features associated with the land, and the level of interest that the public have in the land) or the fishing quota; and

(ii) the nature of the overseas investment transaction (for example, the estate or interest being acquired, whether the estate or interest is temporary or permanent, and the degree of overseas ownership or control of the land or of the estate or interest in land).

(1B) However, **subsection (1A)** does not apply if subsection (3) or (4) applies.

Modified benefit test if relevant land is or includes farm land

(1C) If the relevant land is or includes farm land that in area exceeds 5 hectares, the relevant Ministers must—

(a) give the following factors high relative importance:

(i) the economic benefits factor in **section 17(1)(a)** and, in particular, the creation or retention of jobs, introduction of technology or

business skills, increased export receipts, and increased processing of primary products; and

(ii) the oversight or participation factor in **section 17(1)(f)**; and

(b) ensure that the applicant has demonstrated, in relation to 1 or more of those factors, that the benefits of the investment are of a size or nature that represent a substantial benefit to New Zealand.

(1D) However, the relevant Ministers may determine not to apply **subsection (1C)** if they are satisfied that—

(a) the transaction is minor or technical; or

(b) the transaction does not materially change the level of ownership or control that the relevant overseas person has over the asset~~.~~; or

(c) the farm land has no or limited productive capacity as farm land and will, or is likely to, be used promptly, as a result of the overseas investment, for industrial or commercial development (for example, a supermarket) or for the construction of 1 or more buildings that, taken together, will consist of 20 or more new residential dwellings.

(1E) **Subsection (1C)** does not preclude the relevant Ministers also giving other factors high relative importance.

Modified benefit test for things described in subsection (2) (forestry activities)

(2) In section 16A(3), replace "subsection (1)(a) and (b)" with "**subsection (1)(a)**".

(3) Repeal section 16A(4)(f).

(4) In section 16A(9), repeal the definition of **special land**.

9 Section 17 replaced (Factors for assessing benefit of overseas investments in sensitive land)

Replace section 17 with:

17 Factors for assessing benefit of overseas investments in sensitive land

What are the factors

(1) The factors for assessing the benefit of overseas investments in sensitive land are whether the overseas investment will, or is likely to,—

(a) result in economic benefits for New Zealand (for example, the creation or retention of jobs, the introduction of technology or business skills, increases in productivity or export receipts, or a reduced risk of illiquid assets):

(b) result in benefits to the natural environment (for example, protection of indigenous flora and fauna or erosion control):

(c) result in continued or enhanced access by the public, or any section of the public, within or over the sensitive land or the features giving rise to

the sensitivity (for example, access for recreational purposes or for the purposes of undertaking stewardship of, or exercising kaitiakitanga in relation to, historic heritage or the natural environment):

(d) result in continued or enhanced protection of historic heritage in or on the relevant land (for example, agreement to execute a heritage covenant (or comply with existing covenants), agreement to support entry to wāhi tūpuna, wāhi tapu, or wāhi tapu areas on the New Zealand Heritage List/Rārangi Kōrero, taking other actions under the Heritage New Zealand Pouhere Taonga Act 2014 to recognise or protect heritage values, or agreement to land being set apart as a Māori reservation):

(e) give effect to or advance a significant Government policy:

(f) involve oversight of, or participation in, the overseas investment or any relevant overseas person by persons who are not overseas persons:

(g) result in other consequential benefits to New Zealand.

How factors must be considered

(2) For the purposes of **section 16A(1)(a) and (b)** (including where **section 16A(3)** is being applied), the relevant Ministers—

(a) must consider all the factors in **subsection (1)** to determine which factor or factors ~~(or parts of them)~~ are relevant to the overseas investment; and

(b) must determine whether the criteria in **section 16A(1)(a) and (b)** (including where **section 16A(3)** is being applied) are met after having regard to those relevant factors and, in doing so,—

(i) must deduct from any benefit arising under a factor ~~(or part of a factor)~~ any directly comparable aspect of the counterfactual, and any negative impact of the overseas investment that is directly comparable, but must stop deducting at zero unless **subsection (3)** applies:

(ii) must not deduct from any benefit arising under a factor ~~(or part of a factor)~~ any non-directly comparable aspect of the counterfactual or any negative impact of the overseas investment that is not directly comparable unless **subsection (3)** applies:

Examples

Directly comparable

If a company is generating $10 million in export receipts at the time that the overseas investment transaction is entered into and the overseas investment will result in a total of $15 million in export receipts, the net benefit in respect of export receipts under the economic factor is $5 million.

Non-directly comparable

If the overseas investment will result in an increase in jobs, but a decrease in export receipts, as compared with the counterfactual, the decrease in export receipts cannot be deducted from the benefit associated with the increase in jobs.

If an overseas investment will result in the introduction of technology but a decrease in export receipts, the decrease in export receipts must not be deducted from any benefits arising from the introduction of technology.

(iii) must determine the relative importance to be given to each relevant factor ~~(or part of a factor)~~ or particular benefit arising under a factor, subject to **section 16A(1C)**~~:~~.

~~(iv) must not give any relevant factor (or part of that factor) any relative importance, if the overseas investment will not or is not likely to result in a net benefit in relation to that relevant factor (or part of that factor), unless **subsection (3)** applies.~~

(3) If the overseas investment involves the extraction of water for bottling, or other extraction of water in bulk for human consumption,—

(a) an additional factor is whether the overseas investment will, or is likely to, result in a negative impact on water quality or sustainability; and

(b) the relevant Ministers must determine the relative importance to be given to this factor and deduct that from any overall benefit to New Zealand that has been determined under **section 16A(1)(a)**.

~~(4) **Subsection (2)(b)(ii) and (iv)** is subject to **subsection (3)**.~~

~~(5) **Subsection (2)(b)(iii)** applies unless **subsection (2)(b)(iv)** applies.~~

10 Section 20 replaced (Exemptions from farm land offer criterion)

Replace section 20 with:

20 Exemptions from farm land offer criterion

Powers to exempt

(1) **Section 16(1)(f)** does not apply to an overseas investment if—

(a) the relevant Ministers consider that the overseas investment need not meet this criterion by reason of the circumstances relating to the particular overseas investment or section 12 interest or the nature of the land to which the section 12 interest relates (for example, its productive capacity); or

(b) the overseas person making the overseas investment belongs to a class of overseas persons, or the overseas investment transaction belongs to a class of transactions, that is exempted from this criterion by the relevant Ministers.

(2) The relevant Ministers may also exempt a person or transaction from—

(a) the requirement that offers for acquisition must be on the open market:

(b) any other requirement in regulations about how farm land or section 12 interests must be advertised.

Restrictions on powers to exempt

(3) The relevant Ministers may grant an exemption under this section only if those Ministers consider that—

(a) there are circumstances that mean that it is necessary, appropriate, or desirable to provide an exemption; and

(b) the extent of the exemption is not broader than is reasonably necessary to address those circumstances.

(4) In so considering, the relevant Ministers—

(a) must have regard to the purpose of this Act; and

(b) may have regard to any other factors that seem to those Ministers to be relevant to the circumstances.

Applications

(5) An application for an exemption under this section may be made at any time by written notice to the regulator accompanied by the fee required by regulations.

Conditions

(6) An exemption under this section may be made subject to any conditions.

~~(7) An exemption under this section must be published on an Internet site maintained by, or on behalf of, the regulator, together with the reasons of the relevant Ministers for granting the exemption.~~

~~(8) However, the publication of an exemption under this section, or of the reasons for granting an exemption, may be deferred or dispensed with (in whole or in part) if the relevant Ministers are satisfied on reasonable grounds that good reason for withholding the exemption or the reasons (as the case may be) would exist under the Official Information Act 1982.~~

~~(9) If the exemption is for a class of overseas persons, or a class of transactions, it must also be published in the *Gazette* and **subsection (8)** does not apply.~~

~~(10) An exemption under this section may at any time be amended or revoked.~~

Class exemptions

(7) An exemption made under **subsection (1)(b)** is secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements).

(8) The reasons of the relevant Ministers for granting the exemption must be published with the exemption.

Other exemptions

(9) An exemption made under **subsection (1)(a) or (2)** must be published on an Internet site maintained by, or on behalf of, the regulator, together with the reasons of the relevant Ministers for granting the exemption.

(10) However, publication under **subsection (9)** may be deferred or dispensed with (in whole or in part) if the relevant Ministers are satisfied on reasonable grounds that good reason for withholding the exemption or the reasons (as the case may be) would exist under the Official Information Act 1982, in which case the relevant Ministers must publish the reason for deferring or dispensing with publication and the grounds in support of that reason.

Maximum duration

(11) An exemption under this section may continue in force for not more than 5 years (and at the close of the date that is 5 years after the exemption first comes into force, the exemption must be treated as having been revoked unless it ~~is~~ sooner is revoked or expires).

10A Section 20A amended (Transactions that are transactions of national interest)

(1) In section 20A(1)(b), replace "10% or more" with "more than 25%".

(2) Replace section 20A(1)(e) with:

(e) a transaction of a kind described in section 13(1)(c) where the acquisition is of or includes property (including goodwill and other intangible assets) in New Zealand used in carrying on a SIB.

(3) After section 20A(1), insert:

(1A) However, for the purpose of subsection (1)(a) and (b), references to a "relevant government investor or investors" in the definition of relevant government enterprise in section 6(1) include only relevant government investors from the same country.

Example

An acquisition by a company of which a New South Wales Government pension fund owns 15% and a Victorian Government pension fund owns 15% is a transaction of national interest (because Australia is the single country). But an acquisition by a company of which a New South Wales Government pension fund owns 15% and a Belgian Government pension fund owns 15% is not a transaction of national interest.

10B New section 20AA inserted (Exemptions from definition)

After section 20A, insert:

20AA Exemptions from definition

(1) The purpose of this section is to allow for exemptions for transactions that are transactions of national interest only because the relevant estate or interest in

land, property, or fishing quota is acquired by a relevant government enterprise, provided there are appropriate limitations on the extent to which government control or influence could affect the pursuit of non-commercial objectives.

(2) The Minister may exempt any relevant government enterprise from the definition of non-NZ government investor in section 6(1) for the purpose of section 20A(1)(a) or (b) if the Minister considers—

(a) that the enterprise meets the criteria relating to control or influence that are prescribed in the regulations; and

(b) that there are circumstances that mean that it is necessary, appropriate, or desirable to provide an exemption; and

(c) that the extent of the exemption is not broader than is reasonably necessary.

(3) An application for an exemption may be made at any time by written notice to the regulator accompanied by the fee required by regulations.

(4) The Minister must publish each exemption granted under this section on an Internet site maintained by, or on behalf of, the regulator, together with the reasons of the Minister for granting the exemption.

(5) However, publication may be deferred or dispensed with (in whole or in part) if the Minister is satisfied on reasonable grounds that good reason for withholding the exemption or the reasons (as the case may be) would exist under the Official Information Act 1982.

(6) An exemption may be made subject to any conditions.

(7) An exemption under this section may continue in force for not more than 5 years (and at the close of the date that is 5 years after the exemption first comes into force, the exemption must be treated as having been revoked unless it sooner is revoked or expires).

10C Section 20C amended (Consent may be declined if transaction contrary to national interest)

After section 20C(2), insert:

(3) If the Minister does not decline consent to a transaction of national interest, the Minister may impose any conditions on any consent that may be granted under this Act, and section 25A applies with necessary modifications.

10E Section 23A amended (Applications for standing consent in advance of transaction)

After section 23A(2), insert:

(3) However, a standing consent is not a consent to give effect to an overseas investment under a transaction of a type referred to in section 20A(1)(c) or (d).

11 Section 25A amended (Conditions of consent)

In section 25A(1), replace "sections 25B and **25C**" with "sections 25B, **25C, and 25D**".

12 New section 25D inserted (Automatic condition: transactions involving fresh or seawater areas)

After section 25C, insert:

25D Automatic condition: transactions involving fresh or seawater areas

(1) **Schedule 5** applies if—

(a) an overseas person or their associate obtains consent for an overseas investment in sensitive land; and

(b) the section 12 interest to be acquired is or includes a fresh or seawater interest; and

(c) the criteria that were satisfied as part of the application for consent included the benefit to New Zealand test.

(2) If **Schedule 5** applies, it is a condition of every consent, whether or not it is stated in the consent, that each consent holder must comply with the provisions of that schedule.

13 Section 27A amended (Consent holder may apply for new consent)

In section 27A(5)(a), replace "expected" with "likely".

14 New section 29A inserted (Investor test applications where no change since investor test last met)

After section 29, insert:

29A Investor test applications where no change since investor test last met

(1) A person (**A**) may apply at any time for an assessment of whether the person meets the investor test, in which case the Minister must determine the matter in accordance with **section 18A(3) to (5)**.

(2) **Subsections (3) and (4)** apply if the investor test has to be met in respect of a particular overseas investment (a **new investment**) and a person (**A**) is a person who previously met the investor test.

(3) In that case, the investor test is met, to the extent that it applies to A, if the relevant Ministers are satisfied, in respect of A, that—

(a) there has been no change in the extent to which the investor test factors are established; or

(b) any change in the extent to which the investor test factors are established does not make A unsuitable to own or control any sensitive New Zealand assets.

(4) The statutory declaration required to accompany the application must include verification as to whether there has been any change in the extent to which the investor test factors are established since the information previously provided to the regulator about those factors.

(5) However, if A has ever been the investor (or one of the investors) referred to in **section 18A(2)** in respect of a transaction of national interest for which consent was declined for reasons connected to A under **section 20C**, then—

(a) **subsection (1)** does not apply; and

(b) **subsection (3)** does not apply unless A has met the investor test since that consent was declined.

(6) Section 23 applies with necessary modifications to an application for an assessment of whether a person meets the investor test.

(7) A single application may relate to all or any of the following applicants:

(a) 1 or more persons who together are contemplating an overseas investment transaction (or a series of related or linked transactions); and

(b) 1 or more persons who would be associates of the persons in **paragraph (a)** in relation to those transactions, if they went ahead.

15 Section 37 repealed (Regulator must keep list of reserves, parks, and other sensitive areas)

(1) Repeal section 37.

Consequential amendment

(2) Repeal section 34(3)(d).

15A Section 37A amended (Regulator must publish list of sensitive adjoining land relating to collective group of Māori)

Repeal section 37A(1).

16 New section 38A inserted (Information for tax purposes)

After section 38, insert:

38A Information for tax purposes

(1) The purpose of this section is to enable the making of regulations to impose requirements under which overseas persons who make, or apply to make, an overseas investment in sensitive New Zealand assets must provide information that the Commissioner of Inland Revenue considers necessary or relevant for any purpose relating to—

(a) the administration or enforcement of an Inland Revenue Act (within the meaning of the Income Tax Act 2007):

(b) the administration or enforcement of any matter arising from, or connected with, a function lawfully conferred on the Commissioner.

(2) For the purpose of this section, the Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations that impose requirements on all or any persons who make, or apply to make, an overseas investment in sensitive assets, including prescribing all or any of the following:

(a) overseas investments to which all or any requirements apply (for example, by reference to a type of investment, a pathway, or a type of land):

(b) what information or other evidence or documents must be provided:

(c) by whom, when, where, and how the information must be provided:

(d) to whom the information must be provided:

(e) the form that must be used:

(f) requirements with which information, evidence, or documents that are provided must comply.

(3) The Commissioner may treat information obtained under this section as information obtained for the purposes of administering the Inland Revenue Acts.

17 Section 46 amended (Offence of false or misleading statement or omission)

After section 46(1)(c), insert:

(d) any information provided to the regulator or the Commissioner of Inland Revenue under **section 38A**.

18 New section ~~59A~~ 60A inserted (Reinstatement of emergency notification regime)

Before ~~subpart 2 of Part 3~~ section 61, insert:

~~59A~~ 60A Reinstatement of emergency notification regime

(1) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations that have the broad effect of reinstating, in respect of an emergency, all or part of the emergency notification regime ~~that was inserted by~~ (in subpart 1 of Part 3 ~~of~~ (as inserted by section 52 of the Overseas Investment (Urgent Measures) Amendment Act 2020)).

(2) The Minister may make a recommendation only if the Minister is satisfied that the effects of the emergency justify the emergency notification regime being reinstated, having had regard to the following:

(a) the economic, social, and other effects of the emergency in New Zealand:

(b) any risks to New Zealand's national interest associated with transactions by overseas persons:

(c) New Zealand's international relations and international obligations.

(3) The emergency notification regime—

(a) must be limited in scope to transactions that do not require consent (*see* section 10) and that relate to the acquisition by an overseas person, or an associate of an overseas person, of either or both of the following:

(i) rights or interests in securities of a person:

(ii) property (including goodwill and other intangible assets) in New Zealand used in carrying on business in New Zealand:

(b) must provide for risk management actions only in respect of risks associated with transactions by overseas persons that are contrary to New Zealand's national interest.

(4) The Minister must consult the Minister of Foreign Affairs before making a recommendation.

(5) Regulations made under this section are secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements).

(6) The Minister must present the reasons for making a recommendation to the House of Representatives not more than 6 sitting days after making the recommendation.

(7) The Minister must review, at intervals that are no more than 90 working days apart, whether the effects of the emergency continue to justify the emergency notification regime continuing in place.

(8) In doing so, the Minister must have regard to the matters in **subsection (2)**.

(9) If the Minister is not satisfied that the emergency notification regime should continue, the Minister must recommend to the Governor-General that the regulations made under this section be revoked.

19 Section 61 amended (Regulations)

(1) Replace section 61(1)(b) with:

(b) prescribing, for the purposes of the criteria in **section 16(1)(f)**, when and how farm land or section 12 interests must be advertised for acquisition to persons who are not overseas persons (including what is required for open market advertising):

(2) In section 61(1)(ba), delete "(*see* also paragraphs (c) and (ca) of this subsection)".

(3) Repeal section 61(1)(c), (ca), (d), **(la), and (lc)**.

(4) In section 61(1)(e), replace "(but also the previous costs of Ministers and the Commission in relation to those matters under the Overseas Investment Act 1973)" with "(and those fees and charges may be set so as to meet any shortfall in cost recovery for any of the preceding 4 financial years, and allowance may be made for any over-recovery of costs in those years, including any estimated shortfall or over-recovery for the immediately preceding financial year)".

(5) After section 61(1)(e), insert:

(ea) prescribing the criteria relating to control and influence by government that relevant government enterprises must meet for the purpose of an exemption under **section 20AA**:

(6) Replace section 61(1)(lb) with:

(lb) prescribing enactments for the purposes of **rows 10 and 11 of table 2** in Part 1 of Schedule 1:

(7) After section 61(3), insert:

(4) The Minister must, at least once in every period of 4 financial years, commence a review of fees and charges set under subsection (1)(e).

19A Section 61B amended (Purpose of exemptions)

(1) Replace section 61B(c)(iii) with:

(iii) minor increases in ultimate ownership and control by overseas persons or associates of overseas persons if consent has already been granted for those overseas persons to own or control sensitive assets:

(2) Replace section 61B(c)(viii) with:

(viii) persons, transactions, rights, interests, or assets that the Minister considers to be majority owned and substantively controlled by New Zealanders:

(3) After section 61B(c)(ix), insert:

(x) estates or interests in land other than freehold or leasehold (for example, covenants).

20 Section 62 repealed (Foreshore, seabed, riverbed, or lakebed acquired by the Crown under consent process is not subdivision)

Repeal section 62.

20A Section 82 amended (What is call-in transaction and overseas investment in SIB assets)

(1) This section amends section 82 as proposed to be replaced by section 53 of the Overseas Investment (Urgent Measures) Amendment Act 2020.

(2) Replace section 82(2) and (3) with:

(2) An **overseas investment in SIB assets** is—

Investment in strategically important businesses

(a) the acquisition by an overseas person, or an associate of an overseas person, of rights or interests in securities of a person (**A**) who is (directly or indirectly) carrying on a SIB if,—

Investment in media businesses with significant impact

(i) in the case of a SIB that is a media business with significant impact, as a result of the acquisition the overseas person or the associate (either alone or together with its associates) has—

(A) a more than 25% ownership or control interest in A; or

(B) an increase in an existing more than 25% ownership or control interest in A of a type referred to in **subsection (3)**; or

Investment in listed issuers

(ii) in the case of A being a listed issuer (or an issuer that would be within the definition of listed issuer if references in that definition to a licensed market operator included equivalent overseas market operators) that is not carrying on a media business with significant impact, as a result of the acquisition the overseas person or the associate (either alone or together with its associates) has—

(A) a 10% or more ownership or control interest in A; or

(B) an increase in an existing 10% or more ownership or control interest in A that is of a type referred to in **subsection (3)**; or

(C) any or more disproportionate access to or control of a SIB; or

Any other investment in SIB business

(iii) in any other case, as a result of the acquisition the overseas person or the associate (either alone or together with its associates) has—

(A) any ownership or control interest in A; or

(B) an increase in any existing ownership or control interest in A that is of a type referred to in **subsection (3)**; or

Investment in SIB property

(b) the acquisition by the overseas person or the associate of property (including goodwill and other intangible assets) in New Zealand used in carrying on a SIB,—

(i) in the case of an acquisition of property used by a critical direct supplier, if that supplier considers that the acquisition may impact its ability to provide contracted services to an intelligence or security agency; or

(ii) in the case of an acquisition of property that is used by a media business with significant impact, if the value of the property acquired is more than 25% of the value of all property owned by the media business immediately before the acquisition; or

(iii) in any other case, if the acquisition of the property would result in the overseas person or associate becoming or being a SIB, or

being capable of being a SIB if it were to use the property for an activity of a type referred to in the definition of a SIB in section 6, (for example, because it acquires intellectual property on military or dual-use technology).

(3) An increase is of a type referred to in this subsection if it—

(a) results in an ownership or control interest in A that equals or exceeds their ownership or control interest limit as follows:

(i) if their existing ownership or control interest in A amounted to 25% or less, their ownership or control interest limit is 25%:

(ii) if their existing ownership or control interest in A amounted to more than 25% but less than 50%, their ownership or control interest limit is 50%:

(iii) if their existing ownership or control interest in A amounted to 50% or more but less than 75%, their ownership or control interest limit is 75%:

(iv) if their existing ownership or control interest in A amounted to 75% or more, their ownership or control interest limit is 100%; or

(b) is in securities of A of a different class to the class in which their existing interest is held; or

(c) gives the overseas person or the associate (either alone or together with its associates) any or more disproportionate access to or control of a SIB.

(4) A supplier referred to in **subsection (2)(b)(i)** must notify the overseas person or the associate of its obligations under section 85 no later than the date on which the transaction is entered into.

20B Section 85 amended (Military or dual-use technology and critical direct supplier call-in transactions)

(1) This section amends section 85 as proposed to be replaced by section 53 of the Overseas Investment (Urgent Measures) Amendment Act 2020.

(2) In section 85(4)(a), replace "on a later date that may be set out in regulations" with "as soon as is reasonably practicable after the overseas person or associate receives a notice under section 20E".

20C Section 126 amended (Power to use and disclose information relevant to managing certain risks)

(1) Replace section 126(3) with:

(3) A receiving agency may use information that is disclosed in reliance on this section—

(a) only for the purpose of, or in connection with, the management of national security and public order risks and, if the receiving agency is

the New Zealand Security Intelligence Service or the Government Communications Security Bureau, for the performance of their functions; and

(b) only in accordance with this section and the regulations (if any), despite anything to the contrary in any other enactment.

(2) After section 126(8), insert:

(9) Subsection (1) does not limit a disclosing agency from using any other lawful means to disclose information (whether personal information or other information).

21 Schedule 1AA amended

(1) In Schedule 1AA, repeal Part 4.

(2) In Schedule 1AA, insert the headings and clauses set out in **Schedule 1** of this Act as the last provisions in Schedule 1AA and make all necessary consequential amendments.

22 Schedule 1 amended

(1) In Schedule 1, Part 1, table 1, first column, replace "foreshore or seabed" with "marine and coastal area".

(2) In Schedule 1, Part 1, table 1, number the existing rows 1 to 11, in the style of table 2 (*see* subsection (3)).

(3) In Schedule 1, Part 1, replace table 2 with:

Table 2

Row	Land A is sensitive if it adjoins land of this type	… and land A exceeds this area threshold (if any)
1	marine and coastal area	0.2 hectares
2	bed of a lake	0.4 hectares
3	land held for conservation purposes under the Conservation Act 1987 (if that conservation land exceeds 0.4 hectares in area)	0.4 hectares
4	any reserve under the Reserves Act 1977 that is administered by the Department of Conservation (if that reserve land exceeds 0.4 hectares in area)	0.4 hectares
5	any regional park or part of a regional park that is subject to a declaration under section 139 of the Local Government Act 2002 (if that park or part of the park exceeds 80 hectares)	0.4 hectares
6	any national park held under the National Parks Act 1980	0.4 hectares
7	land that adjoins the ~~sea~~ marine and coastal area or a lake and is a Māori reservation to which section 340 of Te Ture Whenua Maori Act 1993 applies (if that land/reservation exceeds 0.4 hectares in area)	0.4 hectares
8	land over 0.4 hectares that includes a wahi tapu or wahi tapu area that is entered on the New Zealand Heritage List/Rārangi Kōrero or for which there is an application that is notified under section ~~67(4) or~~ 68(4) of the Heritage New Zealand Pouhere Taonga Act 2014	0.4 hectares

Row	Land A is sensitive if it adjoins land of this type	… and land A exceeds this area threshold (if any)
9	land over 0.4 hectares that is set apart as Māori reservation and that is wahi tapu under section 338 of Te Ture Whenua Maori Act 1993	0.4 hectares
10	land (if that land exceeds 0.4 hectares in area) that, pursuant to an enactment specified in Schedule 3 of the Treaty of Waitangi Act 1975 or in regulations,— (a) is owned by the governance entity of a collective group of Māori such as an iwi or a hapū; and (b) is managed in accordance with the Conservation Act 1987 or an enactment referred to in Schedule 1 of that Act	0.4 hectares
11	any reserve under the Reserves Act 1977 (if that reserve exceeds 0.4 hectares in area) that, pursuant to an enactment specified in Schedule 3 of the Treaty of Waitangi Act 1975 or in regulations, is managed wholly or jointly by the governance entity of a collective group of Māori such as an iwi or a hapū	0.4 hectares
12	Te Urewera land (as defined in section 7 of the Te Urewera Act 2014)	0.4 hectares
13	Whanganui River (as defined in section 7 of the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017)	0.4 hectares
14	Maungatautari Mountain Scenic Reserve (as defined in section 71(1) of the Ngāti Koroki Kahukura Claims Settlement Act 2014)	0.4 hectares

23 New Schedule 1A inserted

After Schedule 1, insert the **Schedule 1A** set out in **Schedule 2** of this Act.

24 Schedule 2 amended

(1) In Schedule 2, after clause 12(2)(b), insert:

(c) a business of a person (**C**) if C owns or controls the relevant interest in the residential land and A has rights or interests in securities of C.

(2) In Schedule 2, clause 17(3), after "the land", insert "for residential purposes".

25 Schedule 3 amended

(1) In Schedule 3, clause 2(2)(b), replace "3 years" with "4 months".

(2) In Schedule 3, replace clause 5 with:

5 Certain units acquired and leased back

(1) In this clause,—

TLtP participant means—

(a) the person (**A**) that operates the TLtP premises or that will operate the TLtP premises after the TLtP premises are completed; or

(b) any person involved in the development of the TLtP premises (the **developer**), provided that the developer has assigned its estate or interest

in the land to A, or will assign it to A immediately after the TLtP premises are completed to the extent that it relates to the relevant unit

TLtP premises means premises used, or intended to be used, in the course of business principally for providing temporary lodging to the public.

(2) A transaction does not require consent for the purposes of section 10(1)(a) to the extent that it will result in an overseas investment in sensitive land if—

(a) the relevant land is residential (but not otherwise sensitive) land; and

(b) the relevant land is being used, or is intended to be used,—

(i) in the construction of TLtP premises that have 20 or more units, or to increase by 20 or more the number of units in TLtP premises; or

(ii) for the operation of TLtP premises that have 20 or more units; and

(c) the estate or interest in land described in **section 12(1)(a)** is—

(i) an estate or interest in 1 (or more) of those units that is acquired by a person (a **purchaser**) and that is immediately subject to a lease-back to the TLtP participant; or

(ii) a lease of 1 (or more) of those units by the purchaser to the TLtP participant (a **lease-back**).

(3) The exemption is subject to the following conditions:

(a) the lease-back must meet the following requirements at all times on and after the acquisition of the purchaser's estate or interest:

(i) the purchaser cannot occupy, reserve, or use the unit for more than 30 days in each year; and

(ii) for the rest of the year, the unit must be managed and used for the general purposes of operating the TLtP premises; and

(b) when the lease-back period ends, the purchaser must either, within 12 months of that period ending,—

(i) grant to the TLtP participant a new lease-back of the unit that complies with the matters in **paragraph (a)**; or

(ii) dispose of its estate or interest in the unit; and

(c) the purchaser must not occupy, reserve, or use the unit while it is not leased back to a TLtP participant.

(3) In Schedule 3, replace clause 6(4)(b)(ii) with:

(ii) that are for a total term (as calculated in accordance with **Schedule 1A**) of 10 years or more.

26 New Schedule 5 inserted

After Schedule 4, insert the **Schedule 5** set out in **Schedule 3** of this Act.

Part 2
Amendments to other Acts

Subpart 1—Amendment to Fisheries Act 1996

27 Amendment to Fisheries Act 1996

This subpart amends the Fisheries Act 1996.

28 Sections 57G ~~to 57I~~ and 57H replaced

Replace sections 57G ~~to 57I~~ and 57H with:

57G Criteria for overseas investments in fishing quota

The criteria for an overseas investment in fishing quota are all of the following:

(a) the investor test is met:

(b) the overseas investment will, or is likely to, benefit New Zealand (or any part of it or group of New Zealanders) to the extent required by **section 16A(1A)** of the Overseas Investment Act 2005, as determined by the relevant Ministers under **section 57H**:

(c) if the overseas investment in fishing quota is a transaction of national interest, the Minister has not declined consent to the transaction (*see* **section 20C** of the Overseas Investment Act 2005):

(d) the interest in fishing quota is capable of being registered in the Quota Register or the Annual Catch Entitlement Register.

57H Factors for determining whether or not overseas investment in fishing quota will, or is likely to, benefit New Zealand

~~(1) The relevant Ministers—~~

~~(a) must consider all the factors in **subsection (2)** to determine which factor or factors (or parts of them) are relevant to the overseas investment; and~~

~~(b) must determine whether the criterion in **section 57G(b)** is met after having regard to those relevant factors; and~~

~~(c) in doing so, may determine the relative importance to be given to each relevant factor (or part).~~

What are the factors

(2) The factors for assessing the benefit of overseas investments in fishing quota are whether the overseas investment will, or is likely to,—

(a) result in economic benefits for New Zealand (for example, the creation and retention of jobs, introduction of technology or business skills, increased export receipts, increased processing in New Zealand of fish, aquatic life, or seaweed, or a reduced risk of illiquid assets):

(b) result in benefits to the natural environment (for example, protection of indigenous fish or mitigation of environmental impacts by innovations in fishing technologies):

(c) give effect to or advance a significant Government policy:

(d) involve oversight of, or participation in, the overseas investment and any relevant overseas person by persons who are not overseas persons:

(e) result in other consequential benefits to New Zealand.

How factors must be considered

(3) **Section 17(2)** of the Overseas Investment Act 2005 applies with necessary modifications.

Subpart 2—Amendment to Tax Administration Act 1994

29 Amendment to Tax Administration Act 1994

This subpart amends the Tax Administration Act 1994.

30 Section 3 amended (Interpretation)

In section 3(1), definition of **offshore person**, paragraph (b), replace "section 7(2)(b) to (f) of the Overseas Investment Act 2005" with "**section 7(2)(b) to ~~(h)~~ (j)** of the Overseas Investment Act 2005".

Schedule 1
New ~~Part 5~~ Parts 5 and 6 inserted into Schedule 1AA of Overseas Investment Act 2005

s 21

Part 5
Provisions relating to Overseas Investment Amendment Act (No 3) 2020

35 Interpretation in this Part

(1) In this Part,—

~~2020 (No 3) Act~~2021 Amendment Act means the **Overseas Investment Amendment Act (No 3) 2020**

commencement, in relation to a provision that is being inserted or amended by the ~~2020 (No 3) Act~~ 2021 Amendment Act, means the commencement of the insertion or amendment

new, in relation to a provision of this Act, means the provision as it reads immediately after commencement

new Act means this Act as it reads immediately after the relevant provision of the ~~2020 (No 3) Act~~ 2021 Amendment Act commenced

old, in relation to a provision of this Act, means the provision as it read immediately before commencement

old Act means this Act as it read immediately before the relevant provision of the ~~2020 (No 3) Act~~ 2021 Amendment Act commenced.

(2) Part 1 of this schedule applies when determining whether a transaction is entered into before commencement or on or after commencement (*see* clause 1(4) and (5)).

36 Existing transactions and applications, etc

(1) This clause applies for the purposes of applying a provision of this Act that relates to—

(a) determining who are overseas persons, what are overseas investments in sensitive assets, and other matters in Part 1 of this Act; and

(b) determining when consent is required and the criteria for consent under subpart 1 of Part 2 of this Act; and

(c) the making ~~an~~ of applications for consent and for granting consent under subpart 2 of Part 2 of this Act.

~~(2) Except as provided in this Part, the new Act applies to—~~

~~(a) transactions entered into on or after commencement:~~

~~(b) applications received by the regulator on or after commencement, regardless of when the transaction is or was entered into or, in the case of farm land, when it is or was advertised:~~

~~(c) transactions entered into before commencement in respect of which this Act requires an application to be made on or after commencement (for example, for retrospective consent):~~

~~(d) any other matters that relate to events or circumstances on or after commencement.~~

~~(3) In other cases, the old Act continues to apply.~~

(2) Except as provided in this Part,—

(a) old section 16(1)(f) (farm land advertising) continues to apply to transactions entered into before commencement of **section 7** of the 2021 Amendment Act (regardless of when the application is received), and regulations 4 to 11 of the regulations as they read immediately before commencement of that **section 7** continue to apply to those transactions accordingly; and

(b) the rest of the old Act continues to apply to applications received by the regulator before commencement (regardless of when the transaction is or was entered into or whether it has been given effect to) and any other matters that relate to events or circumstances before commencement; and

(c) in other cases, the new Act applies (including to transactions entered into but not given effect to).

37 Persons who are no longer overseas persons

(1) A person who ceases to be an overseas person on commencement of **section 5** (section 7 amended (who are overseas persons)) may apply to the regulator under section 27 for a variation of a consent granted to them while they were an overseas person.

(1A) In addition to the powers in section 27, the relevant Ministers may revoke a condition of a consent that this Act required to be imposed.

(2) To avoid doubt, this clause does not require a variation to be granted.

37A Calculating total term of interest in land under Schedule 1A

When calculating the total term of an interest in land under **Schedule 1A**, the duration of a previous interest acquired before commencement must be disregarded (whether the term of the previous interest commences before or after commencement).

38 Benefit test

When applying **section 16A** after commencement, **section 16A(1A)(a)** applies in the same way regardless of whether the counterfactual relates to the existing state of affairs before, on, or after commencement.

39 Investor test

New **section 29A(3) and (4)** (investor test applications where no change since investor test last met) does not apply to a person until the person has met the investor test under new **section 18A** (which, to avoid doubt, may be after an application made under new **section 29A(1)**).

40 Existing regulations saved

Regulations that are made under an old provision, and in force immediately before commencement, continue in force until revoked as if made under the new Act.

40A Fees and charges

(1) New section 61(1)(e) applies to enable fees and charges to be prescribed that meet any shortfall in cost recovery for any of the preceding 4 financial years even if 1 or more of the preceding 4 financial years occurs before commencement.

(2) The Minister must commence the first review under **section 61(4)** before 30 June 2023.

41 Existing exemptions saved

Exemptions that are granted under an old provision, and in force immediately before commencement, continue in force until revoked as if made under the new Act.

41A Exactly 25% ownership or control interests and consents

(1) This clause applies if—

(a) an overseas person or associate has an exactly 25% ownership or control interest immediately before commencement; and

(b) consent was granted to the overseas person or associate to acquire that interest; and

(c) the amendments made by the Overseas Investment (Urgent Measures) Amendment Act 2020 did not apply to the consent (for example, because it was granted before 16 June 2020).

(2) The person is treated as if their existing ownership or control interest limit is 50% for the purpose of **sections 12(2) and 82(3)** provided that the person or associate continues to have an exactly 25% ownership or control interest immediately before the increase referred to in the relevant provision.

42 Overseas investment fishing provisions

This Part applies to matters under sections 56 to 58B of the Fisheries Act 1996 in the same way as it applies to similar matters under the rest of this Act.

Part 6
Provisions relating to Legislation Act 2019

43 Application of this Part

(1) This Part, other than **clause 46**, applies until the main commencement date (as defined in clause 2 of Schedule 1 of the Legislation Act 2019).

(2) If this Part comes into force on or after the main commencement date, **clause 46** has effect when this Part comes into force; otherwise **clause 46** has no effect.

44 Exemption under section 20

An exemption made under **section 20(1)(b)** must be published—

(a) on an Internet site maintained by, or on behalf of, the regulator; and

(b) in the *Gazette*.

45 Orders in Council relating to statutory management

An Order in Council made under section 95, 101, or 106 is not a legislative instrument or a disallowable instrument for the purposes of the Legislation Act 2012 and does not have to be presented to the House of Representatives under section 41 of that Act.

46 Amendment of sections 95, 101, and 106

Sections 95(5), 101(5), and 106(4) (as inserted by the **Secondary Legislation Act 2021**) are repealed.

Schedule 2
New Schedule 1A inserted in Overseas Investment Act 2005

s 23

Schedule 1A
Total term of interest in land

s 12

1 Calculation of total term of interest in land

(1) The **total term** of an interest in land is the duration of—

(a) either—

(i) the term of the interest acquired; or

(ii) in the case of an interest that is part-way through its current term, the remainder of any current term of the interest as at the time the overseas investment transaction is entered into; and

(b) any rights of renewal of that interest (whether of the grantor or grantee); and

(c) any previous interest that relates to the same or substantially the same land; and

(d) if a previous interest was separated in time by a periodic interest, that periodic interest.

Example

An overseas person was a tenant of a lease of sensitive land for a term of 9 years with no rights of renewal. At the end of that lease, the parties enter into a 2-year extension.

The total term of the interest is 11 years: 2 years' extension plus 9 years under the previous lease. The acquisition of the extension is an overseas investment in sensitive land, and consent is required.

(2) A **previous interest**, in relation to an interest in land, is an estate (other than a freehold estate) or interest in land that—

(a) was held by—

(i) the overseas person or an associate of the overseas person; or

(ii) a person in which the overseas person or their associate (either alone or together with its associates) had a more than 25% ownership or control interest; and

(b) was consecutive in time to the relevant interest or to another previous interest of the relevant interest.

(3) The duration of a previous interest before the overseas person or their associate had a more than 25% ownership or control interest in the person who held that previous interest must be disregarded from the calculation of the total term.

Example

A tenant has a lease of land for a term of 10 years. In year 6 of the lease, an overseas person increases ~~its~~ their ownership interest in the tenant from 15% interest to 30%. At the end of the lease, the tenant enters into a new lease of the same land for a 5-year term.

The total term of the interest is 9 years: 5 years in the new lease plus 4 years of the previous lease from the point that the overseas person invested in the tenant. The acquisition of the new lease is not an overseas investment in sensitive land.

(4) In this clause,—

consecutive includes separated by—

(a) any periodic interest; or

(b) a period of less than 4 months

periodic interest means any interest in land that—

(a) is terminable at will, whether by the grantor or the grantee; and

(b) offers no certainty of term of 4 months or more (including rights of renewal, whether of the grantor or the grantee).

Example

An overseas person was a tenant under a lease of sensitive land for 5 years. The tenant held over after the lease expired. No consent is required for that periodic lease (*see* clause 2 of Schedule 3).

After a year of holding over, the tenant enters into a new lease with the landlord for another 5 years.

The new lease is the acquisition of an interest in land. The total term of the interest is 11 years: 5 years in the new lease, 1 year of holding over, and 5 years under the previous lease. The acquisition of the new lease is an overseas investment in sensitive land, and consent is required.

Schedule 3
New Schedule 5 inserted in Overseas Investment Act 2005

s 26

Schedule 5
Fresh or seawater areas

s 25D

Contents

Part 1
Application and interpretation

1 Which owners of land this schedule applies to

(1) This schedule gives the Crown the right to acquire fresh or seawater ~~areas~~ interests from the owners of the fresh or seawater interests ~~that relate to those areas~~.

(2) In this schedule, ~~an~~ **owner**, in relation to a fresh or seawater interest, means—

Overseas person and their associate

(a) the relevant overseas person that acquires the fresh or seawater interest as a result of an overseas investment in sensitive land; and

(b) any owner (as defined in section 5(1) of the Land Transfer Act 2017) of the fresh or seawater interest that is an associate of the relevant overseas person; and

Other owners, but only if a notice is registered or covenant is entered into

(c) if a water areas acquisition notice has been registered under **clause 12 or 18** in relation to the fresh or seawater interest, any other owner (as defined in section 5(1) of the Land Transfer Act 2017) of that fresh or seawater interest; and

(d) if a water areas acquisition notice has been provided under **clause 19**, any owner (as defined in section 5(1) of the Land Transfer Act 2017) ~~that enters into a water areas covenant in accordance with **clause 19**~~ of that fresh or seawater interest that has notice of the Crown's right to acquire the fresh or seawater interest.

2 Interpretation

In this schedule,—

fresh or seawater area means any part of the relevant land that is marine or coastal area, the bed of a lake, or the bed of a river, and a reference to a **fresh or seawater area** is a reference to the whole or any part of that area

fresh or seawater interest means the freehold estate or pastoral lease interest that relates to the fresh or seawater area

owner has the meaning set out in **clause 1(2)**

pastoral lease has the meaning set out in section 2 of the Crown Pastoral Land Act 1998

prescribed manner means the manner prescribed in regulations under **clause 21**

record of title has the meaning set out in section 5(1) of the Land Transfer Act 2017

Registrar means the Registrar-General of Land

water areas acquisition notice means ~~the~~ a notice under **clause 12 or 19**

water areas covenant means a covenant between an owner and the Crown under ~~**clause 19**~~**clause 19A** on the terms and in the form prescribed by regulations.

Part 2
Crown acquisition of fresh or seawater ~~area~~ interest

3 Crown must acquire fresh or seawater ~~area~~ interest

(1) The Crown must acquire, and the owner must allow the Crown to acquire, the fresh or seawater ~~area~~ interest in accordance with this schedule.

(2) The Crown must acquire the fresh or seawater ~~area~~ interest before the water areas acquisition notice expires (*see* **clause 14**).

(3) However, the Crown need not acquire the fresh or seawater ~~area~~ interest if the owner is notified of a decision not to acquire in accordance with **clause 4 or 5**.

4 Acquisition not required if amenity and conservation value outweighed

(1) The Crown may decide not to acquire a fresh or seawater ~~area~~ interest (in whole or in part) if the Minister for Land Information is not satisfied that the amenity and conservation value of the fresh or seawater area outweighs the potential risks, liability, and costs of acquisition and ownership of the area.

(2) A decision not to acquire a fresh or seawater ~~area~~ interest must be notified in writing to the owner of the fresh or seawater interest.

(3) The notice must be given no later than the date prescribed in regulations.

5 Acquisition not required if Minister not satisfied with amount of compensation to be paid

(1) The Crown may decide not to acquire a fresh or seawater ~~area~~ interest (in whole or in part) if the Minister for Land Information is not satisfied with—

(a) the amount of compensation to be paid under **clauses 9 and 10**; or

(b) if the compensation payable under **clause 10** has not yet been assessed, the amount of compensation to be paid under **clause 9** and likely to be paid under **clause 10**.

(2) A decision not to acquire a fresh or seawater ~~area~~ interest must be notified in writing to the owner of the fresh or seawater interest.

(3) The notice must be given no later than the date prescribed in regulations.

6 Terms of acquisition

(1) Unless the Crown and the owner of a fresh or seawater interest agree otherwise, the terms of the acquisition are those prescribed in regulations.

(2) The Crown and the owner may agree amendments, additions, and deletions to the terms of the acquisition.

(3) An agreement under **subclause (2)**, when recorded in an instrument registered under **clause 13**, runs with and binds the land that is subject to the water areas acquisition notice.

7 Manner of acquisition

(1) The Minister for Land Information may, by notice in the *Gazette*, vest a fresh or seawater area in the Crown.

(2) Before making a notice under **subclause (1)**, the Minister for Land Information must—

(a) ensure that any requirements or steps prescribed in regulations are met or taken; and

(b) agree or determine the amount of compensation to be paid to the owner in accordance with **clause 9**.

~~(3) If a notice is made under **subclause (1)**,—~~

~~(a) any part of the fresh or seawater area that is the bed of a lake or a river vests in the Crown under the Land Act 1948; and~~

~~(b) any part of the fresh or seawater area that is marine and coastal area vests in the Crown (and, to avoid doubt, becomes part of the common marine and coastal area under the Marine and Coastal Area (Takutai Moana) Act 2011).~~

(3) If a notice is made under **subclause (1)**,—

(a) any part of the fresh or seawater area that is marine and coastal area vests in the Crown (and, to avoid doubt, becomes part of the common marine and coastal area under the Marine and Coastal Area (Takutai Moana) Act 2011); and

(b) any other part of the fresh or seawater area that is the bed of a lake or a river vests in the Crown as Crown land under the Land Act 1948.

(4) The Minister for Land Information must ~~give~~ lodge the notice ~~to~~ with the Registrar in the prescribed manner.

(5) On receipt of a notice, the Registrar must—

(a) register the notice:

(b) cancel any relevant water areas acquisition notice:

(c) comply with **clause 16** (if applicable).

8 Effect of acquisition on estates or interests in land

(1) A fresh or seawater area is vested in the Crown free from all estates or interests in land including any encumbrances (without the necessity of any instrument of release or discharge or otherwise), except any estate or interest in land prescribed in regulations or specified in the notice under **clause 7** as an interest to which the vesting does not apply.

~~(2) However, if the owner's fresh or seawater interest is not recorded in a record of title immediately prior to the vesting, **subsection (1)** only applies to the extent that there is no better claim to the fresh or seawater area than the claim that the owner had immediately prior to the vesting.~~

9 Compensation payable to owner of fresh or seawater interest

(1) An owner of a fresh or seawater interest is entitled to claim compensation from the Crown.

(2) The compensation may be claimed and must be determined in the manner prescribed by regulations.

(3) However, the Crown and the owner may agree a different amount or procedure for determining an amount of compensation.

(4) An agreement under **subclause (3)**, when recorded in an instrument registered under **clause 13**, runs with and binds the land that is subject to the water areas acquisition notice.

10 Compensation payable for other registered interests in land

(1) Any other registered owner of an estate or interest in land that is extinguished because of the operation of **clause 8** is entitled to claim compensation from the Crown.

~~(2) The compensation may be claimed and must be determined in the manner provided by the Public Works Act 1981 (with any necessary modifications) as if the person's estate or interest was land taken for a public work.~~

(2) The compensation may be claimed and must be determined in the manner prescribed by regulations.

(2A) However, the Crown and the person may agree a different amount or procedure for determining an amount of compensation.

(3) However, a person is not entitled to compensation if either or both of the following apply:

(a) the water areas acquisition notice has priority over the instrument relating to the person's estate or interest (*see* section 35 of the Land Transfer Act 2017):

(b) the person consented to the registration of the water areas acquisition notice.

(4) The consent of a person under **subclause (3)** binds—

(a) that person; and

(b) any person who subsequently derives their estate or interest from that person.

Part 3
Water areas acquisition notice

11 Crown's right is interest in land

The Crown's right to acquire a fresh or seawater area under this schedule is an interest in land within the meaning of section 51 of the Land Transfer Act 2017.

12 Registration of water areas acquisition notice

(1) The Crown's right must be registered by lodging a water areas acquisition notice for registration with the Registrar in the prescribed manner.

(2) The Registrar must register a water areas acquisition notice on receipt of a notice.

(3) Every water areas acquisition notice, when registered, runs with and binds the land that is subject to the water areas acquisition notice.

(4) **Subclause (3)** applies despite anything to the contrary in section 103 of the Land Transfer Act 2017.

13 Variation of water areas acquisition notice

(1) The following may be registered by lodging an instrument varying the water areas acquisition notice with the Registrar in the prescribed manner:

(a) an agreement under **clause 6** (relating to the terms of the acquisition):

(b) an agreement under **clause 9** (relating to the compensation payable to the owner of the fresh or seawater interest):

(c) an extension under **clause 14** (relating to the term of the water areas acquisition notice).

(2) The Registrar must register a variation instrument on receipt of an instrument.

(3) The consent of a registered mortgagee of an estate or interest in the fresh or seawater area must be obtained before registration of the instrument.

(4) The consent of a mortgagee under **subclause (3)** binds—

(a) the mortgagee; and

(b) any person who subsequently derives an interest in the mortgage from the mortgagee.

14 Expiration of water areas acquisition notice

(1) A water areas acquisition notice expires at the end of the term prescribed in regulations.

(2) However, the Crown and the owner may agree an extension (but not a reduction) of the term of a water areas acquisition notice.

(3) An extension under **subclause (2)**, when recorded in an instrument registered under **clause 13**, runs with and binds the land that is subject to the water areas acquisition notice.

~~(4) If an extension is recorded in an instrument registered under **clause 13**, the relevant water areas acquisition notice expires at the end of that extended term.~~

15 Cancellation of water areas acquisition notice

(1) A water areas acquisition notice may be cancelled if—

(a) the Crown gives a notice under **clause 4 or 5**:

(b) the water areas acquisition notice has expired (*see* **clause 14**):

(c) the Minister for Land Information is satisfied that a record of title does not contain any fresh or seawater areas:

(d) any other event specified in regulations occurs.

(2) The cancellation of a water areas acquisition notice may be registered by lodging an instrument cancelling the notice with the Registrar in the prescribed manner.

(3) The Registrar must cancel a water areas acquisition notice on receipt of an instrument.

Part 4
Miscellaneous provisions

16 Cancellation and issue of records of title

(1) If any record of title comprises any fresh or seawater area that is vested under **clause 7** and any adjacent land (the **adjacent land**), the Registrar must, despite anything in the Land Transfer Act 2017,—

(a) cancel the record of title that comprises the fresh or seawater area and the adjacent land; and

(b) issue a record of title in the name of the owner of the adjacent land for the adjacent land; and

(c) note any current registered interest or current registered notification that relates to the adjacent land against that record of title in the order in which it appears on the record of title cancelled under **paragraph (a)**; and

(d) issue a record of title for any current registered notification, or registered estate or interest not extinguished because of the operation of **clause 8**, that relates to the fresh or seawater area that was part of the record of title cancelled under **paragraph (a)**.

(2) The Registrar may require the Minister for Land Information or the owner to deposit any survey plan necessary for the issue of a record of title under **sub-clause (1)**.

17 Acquisition relating to Māori freehold land

If the owner's acquisition of the relevant fresh or seawater interest is confirmed by the Maāori Land Court under Te Ture Whenua Maori Act 1993 (the Maori Land Act 1993), that confirmation includes a confirmation of the Crown's right to acquire the fresh or seawater ~~area~~ interest (and, for the avoidance of doubt, the notice under **clause 7** and the water areas acquisition notice (including any variations to that notice) need not be separately confirmed by the court).

~~**18 Acquisition relating to fresh or seawater interest held off-register: notice on adjacent title**~~

~~(1) This clause applies if a water areas acquisition notice cannot be registered against a record of title relating to a fresh or seawater area (for example, because there is no record of title for the fresh or seawater interest).~~

~~(2) If the owner of the fresh or seawater interest is also the registered owner of a record of title relating to land adjoining the fresh or seawater area (an **adjacent title**), a water areas acquisition notice may instead be registered against the adjacent title.~~

~~**19 Acquisition relating to fresh or seawater interest held off-register: water areas covenant**~~

~~(1) This clause applies if a water areas acquisition notice cannot be registered under **clause 12 or 18** (for example, because there is no record of title for the fresh or seawater interest and no adjacent title).~~

~~(2) The obligation to register a water areas acquisition notice in **clause 12** is an obligation to enter into a water areas covenant in the prescribed manner.~~

~~(3) References in **clauses 3(2) and 14(1) and (2)** to the water areas acquisition notice must be read as if they were a reference to the covenant.~~

~~(4) An agreement under **clause 6 or 9** or an extension under **clause 14** may be recorded in a variation to the water areas covenant.~~

~~(5) If an extension of the term of a water areas covenant is recorded in a variation to the covenant, the relevant covenant expires at the end of that extended term.~~

~~(6) A water areas covenant may be varied or cancelled in the prescribed manner.~~

18 Water areas acquisition notice relating to fresh or seawater interest held off-register: notice on adjacent title

(1) This clause applies if—

(a) a water areas acquisition notice cannot be registered against a record of title relating to a fresh or seawater area (for example, because it is a presumptive interest only or there is no record of title for the fresh or seawater interest for any other reason); and

(b) the owner of the fresh or seawater interest is also the registered owner of a record of title relating to land adjoining the fresh or seawater area (an **adjacent title**).

(2) A water areas acquisition notice may instead be registered against the adjacent title.

(3) Clauses 7, 8, and 10 do not apply in relation to the fresh or seawater interest.

19 Water areas acquisition notice relating to fresh or seawater interest held off-register: owner does not own adjacent title

(1) This clause applies if—

(a) a water areas acquisition notice cannot be registered against a record of title relating to a fresh or seawater area under **clause 12** (for example, because it is a presumptive interest only or there is no record of title for the fresh or seawater interest for any other reason); and

(b) **clause 18(1)(b)** does not apply (that is, the owner of the fresh or seawater interest is not also the registered owner of an adjacent title).

(2) The owner of the fresh or seawater interest must provide a water areas acquisition notice to the Crown in the prescribed manner.

(3) **Clauses 7, 8, 10, 12, 13, 14(3), and 15(2) and (3)** do not apply in relation to the fresh or seawater interest.

19A Acquisition relating to fresh or seawater interest held off-register

(1) This clause applies, in place of **clause 7**, in the circumstances described in **clauses 18(1) and 19(1)**.

(2) The Minister for Land Information may, by requiring the owner to grant a water areas covenant to the Crown, acquire the fresh or seawater interest.

(3) Before requiring the grant of a water areas covenant, the Minister for Land Information must—

(a) ensure that any requirements or steps prescribed in regulations are met or taken; and

(b) agree or determine the amount of compensation to be paid to the owner in accordance with **clause 9**.

(4) If the owner of the fresh or seawater interest is also the registered owner of an adjacent title, a water areas covenant may be registered against the adjacent title.

(5) The Crown only acquires the fresh or seawater interest under this clause to the extent that there is no better claim to the fresh or seawater interest than the claim that the owner had immediately prior to the vesting.

20 Acquisition is not subdivision

Nothing in section 11 or Part 10 of the Resource Management Act 1991 applies to—

(a) any acquisition by the Crown of land as a direct or indirect consequence of the operation of this schedule; or

(b) any matter incidental to, or required for the purpose of, any acquisition of that kind.

21 Regulations regarding acquisition of fresh or seawater areas

(1) For the purposes of this schedule, the Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations for the purposes of this schedule that prescribe any or all of the following:

~~(a) the terms and form of a water areas covenant (for example, a term imposing an obligation on the covenantor to obtain a covenant in the same form from any subsequent owner of the fresh or seawater interest):~~

(a) the terms and form of a water areas acquisition notice:

(b) the date before which a notice under **clause 4 or 5** must be given:

(c) the terms of the acquisition for the purposes of **clause 6**:

(d) processes or steps for the purposes of **clause 7** (for example, requirements to survey the fresh or seawater area or the adjacent land (as defined in **clause 16**)):

(e) interests in land for the purposes of **clause 8**:

(f) the process for claiming and determining compensation payable to an owner of a fresh or seawater interest for the purposes of ~~**clause 9**~~ **clauses 9 and 10**, including—

(i) the manner in which compensation may be claimed and the consequences of failure to claim compensation:

(ii) a procedure for determining compensation:

(g) an event for the purposes of **clause 15**:

(ga) the terms and form of a water areas covenant:

(h) for the purposes of any provision of this schedule that requires a thing to be done in a prescribed manner, the manner in which the thing must be done, including—

(i) by whom, when, where, and how the thing must be done:

(ii) any form that must be used in connection with doing the thing:

(iii) any information or other evidence or documents that must be provided in connection with the thing.

(2) Regulations made under this clause are secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements).

Legislative history

14 May 2020	Introduction (Bill 265–1)
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