

COMMENTS RECEIVED BY THE TREASURY FROM THE TECHNICAL REFERENCE GROUP

This document compiles and summarises the substantive comments received from the Technical Reference Group established to assist with the review of the Overseas Investment Screening Regime. Parts of the comments have been withheld to maintain the effective conduct of public affairs through the free and frank expression of opinions and to protect the privacy of natural persons.

The Group was not commissioned to produce a report or to directly advise Ministers. Individual members provided (to Treasury) initial ideas for consideration in the review, and commented on drafts of the Regulatory Impact Statement/Policy Document which were prepared by Treasury (these documents are separately released).

For ease of use and reference, this document groups and summarises the comments received from the Group over the course of the review. The comments are listed in chronological order and grouped by topic/subject. Where necessary a dashed line is used to separate comments received from different members on the same subject. There has been no attempt to reconcile any inconsistent views between the members.

Initial suggestions received from the Group in response to a request from Treasury for ideas to be considered in the review (received April 2009)

Increases in Control or Ownership:

The requirement for an overseas party which has a 25% or greater ownership or control to obtain further consent on each occasion that it seeks to increase its share of ownership or control is unnecessary. Additional consent should only need to be sought if there is a significant change in the structure of the company acquiring the additional ownership or control rights.

There should be the ability to acquire a limited amount of additional control or ownership without needing to obtain consent. We would suggest that something similar to the creep exception contained in rule 7(e) of the Takeovers Code is adopted.

Business screening

It is unclear how the monetary threshold is to be applied in the context of global transactions where the consideration for the NZ business has not been specifically identified. For example, is it gross assets in the latest financial statements, or a pro rata share of the consideration paid for the total worldwide business being sold?

We query whether the Act should also apply where an overseas person already holds a greater than 25% interest, and then increases its interest. It would have already obtained approval and the test/criteria are the same if it is to acquire 26% or 100%, and on the basis of its initial application it could have obtained approval to acquire 100%.

Dividend Reinvestment Plans: Currently OIO approval is required if an NZ incorporated company is an "overseas person", and one of its shareholders, who is also an overseas person participates in a dividend reinvestment plan, and increases its percentage shareholding, even if the percentage increase is minimal. The solution may be to allow a percentage "creep" each year, for example, 2 – 5%. Under the Takeovers Code, if a person holds more than 50% but less than 90% of the shares the code is not triggered if that person increases by not more than 5% its percentage shareholding in a 12 month period. Alternatively, this issue would be dealt with if consent was only required once an overseas person acquires 25% or more of the shares (as noted above).

Sensitive Land:

The definition of sensitive land does not allow for the proper balance to be achieved between:

- (a) ensuring that assets which all New Zealanders would like to see protected are protected; and

(b) enabling transactions, which have no impact upon the land being acquired or on land adjoining the land being acquired, to proceed without the need for consent, which is the balance the Act should seek to achieve. We see little benefit to New Zealand in an overseas purchaser being required to apply for approval pursuant to the Act for the purchase of an office tower on land which is over 4000m² just because it adjoins a 50m² park. The fact that all reserves (other than drainage and storm water reserves), regardless of their size, location and purpose automatically trigger the sensitive land provisions does not seem to reflect the true intent behind the Act. In addition there is already sufficient legislation in place to protect reserves.

We agree that the area thresholds should be increased and that types of sensitive land are too broad. Wording of some aspects of Schedule 1 is unclear (e.g., Table 1 refers to the area of a "historic place, historic area or wahi tapu area, rather than the land on which a historic place, historic area or wahi tapu area is located).

Foreshore / Seabed: The current definitions mean that an overseas purchaser of a unit in Princes Wharf needs to obtain consent under the OIA. We query whether this is the intended result, given that the Crown owns the seabed underlying Princes Wharf.

Covenants: The Act arguable applies to covenants registered against titles to land. We query whether the Act should be clarified so that covenants are an "exempted interest" to the extent that a covenant is an interest in land. Also, should a caveat be an interest in land?

Benefit to New Zealand: It is difficult to show true benefit to New Zealand where a trade player or private equity purchaser is acquiring a business and wants to run the business in the same way.

Land Areas: There needs to be certainty as to how the land area which is the subject of a potential application is measured. Where the land in question contains a multi storied building, only the area of the underlying land should be measured. The floor plates of each floor of the building should not be added together for the purposes of measuring the total land area.

Substantial and Identifiable Benefit:

The interpretation of "substantial and identifiable benefit" (Section 16 (1) (e) (iii)) has become unduly restrictive and is likely to result in many applications that involve more than 5 hectares of non-urban land being declined.

This is a particular issue for business acquisitions, lifestyle block acquisitions or acquisitions of passive investments (e.g. forestry) where the intention is to continue to use the land for the same purposes as it has been used by the vendor. It is often not possible to bring substantial and identifiable benefits to these categories of acquisitions. If a New Zealand entity cannot acquire or is not interested in acquiring an interest in the land then there is no apparent detriment to the status quo of the land being maintained but by a different owner (even an overseas owner). The transactions noted above could be treated along the same lines as farm land transactions so there is a requirement to first offer the asset to New Zealanders for a period of time (unless an exemption similar to a Section 20 exemption is obtained). Following that period, if no New Zealander purchases the asset it can then be offered to overseas parties without the need for the overseas party to have to satisfy the substantial and identifiable benefit test.

The substantial and identifiable benefit test should still apply where an overseas party intends to acquire more than 5 hectares of non-urban land and to use the land for a purpose which is different from the purpose for which the vendor used the land.

Definition of Associate:

The definition of "Associate" in Section 8 is too wide. It should be redefined so that it captures only those people acting as an agent or a nominee for an overseas party on a particular transaction. The definition should not be so wide as to capture anyone who has had dealings with an overseas party.

The "associate" definition is difficult to apply to a number of ordinary commercial transactions (for example, shareholders agreements that contain negative control rights for a minority shareholder who is an overseas person).

Protection for Listed Companies:

Provisions should be included in the Act to provide protection for New Zealand companies listed on the New Zealand Stock Exchange, which through a third party acquisition of its shares becomes an overseas entity after it has entered into an agreement to acquire an interest in significant business assets and/or sensitive land but before the transaction is completed. As the Act is currently drafted the New Zealand company would either have to renegotiate its contracts or apply for retrospective consent and pay the additional fees which come from having to make such applications.

Delegation:

The Overseas Investment Office should have a higher degree of delegated authority. This is needed to ensure that there is transparency in the application and review process and that overseas parties have confidence in the process.

A lot of discretions are vested in the Ministers. A further measure of decision making could be delegated to OIO, to streamline processes.

Purchasing Programmes:

There needs to be greater clarity around purchasing programmes. At the moment it is unclear: how large an area can be covered by the purchasing programme; whether or not you can have a programme to acquire leasehold interests; and what level of information needs to be provided as part of a purchasing programme application. In particular it is not clear which of the provisions of Section 16 and Section 17 need to be covered in the purchasing programme application and which can be covered in the application for the individual sites being acquired pursuant to a purchasing programme.

Habitual Investor:

Provisions should be made so as to allow overseas parties who habitually make investments of a similar nature to be exempt from the requirement to provide corporate background information with each and every application. Such information could be provided once and then provided again only if there is a change in the company's corporate position. This should be reviewed in conjunction with a review of the purchasing programme regime.

There may be benefit in formal recognition of "approved status" being given to applicants that had previously obtained approval. For example, if an overseas person had been given "approved status", then if it proposed to make another acquisition, the information it would be required to supply may be limited to information about the specific investment and updating certain information already filed e.g. names of directors.

Special Land:

There should be the ability to apply for an exemption from the offer back provisions which apply for 'special land'. Regulation 15 which permits the Crown to waive its rights in relation to special land, still contemplates that the special land will be offered to the Crown. Such an exemption should be along the same lines as the exemption from the farm land provisions contained in Section 20. Listed companies which are the subject of a takeover bid should be exempt from the special land offer back provisions on the basis that they are not in a position to control whether or not they become an overseas entity.

Problems are occurring because of delays in decision-making by the Crown, including delays in deciding if it will acquire the special land and in the situation where the Crown has decided to acquire the special land, delays in the Crown completing the acquisition. This creates issues for the owner especially if it is looking to on-sell some of the land and/or charge the land to raise finance.

Offshore Transactions:

Offshore transactions between overseas parties, where the New Zealand component of the transaction is below a certain threshold (which should be set at a de minimus level) should either be exempt from the provisions of the Act

or subject to a more lenient regime than other transactions. Such transactions should also be processed as a priority so that where the New Zealand portion of a transaction is minor New Zealand is not seen to be holding up the transaction.

An overseas transaction involving two large listed companies [can trigger] a requirement for New Zealand consent. For example, if there is a takeover of an Australian company which happens to have a New Zealand operation, then OIO consent requirements can be triggered. There is a valid point, however, that exempting all offshore transactions could create the possibility of avoidance structures - you would just need to incorporate an Australian holding company in order to sell New Zealand assets. For this reason we would suggest that the exemption only apply to transactions involving securities which are listed on a recognised stock exchange. To borrow from the NZX Listing Rules, a "recognised stock exchange" could be defined as a member of the World Federation of Exchanges and other exchanges approved by the OIO.

We query whether the Act should apply to "international transactions". The Act needs to be clarified so either it only applies to New Zealand transactions, or if it is to apply to international transactions, it makes it clear that it only applies when the value of the NZ assets/consideration exceeded the thresholds.

If the regime applies to international transactions, there needs to be some de minimus threshold. We note in Australia they structure it by providing an exemption for "takeovers of offshore companies whose Australian subsidiaries or gross assets exceed \$200m and represent less than 50% of the global assets". In addition, our earlier comments on "business screening" and the application of the OIO regime to nominal increases in shareholding, also apply. At present, a small change in offshore shareholding in a parent company with a New Zealand subsidiary could result in the need to obtain OIO approval.

Ordinary Course of Business:

The phrase "lending in the ordinary course of business" in regulation 33(1)(h)(ii) should have its true meaning such that if a party decides to lend money then it is lending money in the ordinary course of business. At present the phrase is interpreted so that it only applies to banks and other financial institutions.

Intra Group Transfers:

All intra group transfers should be exempt from the provisions of the Act. Currently Regulation 33 only allows for some limited exemptions. There is no apparent detriment to allowing all intra group transactions to be exempt.

We think the breadth of this exemption needs to widen. For example, the exemption should apply when interests are held by "associated persons".

Transparency:

There needs to be greater transparency in how the OIO is interpreting the various sections of the Act.

Regulation 28(h):

The concept of "New Zealand control of strategically important infrastructure" seems at odds with the need for overseas capital to give us the quality and quantity of infrastructure we want. The repeal of this regulation would be a symbolic gesture towards overseas investors, who have struggled to understand its import.

\$100 million threshold for significant business assets:

In section 13(1)(a)(ii) of the Act, a consent threshold is where "the value of the assets...exceeds \$100 million". The way the section is drafted, this could capture the worldwide assets of a corporate group, even if the New Zealand assets are only a very small part - e.g. only \$1 million in value. Although it is commonly interpreted only to refer to New Zealand assets, it would be desirable to clarify this, by changing "assets" to "New Zealand assets".

The "net benefit test" for overseas investment

the investment must be shown to have a net benefit to New Zealand. This differs from at least one relevant Australian test which is that the investor must demonstrate no net detriment to Australia. Adopting such a test would also avoid the current "ratchet" problem, where each time an asset is purchased by a subsequent overseas owner, the net benefit must be shown to have increased from the last overseas owner.

Other comments

Business Plan: We query the effectiveness of the requirement to have business plans. A large number of purchasers do not know prior to the acquisition how they propose to deal with the assets in a way that allows for the preparation of a meaningful business plan. We would prefer an approach where consent must be given unless the OIO / Ministers can show that the transaction is not in the "national interest" (similar to the Australian position). For example, if the assets were already owned by an overseas person and were transferred to another overseas person, it would be hard to say that the transaction would not be in the national interest. This would reduce the compliance costs for overseas investors.

Other requirements: We question the need to provide a copy of passports. The certificates that had to be signed in relation to criminal activity are unclear. In some instances, it is not clear who should in fact sign the application. It may help if a simple template was prepared that applicants had to complete. We think there should be far more focus on the rationale for the transaction and the benefits and other things

Form of application: At the moment there is an extremely lengthy and detailed guidance note as to how to prepare an application. It would be much easier if there was an application form provided, with a more "tick the box" approach as they have in Australia.

Process and timing: Effectively the process takes far too long from an overseas investment perspective. The answer here is to simplify the regime or resource the OIO further.

Vendor burden: This refers to the demands on vendors (often New Zealand companies) in collating and providing extensive information on their business, assets, land etc and assisting in follow up questions from the OIO when overseas investment is being sought. In effect it is a significant barrier to the raising of overseas capital by New Zealand businesses.

Offer back: Query why the requirement to offer back foreshore seabed etc is present in the overseas investment regime.

Farmland exemption: The current farmland exemption applies only to takeovers. We think this is too narrow. It should extend to such things as amalgamations and schemes of arrangement.

Statutory Corporate Trustees: As statutory corporate trustees have no beneficial interest in the assets but are currently caught, we consider that there should be a class exemption for them.

Anti-avoidance (section 43): We question the need for this requirement and also its application. If a transaction is structured in a way to ensure that it is not caught by the regime, does that constitute avoidance? For example, if a lease is entered into for just less than 3 years is that avoiding the Act? Or if an overseas person acquires 24.9% of the shares in a company and enters into a shareholders agreement to protect its minority shareholding position, is that potentially avoidance?

Underwriting Exemption: We suggest that the underwriting exemption should not only apply to new issues, but that it should also apply to share sell downs by an existing shareholder. Many of these are also underwritten and the same issues apply as apply to new issues of shares.

Comments received June 2009 relating to the first Overseas Investment Review policy document (document 30)

Purpose Statement (relates to section 3 of document 30)

I agree with the proposed option (option 3) and the reasons put forward in support of it.

We agree that the existing Purpose Statement requires amendment. In our view, it has in some cases led to a restrictive interpretation of certain provisions of the Overseas Investment Act 2005 (the **Act**).

We have considered the four options proposed in the Policy Document together with the Purpose Statements of Canada and Australia. We think there is real merit in following the approach taken by Australia for the following reasons:

(a) The statement set out in paragraph 3.17 of the Policy Document makes it clear that the Government's policy is to encourage foreign investment consistent with community interests.

(b) Paragraph 3.18 recognises that there are community concerns about foreign ownership, and that one of the objectives of the Government's policy is to balance the community concerns against the economic benefits that arise from foreign investment.

We think consideration should be given to a similar Purpose Statement to that adopted by Australia.

Definition of an Overseas Person (relates to section 4 of document 30)

In the introduction, it would be helpful to identify whether the concern the OIA is trying to address is perceptions that foreigners would use their control of sensitive New Zealand assets in a way detrimental to the long term well being of New Zealand, or to simply address an aversion to foreigners profiting from (and denying us the opportunity to profit from) our New Zealand sensitive assets, or both. The former leads to criteria based on control and the later leads to criteria based on ownership.

In 4.1 (third dot point), the test referred to is 25% or more of "any class of A's securities" in the multi-class context; applying the 25% threshold to each class is too low a threshold. It should relate only to voting securities, if you are concerned solely with control (see the Takeovers Code for a suitable definition) or an enterprise value, economic interest test if you are concerned with ownership. Are drafting issues such as this worth mentioning at this stage? if so, you could also clarify whether "meeting" means a director meeting or shareholders meeting, or both. I prefer shareholders meeting (as one foreign director out of four would not seem enough to warrant requiring consent).

Paragraph 4.31 observes that a change from an ownership or control test to one based solely on control might result in evasion of the OIA regime by parties transferring the overseas held controlling interest to a New Zealander, and then reacquiring it once the investment has been made. It seems to me that such action would be caught under the Act anyway, either because the New Zealand transferee would become an Associate of the overseas person or because the overseas person would need to apply for consent to reacquire the controlling interest. You may wish to amend this paragraph.

Questioning the suitability of a control or ownership test is a good question. If, as I suspect, both are needed to address the dual purposes I identified earlier, personally I prefer focusing on a general control test, with additional deemed "control" in defined ownership circumstances. I also prefer the Australian ownership thresholds with the 15% being increased to 25% (despite their additional complexity) because adverse perceptions of NZ's regime are less likely if we have "no less favourable" thresholds than Australia. Incidentally, you should include reference to associates' holdings in paragraph 4.38 to 4.40 as they are a key part of the workability of the test.

I could see that there could be even higher thresholds for NZ listed companies given the NZSX Listing Rules and the Takeovers Code protections, and the tendency for listed investments to be of a portfolio nature.

The issue of whether the thresholds extend to "ownership and control" or just "control" merits closer consideration. The Act currently refers to 25% of any class of securities. This means that an overseas person who acquires more than 25% of, say, a class of non-voting preference shares will cause the company in which the shares are held to become an overseas person.

A threshold which is based on control of voting rights which can be exercised in a general meeting of shareholders would seem more appropriate. It is difficult to see any reason why a control test would not fully meet the policy requirements of the legislation. This is on the basis that the legislation does not seek to screen investment in New Zealand from the perspective of the ability to repatriate wealth from New Zealand, which is doubtless the case as there are many ways other than through ownership that wealth can be transferred outside New Zealand.

If this approach is adopted, it will be appropriate to exclude, for the purpose of determining voting control, votes that can only be cast in certain limited circumstances (for example where class rights are being affected).

Paragraph 4.34 of the Policy Document makes no mention of the control threshold tests applying in the context of corporate takeovers. This might be seen as something of an omission. As you are no doubt aware the New Zealand Takeovers Code regulates takeover transactions at a threshold of 20% of voting rights in the target company. I believe it would be desirable to at least address this as a possible threshold, to deal in advance with any suggestion it should be adopted.

We agree with the comment made in paragraph 4.31 of the Policy Document. We do not think that on balance there is a major concern with having both a "control" and "ownership" test. We think there is probably some merit in having a "control" test provided that this can be defined appropriately. We think more work needs to be undertaken to ensure that the removal of the "ownership" test does not create potential anti avoidance concerns where "ownership" would otherwise cover the relevant situation.

Thresholds for determining an overseas person (relates to section 4 of document 30)

In my view, the 25%/40% proposal makes sense.

The paper does not deal with the important issue of whether the overseas person should have flexibility to increase its holding without obtaining further consent. The lack of flexibility in this regard under the current Act is a source of frustration for clients, particularly where an urgent capital injection is required. It is difficult to see the rationale for being overly restrictive in this regard. In my experience, the OIO understandably has a low level of interest in the actual proposed shareholding level of the applicant at the time of the initial application, other than to note that the proposed level is above the 25% threshold and that consent is therefore required. Is there really any difference between say a 50% holding and a 100% holding in terms of the factors that the OIO should consider? Should applicants be able to move their holding level around within say a 5 year time period from the date of the original consent?

The Policy Document does not currently address the issue of association, when considering the application of the "individual holder" 25% threshold. As an anti-avoidance measure, I would suggest that breach of the 25% threshold be determined by reference to the holdings of an overseas person and its associates (as defined in section 8(1) of the Overseas Investment Act 2005 (Act)).

At paragraphs 4.41 and 4.44 reference is made to practical difficulties in extending the 25/40 threshold to ownership structures such as partnerships and trusts. I do not believe there are significant difficulties in this.

I do not see difficulties with applying the dual threshold test to, or developing "residence" type exemptions for, other entities. Mostly it would be a case of separating out the existing tests into two parts, instead of having "person or persons" together, there would be separate tests for each of them. However, whether or not you adopt a single or dual test, I think each other entity class needs to be considered specifically to set thresholds which are suitable for it. The threshold for limited partnerships, for example, could be that the general partner is foreign controlled under the dual threshold test, but investors could have a higher threshold as they will be non controlling portfolio investments, likewise unit trusts and superannuation schemes are generally non controlling portfolio investments and should have a higher threshold for their unitholder thresholds – maybe 25% (individual) and 50% (collective). As mentioned above, I don't think the threshold should be met if the manager of a unit trust or superannuation scheme is an overseas person, given their roles are to manage the assets or supervise the management of the assets as a fiduciary of the investors.

We note that directors of New Zealand listed companies will need to establish whether or not the company is an overseas person on the basis of the two tier threshold. This is similar to the existing position in that listed companies need to monitor their shareholder register to ensure that less than 25% of the shares are held by overseas persons. However, we think a dual threshold will add a level of complexity and compliance cost for listed companies. Listed companies will need to determine whether any single overseas shareholders holding less than 25% are associates of any other overseas shareholders (at present listed companies do not need to consider association between individual overseas shareholders). For example, if there are two overseas shareholders that each hold 15% of the shares in a New Zealand listed company (30% in total), then:

(a) Under the existing 25% test, the listed company is an overseas person – the directors of the listed company can determine this from the share register;

(b) Under the proposed two tier threshold test, the listed company is not *prima facie* an overseas person, but may be an overseas person if the two shareholders are "associates", or if either shareholder is an associate of a New Zealand registered shareholder such that the overseas person has 25% control.

The directors of listed companies do not at present have any ability to determine whether overseas shareholders are associates of other overseas shareholders. Directors of listed companies will be concerned with this given the potential penalties for breaching the Act if they undertake acquisitions of sensitive land / significant business assets

at a time when the listed company was actually an overseas person.
One option to deal with this issue could be to give listed companies the power to obtain information from shareholders to establish whether or not shareholders are associated. This could involve a regime similar to the Securities Markets Act 1988 (sections 35, 35A and 35B) which gives listed companies the power to require a person to disclose information to determine whether a shareholder is a substantial security holder. A listed company could equally be given the power to require shareholders to disclose information about any association with other shareholders in the company. This would increase compliance costs for a listed company.

Policy changes by regulation (relates to section five of document 30)

I agree with the proposed approach of removing sections 17(2)(g) and 61(1)(d) from the Act. In my view, the discipline of changes of this nature having to be made through the normal full parliamentary process would be received positively by the business community.

We agree with the preferred option of removing sections 17(2)(g) and 61(1)(d) of the Act. It would seem to make sense to also move the Regulation 28 factors into the Act.

Foreigner to foreigner transactions

It may be worthwhile considering a limitation on or exemption from the application of the Act where there is an international merger of foreign companies or acquisition of a foreign owned company by another, if the vendor has previously been approved in respect of the NZ assets. In those circumstances, presumably we can take it that foreign ownership has been approved. It's just the character, acumen and intentions of the purchaser that would be relevant. The narrower considerations could lead to a more streamlined application process. Options include requiring notification only of the change of ownership, details of the new owners, a confirmation of continued intentions and the adoption of any previous undertakings to the OIO if the provider is to exit. It would be desirable that these sorts of transactions are processed quickly as delay particularly in these situations can impact adversely on NZ's reputation as a good jurisdiction in which to do business.

International transactions

We note that the current Policy Document does not address the application of the Act to international transactions. This may be part of the next draft of the Policy Document. As we have previously mentioned, it is often difficult for an overseas person acquiring New Zealand sensitive assets from another overseas person to show any additional benefit over and above that already provided by the existing overseas owner. International transactions need to be considered further (particularly overseas takeovers). In addition, we query whether an overseas person should have to show an added benefit to New Zealand, or whether it is sufficient for that person to show its acquisition will not be detrimental to New Zealand (i.e., if they can confirm to the OIO that they will operate the assets in a similar way to the previous overseas owner, that would meet the criteria). This would be in addition to satisfying the criteria for a significant business assets transaction (e.g., business acumen, financial commitment and good character).

Exemptions

Corporate trustees – professional corporate trustee companies are caught by the “ownership” rather than the “control” limb of the definition of overseas person. We think such corporate trustees should be entitled to rely on a class exemption on the grounds that they hold assets solely as a trustee.

New Zealand controlled / owned overseas persons – the current regime defines “overseas persons” to include entities incorporated outside New Zealand, even where New Zealand entities / persons own the overseas entity. We think that there should be a class exemption for entities incorporated outside New Zealand that are wholly owned / controlled by New Zealand entities / persons.

Associates

Because of the scope of the definition of “associates”, we are of the view that there should be fast track process to obtain “binding rulings” from the Overseas Investment Office to determine whether or not people are “associates”. We think this would be a useful process to deal with the following situations:

- (a) *Shareholder agreements* – if an overseas person owns 20% of a New Zealand company and New Zealand person owns 80% of a New Zealand company, are they associates if they enter into a shareholders agreement which contains negative control rights for the overseas shareholder? If so, does this make the New Zealand company an overseas person?
- (b) *Closely held companies* – if a New Zealand person holds 24% in a closely held company and the remaining

shares are held by overseas persons, would the New Zealand shareholder require consent if it was to purchase shares from the other shareholders to increase its holding to 30%? Based on the current definition of "associate", the New Zealand person is probably an associate of the overseas shareholders if they have been in business and operated the company together.

Other

It will be very important that foreign portfolio investment assets (such as international equities) held by New Zealand unit trusts and other entities and all debt securities are not regarded as assets or New Zealand expenditure or property in NZ for the sensitive business test as that would cause NZ unit trusts and superannuation schemes with foreign investors and large international investment portfolios to need to apply for consents, simply because they are carrying on business in NZ.

One other issue we wish to raise is the possibility of introducing a "creep" type provision that would allow an overseas person that holds 25% or more of the shares in a company to acquire further shares in the company during a certain period without needing to obtain further consent. We see no policy reason for requiring an overseas person to be screened when they have already obtained consent and only wish to acquire a further small percentage of shares within say a 12 month period after consent was granted. In the alternative, we think there may be merit in allowing overseas persons the freedom to acquire up to 100% if they have previously obtained consent at the 25% threshold. We query what the rationale is for requiring an overseas person to obtain a further consent if it acquires an increased level of control (whether it be a 1% increase or 75% increase).

Although it is perhaps outside the scope of the paper, there is also a wider issue of whether the OIO should be part of LINZ or part of Treasury.

Comments received December 2009 on the Regulatory Impact Statement (document 18)

Definition of an Overseas Person (relates to section 3 in document 18)

I had hoped we could follow the Australian 15%/40% model. The paper raises concerns about the dual approach but doesn't discuss in detail how the Australians make this approach work. I think the exemption approach will likely be difficult in practice as there will be a lot of judgement involved which translates to uncertainty for investors.

Exemptions (relates to section 3 in document 18)

Expanding the availability of exemptions for New Zealand-linked investors would be sensible. In this regard specific provision for limited partnerships would be logical given the limited partnership structure has been introduced by statute to specifically facilitate passive offshore investment by off shore people.

Sensitive land (relates to section 6 in document 18)

The proposal to narrow the scope to remove land adjoining local parks and reserves and commercial/industrial sites in non urban areas will make a real difference to applicants by removing a number of applications for consent in respect of land that in reality has no significance or sensitivity at all.

Special land (relates to section 7 in document 18)

Removing river bed or the offer back process all together will save time and cost. In a recent application that I prepared for a client the special land component added considerable time and cost to the client as a fair degree of effort had to be invested to sufficiently identify the indicative boundaries of the special land involved.

Increases in existing levels of ownership/control (relates to section 12 in document 18)

Removing the need for an existing overseas person which has obtained the consent to obtain fresh consent each time the extent of its interest increases is absolutely endorsed. As your examples highlight, a number of significant corporations are put through pointless and expensive application processes to give effect to what are more often than not business as usual transactions in relation to assets that have already been consented.

Compliance cost summary

In relation to your specific queries, the compliance cost summary on page 19 is about right although we note that the timeframes put forward by the OIO for the decision process is actually 50 working days, not 50 calendar days. It is difficult to give a percentage estimate of time and cost that might be saved through the changes. Suffice to say that reducing the criteria of the current benefit test would reduce time and cost in preparing applications and presumably time and cost for the OIO in processing them. The indicative 8 to 10% change in compliance cost may well be close to the mark.

General

The paper refers to low levels of uncertainty for investors in a number of the tables. It needs to be remembered that uncertainty of timeframe has been a big issue for investors. The fact that an outcome is predictable still creates an issue if the timeframe in which that outcome will be achieved is highly variable.

Comments received September 2010 on the final Regulatory Impact Statement (document 4)

Overall objectives

Query whether you should also be considering the impact of the proposals on New Zealand vendors of land. Many of our New Zealand clients have a vested interest in being able to sell their land to overseas people with capital. To add another hurdle / factor into the benefit to New Zealand test may be a concern for a number of New Zealand vendors. This is also a real issue when advising a New Zealand vendor because we are often asked to advise whether an overseas purchaser would be likely to obtain consent – the certainty around this is often a key factor in deciding whether or not to enter into a sale agreement, and “escape clauses” aren’t always the answer. To create more uncertainty for investors will also create more uncertainty for New Zealand vendors.

Economic interests factor

a wider “economic interests” test is an advance on the specific (limited) factors set out in section 17(2)(a). It would allow a wider range of economic factors to be considered.

Such a test, in place of the “strategically important infrastructure” test in regulation 28(h), would also mandate a more principled approach to investments in infrastructure. The “New Zealand control” aspect of the infrastructure test could be captured by the more general “opportunities for New Zealand oversight” test proposed.

The tests should be expressed more objectively, so that aspects of a transaction going either way can be considered, and they are not just perceived as additional hurdles. The tests could be made even more objective and general, viz.:

- (a) whether the overseas investment will give rise to economic benefits or detriments to New Zealand;
- (b) the degree to which there are opportunities for New Zealanders to to participate in the overseas investment or the management or oversight of the overseas investment.

On the other hand I see a risk, from a constitutional law and reputational perspective, in seeking to implement such a major engraving on section 17 by subordinate legislation.

Other concerns may be:

(i) the impression that further use of the section 17(2)(g) power may create with existing and potential overseas investors, and their overseas advisors (who, in my experience, can have a persuasive impact on the decision to seek to invest in New Zealand).

(ii) that such a wide and unfocussed test - at the level of overall economic benefit - would allow investments to be turned down more readily. This might discourage prospective applicants (i.e. they might view New Zealand as an even harder target for their investment dollars). These concerns could be mitigated by use of the policy statement in an appropriate way - i.e. “It is important to assess whether overall economic benefits outweigh any other aspects which might be taken to be negative. New Zealand control or oversight should not be seen as a requirement but rather a factor mitigating concerns arising out of other listed factors.”

Option 1 (a general economic interests factor) is in my view desirable as it would enable the Minister to consider a broader range of economic factors, rather than just jobs, technology, export receipts, investment for development, processing power and control of infrastructure; some of which would have limited relevance to the key questions associated with foreign ownership of particular land types including farming. A general economic considerations factor will assist applicants, as well as adding flexibility to the Minister’s decision, by enabling the applicant to draw in other positive economic factors for consideration. Without this change, these other economic factors are excluded. The downside is that the greater generality will have a detrimental effect on certainty for applicants. This downside could be addressed by greater articulation of the relevant economic factors for particular types of acquisitions in guidance notes or directions.

The new factor appears to be a narrower “national interest” test but limited to economic aspects. I believe that this will simply be viewed by overseas investors as another hurdle in an already uncertain regime. However, I expect it will address the “public confidence” issue, and further enhance “Ministerial flexibility”.

The proposed factor raises a number of concerns, as drafted:

- Is the factor is actually required to provide Ministers with increased Ministerial flexibility and public confidence. In my view, the regime as it currently exists already provides the OIO and Ministers with sufficient discretion/power to decline sensitive applications if they choose to do so.
- The factor will end up applying to all sensitive land applications. Investors will be unclear about how far they need to go to show that their investment safeguards or promotes New Zealand’s economic interests etc. For example, does this require an applicant to obtain an independent report from an economist to show how their transaction will improve GDP or how it otherwise affects New Zealand’s economic interests? Will this be similar to the requirements for an independent report from a consultant on safeguarding flora and fauna? If an independent report is required, this will add significant time and cost to the application process. I expect what will happen in practise (as with the other factors) is that in less sensitive applications the factor can be dealt with by way of a simple paragraph in the application, but in more complex/sensitive applications the OIO will require an independent report from an economist or financial adviser. Unfortunately this makes it difficult for lawyers to advise their clients on the level of evidence required to be included in the application. Some applications appear to be approved with very little benefit to New Zealand, while other applications need to meet a high hurdle to show “benefit to New Zealand”.

Mitigating Factor

New Zealand oversight and control should be a very relevant mitigating factor. It mitigates the concern that New Zealand community and social constraints are not imposed on foreign investors who reside overseas. However many of the proposals are not an absolute protection on foreign influence and so do not remove control concerns entirely.

Option 3 (removing the strategic asset factor): Removing the strategic asset factor would assist in comforting some foreign investors I believe. But then the knowledge that strategic assets could be excluded by other means would mitigate any real benefit.

Directive Letter or Government Policy Statement

Generally it is helpful to get greater guidance in either of these forms. However it depends on how targeted and specific these are as to how helpful they may be.