Chair
CABINET

OVERSEAS INVESTMENTS ACT (STRATEGIC ASSETS)

Proposal

1. I seek Cabinet's agreement to the making of a new regulation under the Overseas Investments Act 2005 via an Order in Council which allows Ministers in considering applications in relation to sensitive land to take into account the benefits of maintaining local control in relation to important strategic infrastructure, such as Auckland International Airport (AIAL).

Background

2. As you know, we have been watching developments with the Canadian Pension Plan Investment Board's offer to AIAL shareholders over the past weeks. If the offer is successful, the effect will be that New Zealand's main gateway to the world will effectively have passed into foreign control.

3. A large number of countries have some form of foreign ownership restrictions on some classes of assets because they consider it in their national interest to do so. Assets thought sensitive vary from country to country but restrictions on land ownership are the most common. Media companies, aviation and infrastructure monopolies are also common targets. New Zealand has specific restrictions on ownership of some individual companies, for example Telecom and Air New Zealand, and a generic Overseas Investment regime.

4. For over a decade, Australia has had restrictions on foreign ownership of its airports. Although the Australian situation differs in an important respect (the Federal Government owns airport land which the airport companies lease), the Australian Airports Act 1996 includes limits on foreign ownership ensuring majority Australian shareholding and that a majority of directors of an airport-operator company must be Australian citizens and/or residents.

5. I believe the time has come for us to strengthen the scrutiny of proposals which may alter the ownership of strategic infrastructure assets such as Auckland Airport. As the current offer to AIAL shareholders closes on 13 March, it is important that the government move quickly. Consequently, I propose that a regulation be issued via Order in Council today.

Options considered

6. In considering ways of protecting New Zealand's strategically important infrastructure on sensitive land, such as Auckland Airport, I considered three options:

   a. Legislation. A Bill would need to be introduced and passed this week which would specifically restrict foreign ownership in AIAL;

   b. An amendment to the Overseas Investments Regulations to bolster factors Ministers may take into account when considering the Canadian Pension Plan's application and any subsequent application for clearance under the Overseas Investments Act;

   c. Issuing a policy or strategy statement which would need to be considered in assessing the CPPIB application.

7. I have concerns that the legislative path would have possible implications for our international obligations. New Zealand has entered into a number of multilateral and bilateral agreements that restrict the ability of the Government to impose new restrictions on foreign investments in New Zealand. The multilateral agreements are the OECD Codes of Capital Liberalisation, and the WTO General Agreement on the Trade in Services (GATS). The bilateral agreements, such as the NZ-Singapore CEP and the NZ-Thailand FTA require screening of foreign investments above certain thresholds, but do not bind in the criteria that are used within that screening. Legislating for restrictions on foreign shareholding levels in AIAL would violate the obligations that New Zealand has under these agreements as such a move is more restrictive than the present screening of such foreign investments.

8. In choosing which of the Overseas Investments Act options to use, I consider that the best approach is option b (an additional regulation).

9. The regulations will provide clear guidance to the Ministers on the factors to take into account when considering the CPPIB's application and any subsequent application, and I recommend that this option be adopted.

Economic and International Implications

10. There is a risk that foreign investors and rating agencies will view New Zealand's country risk as having increased, with consequential risk premium built into our sovereign risk rating. This is because the government's decision to intervene may create a perception of regulatory uncertainty, which would lead to foreign investors being less likely to invest in New Zealand companies. This risk may be mitigated by emphasising the very narrow range of assets which would be covered by the new criteria.

Consultation

11. Treasury and the PCO were consulted on this proposal. Given the extreme commercial sensitivity no other consultation has occurred.

12. Treasury is concerned that the economic costs of the proposed intervention could substantially outweigh any economic benefits they can identify. In Treasury's view the costs extend beyond the specific intervention because the process leading to the regulatory change has not been transparent and the proposal has adverse implications for property rights. The overall effect is to make New Zealand appear a less desirable place to invest. This conclusion applies regardless of the approach taken. If, however, the government is committed to intervene, Treasury recommends a regulatory option as this is less likely to place New Zealand in breach of its WTO obligations and FTA undertakings. As I have indicated in paragraph 10 these concerns can be mitigated. Much of Treasury's concern is based on the belief that overseas owners interests will align with those of New Zealand interests, a view which I regard as open to question.

Financial Implications

13. There are no financial implications for the Government in this proposal.

Human Rights

14. A Bill of Rights report will be provided prior to the introduction of the regulation.

Legislative Implications

15. A regulation will be made by Order in Council on Monday 3 March 2008. .

Regulatory Impact and Business Compliance Cost Statement

16. There has been insufficient time to prepare this statement.

Gender Implications

17. None.

Disability Perspective

18. None.

Publicity

19. If Cabinet agrees with this proposal, I intend announcing the Government's decision tonight after the markets on both sides of the Tasman have closed for trading.

Recommendations

20. It is recommended that Cabinet:

    a. Agree to make by Order in Council a new regulation under s61 of the Overseas Investments Act 2005 which will enable Ministers, in assessing an application, to consider whether an investment is likely to assist New Zealand to maintain local control of strategically important infrastructure on sensitive land;

    b. Invite the Minister of Finance to have the regulation prepared for submission to the Executive Council on Monday 3 March

    c. Note that the Minister of Finance will announce this decision after the Australian share market has closed for trading on Monday 3 March

Hon Dr Michael Cullen
Minister of Finance

Date: 3 March 2008