16 October 2018

Reform of the Overseas Investment Act 2005: Terms of Reference

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

Purpose

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

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

Context and rationale

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

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

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

- the application process is too complex and that both the criteria for consent and the conditions imposed after receiving consent are more onerous than necessary;
- the level of discretion in the Act both creates unnecessary uncertainty for investors and for decision makers and can result in significant delays in decision making;

- the Act could do more to attract investment to productive sectors of the economy; and

- the Act is not sufficiently clear on the grounds for which a prospective investment in sensitive New Zealand assets would be declined.

Negative perceptions may reduce New Zealand's attractiveness as a foreign investment destination, with potential costs for economic strength and resilience. Given that there was nearly $5 billion in new foreign investment between July 2016 and June 2017 and that processing times for consent applications have considerably reduced over the last 18 months, these risks do not appear to have materialised. However, they are worth monitoring and addressing in light of both: the significant stock of foreign investment in New Zealand ($103.9 billion as at 30 June 2017, including investment in property and other real estate)[1] and the fact that New Zealand receives proportionately lower levels of foreign direct investment than many other small advanced economies.[2]

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

- to screen investments in significant business assets with monopoly characteristics (for example, some types of infrastructure);

- to consider the importance of New Zealand companies with international distribution systems to New Zealand's broader participation in global value chains; or

- for Ministers to examine factors identified in the Act and regulations, but deemed not relevant to the particular foreign investment by the applicant.

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

- the need to restrict investments that may be unproductive, unbeneficial to New Zealand, or otherwise inconsistent with New Zealand's national interest; and

- the view held by some stakeholders that New Zealanders should retain ownership and control of sensitive domestic assets and the Act's purpose "that it is a privilege for overseas persons to own or control New Zealand assets".

Objectives for the review

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

[1] Stats NZ: Global New Zealand International trade, investment, and travel profile Year ended 30 June 2017

[2] Landfall strategy group: Foreign direct investment in small economies (August 2018)

a) provides a clear pathway for consent for investment that supports a productive, inclusive and sustainable economy and creates opportunities for regions and businesses to grow and connect internationally;

b) provides appropriate protection against risks to New Zealand associated with the overseas ownership of sensitive assets, with particular consideration of whether New Zealand's national interest is sufficiently protected; and

c) imposes compliance and administrative costs (as distinct from fees and other direct costs of applying for consent) that are proportionate to the risks associated with overseas investments.

Further, any proposed changes to the regime should:

- improve predictability and transparency around the process and decision making (by Ministers, and where relevant, the Overseas Investment Office) wherever possible; and

- ensure that discretionary powers appropriately balance the need to both create certainty for investors while reserving the ability to decline investments that are not beneficial to New Zealand.

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

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

Scope

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

1. the definition of 'overseas persons' as it relates to body corporates;

2. the factors underpinning the existing generic "benefits to New Zealand" test (including whether water extraction, Māori cultural values as they relate to the physical and historical characteristics of the relevant sensitive land and tax residency should be among the positive and negative factors considered when assessing applications made under that test);

3. the extent that any 'negative benefits' of a prospective investment can be considered under the "benefits to New Zealand" test and, if necessary, whether there needs to be additional legislative guidance on how 'benefits' and 'negative benefits' should be balanced under that test;

4. the investor test, with particular regard to whether the requirements are appropriate and provide sufficient certainty to applicants;

5. existing levels of Ministerial discretion, with particular regard to whether the appropriate balance is struck between:

    5.1. creating certainty for applicants; and

    5.2. allowing for a more holistic and adequate consideration of the implications of foreign direct investment on New Zealand's national interest (that is, consideration of the need for a 'national interest' test similar to those in place in Australia and Canada, and under consideration in the United Kingdom);

6. the treatment of land adjoining other types of sensitive land (that is, land as described in Table 2 in Schedule 1 of the Act); and

7. any minor technical amendments required to resolve unintended consequences associated with the implementation of the Phase One reforms.

Out of scope

This is not a 'first principles' review of the Act – whether the Act is required is out of scope.

Further, this review will not reconsider whether the sale of sensitive New Zealand assets, irrespective of ownership, to overseas persons is covered by the Act.

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

Constraints

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

The review will only develop policies consistent with New Zealand's international obligations.

Process

Treasury will lead the review in two broad, concurrent, workstreams:

1. **a stronger OIA**, which will consider whether the Act adequately protects New Zealand's national interest;and

2. **a better and more efficient OIA**, under which all other issues within the scope of the review will be considered.

In conducting the review, Treasury will work collaboratively with other agencies and external stakeholders as appropriate. Key government agencies including the Overseas Investment Office, the Ministry of Foreign Affairs and Trade, the Ministry for Business, Innovation and Employment, New Zealand Trade and Enterprise, Te Puni Kōkiri, the Ministry for the Environment, the Office for Crown-Māori Partnership and the

Department of Prime Minister and Cabinet. In addition to consultation within Government, Treasury will consult with users of the regime, Māori and iwi groups, and the general public throughout the review.

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