The Treasury

Overseas Investment Act Submissions Information Release

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24 May 2019

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SUBMISSION ON REFORM OF THE OVERSEAS INVESTMENT ACT 2005

Background

1 The Retirement Villages Association of New Zealand (the *RVA*) is a voluntary industry association that represents the interests of registered retirement village owners, developers and managers throughout New Zealand. The RVA's members include listed companies, private companies, and charitable and community-based organisations, which operate 370 villages with 31,000 units, and which are home to around 40,000 older New Zealanders. This is around 13% of the country's +75 population.

2 The RVA welcomes the opportunity to comment on Treasury's consultation document on reform of the Overseas Investment Act 2005 (the *Act*) dated April 2019 (the *Consultation Paper*).

3 We set out below our comments on a number of aspects of the Act identified in the Consultation Paper, and the RVA's suggested solutions that it believes will achieve appropriate reforms to the current law. The RVA has focused on the areas it sees as those in need of greatest reform, even though there are other areas covered in the Consultation Paper where reform is also likely to be warranted.

THE RVA'S SUBMISSION IN BRIEF

The RVA supports the following options/solutions to issues under the Act, as part of Treasury's proposed reform of the Act.

(i) *Definition of 'overseas person'*: Issuers with a primary listing of their equity securities on the NZX Main Board should only be treated as an overseas person if at least one overseas person (alone or together with associates) has a shareholding of 25% or more in the issuer. A proviso to this revised definition, applying defined criteria, may be appropriate where an issuer is in substance controlled by overseas persons. ***See paragraphs 5 to 23.***

(ii) *Passive portfolio investors*: A class exemption should be granted for passive portfolio investors that are beneficially owned and controlled by New Zealanders (with ownership and control for this purpose being at least 51% of the entity's funds being held on behalf of New Zealanders). This would recognise both that New Zealanders' funds are being invested through these portfolio investors, and the passive nature of these investments. ***See paragraphs 24 to 27.***

(iii) *Investor test*: The investor test should be significantly narrowed from its current scope, by pursuing Option 2 in the Consultation Paper. This would simplify the good character

element of the investor test, by focusing attention and resources on substantive matters of character that go to the heart of the suitability of the investor, rather than peripheral matters. ***See paragraphs 28 to 31.***

(iv) *Impact of investments*: The RVA supports in principle the adoption of a 'national interest' test (Option 4 in the Consultation Paper) in place of the current benefit to New Zealand test applied under the Act. However, a national interest test would need to be designed with clear parameters so that it does not operate as an open-ended and carte blanche discretion that reduces transaction certainty. The development of retirement villages and aged care developments should generally be treated as being firmly in the national interest. ***See paragraphs 33 to 38.***

(v) *Sensitive adjoining land*: Much of the current sensitive adjoining land should be removed from the scope of the Act, through pursuing Option 1 in the Consultation Paper. Investments in certain land adjoining highly sensitive land (such as foreshore or lakebeds, or land of great significance to Maori) would continue to be screened. ***See paragraphs 39 to 41.***

(vi) *Standing consents*: The standing consent regime and the bright line test for the development of long term accommodation facilities (e.g. retirement villages and aged care facilities), which are only applicable to the acquisition of land that is sensitive land solely because it is residential land, should be extended to all sensitive land. There are no genuine policy grounds for the present distinction. ***See paragraphs 42 to 46.***

4 The above is a brief overview of the RVA's submission. More detailed discussion of each of the issues, including the current problems and reasons for the solutions proposed, are set out below.

DETAILED COMMENTS

Definition of 'overseas person'

5 The RVA's members include a number of listed retirement village operators, notably Arvida, Metlifecare, Oceania, Ryman and Summerset. We expect this will increase over time in light of the likely growth of the sector in coming years as demand for retirement village and aged care facilities further intensifies.

6 The RVA is pleased to note Treasury's recognition that the current definition of 'overseas person' in the Act is unsuitable for listed New Zealand issuers. It results in many listed issuers being treated as overseas persons under the Act despite being New Zealand companies in a true sense, including being headquartered in New Zealand, having a majority of their boards and senior management based in New Zealand, and having a predominantly New Zealand based workforce.

7 The current definition of 'overseas person' does not reflect the nature of overseas investment in listed New Zealand issuers. In particular it does not recognise that:

7.1 the majority of overseas investment in listed New Zealand issuers is passive investment by offshore fund managers;

7.2 shareholdings held by overseas persons that together result in a New Zealand issuer being an overseas person under the Act do not necessarily mean the New Zealand issuer is controlled by overseas persons – the individual shareholdings are too small

and there is no arrangement between the overseas persons that aggregates the rights attached to the shares; and

7.3 portfolio investors in listed New Zealand issuers (such as KiwiSaver funds) are often investing New Zealanders' funds, but are counted as overseas persons because its manager may be owned by an Australian bank for instance – see the section on *Portfolio Investors* below.

8 The existing definition imposes a significant regulatory burden on listed retirement village operators, despite being companies that are clearly in New Zealand hands. In addition to the lost time and delays in completing transactions due to progressing consent applications under the Act, each application can cost in excess of $100,000 in advisory costs and fees.

9 In a retirement village and aged care setting this experience is particularly suboptimal, given the benefits of these companies' operations to New Zealand, in terms of the development of critical accommodation and healthcare infrastructure for older New Zealanders, their success in freeing up residential housing for New Zealanders, and the ongoing care and other specialist services provided to their residents including hospital level care and dementia accommodation and care that the State would otherwise have to provide. See the section on *Impact of investments* below for more details.

10 The RVA commends the exploration of alternative definitions for an overseas person in a listed setting. We broadly support the submission by the Listed Companies Association (the *LCA*) on this aspect of the Consultation Paper, and the solutions put forward by the LCA.

11 The RVA submits that, for an issuer with a primary listing of its equity securities on the NZX Main Board, the issuer should be treated as an overseas person only if at least one overseas person (alone or together with associates) has a shareholding of 25% or more in the issuer.

12 The RVA acknowledges there may be circumstances where an NZX-listed issuer could be overseas-controlled despite not meeting the above proposed definition of overseas person. To avoid this scenario, the above definition could be subject to a proviso (as promoted by the LCA) allowing the OIO or responsible Ministers to treat an NZX-listed issuer as an overseas person where, in accordance with established publicly-available guidelines, it is in substance being controlled by overseas persons.

13 This proposed new definition reflects that, for the type of passive overseas investment typically seen in listed New Zealand issuers, investors do not have the objective of acquiring, and do not have, any level of control over the issuer. These shareholders generally seek no dialogue with the board or management of listed entities, nor any representation on the board.

14 Funds with small shareholdings (as is usually the case) would need to work in concert to have any ability to influence a listed entity's affairs. The possibility of this occurring is virtually non-existent because of the geographic spread, the lack of contact between competing funds, and the absence for any need for such influence reflecting the purpose of the shareholding. In the case of 'tracker' funds (or exchange tracked funds / ETFs), there is often not even a conscious decision made on whether to invest in the listed entity or to acquire further shares or sell shares.

15 In contrast, an acquisition of a holding of 25% or more in a listed issuer by an overseas person (and any associates) is illustrative of an objective of seeking control of that issuer,

and is consistent with the concept of control under the Takeovers Code and the threshold at which special resolutions of the issuer may be blocked.

16 Treasury recognised this difference in its 2009 review of the overseas investment screening regime, in stating the following:

> There is also a difference in the ability of one overseas investor with 25% of the voting rights of a company to exert control and 25 overseas investors who each control 1% of the voting rights. The 25 individuals must coordinate when making their voting decisions in order to exert the same degree of influence that the single owner has.

17 The RVA supports the LCA's proposed alternative option of combining Options 1 and 2 in the Consultation Paper, if the option outlined above is not acceptable. However, we believe the option outlined above is demonstrably more effective than any alternative and it is the RVA's strong preference that the preferred amendment outlined above (rather than combining Options 1 and 2) be adopted.

18 A combination of Options 1 and 2 would mean that, for an issuer with a primary listing of its equity securities on the NZX Main Board, the issuer would be treated as an overseas person only if:

18.1 more than 49% of the equity securities of the issuer are held by overseas persons; and

18.2 substantial product holdings of equity securities in the issuer cumulatively total 25% or more.

19 The RVA considers the options proposed in the Consultation Paper would continue to leave issuers with the existing challenges they face in reliably determining the beneficial shareholdings at any point in time.

20 While a combination of Options 1 and 2 would be a considerable improvement on the current confusing position, issuers would still face a complexity issue (in terms of genuinely determining who holds the beneficial interest in their shares) and a temporal issue (in that their share registers are ever-changing). For example, tracker funds (which form part of the overseas passive holdings in New Zealand listed issuers) change their tracking positions frequently, often hourly.

21 This means that any report obtained by an issuer on its overseas shareholdings is both (i) likely to be flawed given the identity of beneficial owners of shares (to the extent these can even be identified behind nominees and custodians) are based on residential addresses rather than citizenship, and (ii) almost certainly out of date by the time it is received.

22 Retaining a definition of 'overseas person' based on a defined aggregate overseas shareholding percentage is also too blunt in the RVA's view, as it does not account for the difference in the nature of the investments, between passive overseas holdings (the common type of investment in NZ listed issuers) and those occasions where an overseas person is endeavouring to control a New Zealand listed issuer. It also perpetuates the problems with the current definition of overseas person in a listed context.

23 The RVA is also supportive of an exemption regime being available (Option 4 in the Consultation Paper). This should include clear publicly-available guidelines on when an exemption from the consent requirements of the Act could be obtained by a body

corporate that can demonstrate it is clearly a New Zealand company despite having a level of overseas ownership of its shares.

Portfolio investors

24 The RVA supports Treasury's recognition of the problem under the current Act where portfolio investors that are genuinely passive are often treated as 'overseas persons' because their managers may be overseas persons. These portfolio investors are commonly investing funds on behalf of individuals that are predominantly or exclusively New Zealanders. KiwiSaver funds administered by the large Australian-owned banks in New Zealand are a classic example of this type of passive portfolio investor.

25 This current treatment:

25.1 in many instances results in a New Zealand entity being treated as an overseas person under the Act, even though it would not be if New Zealanders' funds invested through the portfolio investor had been invested directly in the entity; and

25.2 as with the definition of 'overseas person' discussed above, fails to recognise the passive nature of the investments made where no control or degree of influence is sought by the portfolio investors.

26 The RVA submits that a class exemption be granted for portfolio investors that are beneficially owned and controlled by New Zealanders (with ownership and control for this purpose being at least 51% of the entity's funds being held on behalf of New Zealanders).

27 We consider this addresses the problem identified by Treasury in respect of passive portfolio investors acting for or on behalf of individuals that are predominantly New Zealanders, while ensuring funds that are intended to benefit overseas persons to a greater extent than New Zealanders remain overseas persons for this purpose.

Investor test

28 The experience of RVA members in applying for consent under the Act is that assessments of the good character of relevant overseas persons (*ROPs*) and individuals with control of those ROPs (*IWCs*) are often unnecessarily broad.

29 The RVA considers that, in assessing the suitability of an overseas person seeking to invest in significant business assets or sensitive land, a distinction should be drawn between:

29.1 matters of character that go to the heart of the suitability of the investor, such as fraud, tax evasion and dishonesty offences committed by a ROP or IWC; and

29.2 peripheral matters or more minor conduct (or allegations of such matters/conduct) that lack egregiousness or have limited or no nexus with the investor's ability to conduct itself and manage its investment in line with New Zealand laws and accepted practices.

30 The RVA submits that the investor test should be significantly narrowed from its current scope, by pursuing Option 2 in the Consultation Paper. This would simplify the good character element of the investor test, by focusing attention and resources on substantive matters of character rather than the peripheral matters suggested in paragraph 29.2.

31 RVA members consider this would lead to a more expedited timeframe for the OIO to screen applications, given their experience is that liaising on these peripheral matters can

prolong the processing timeframe while the applicant liaises with both the OIO and various ROPs/IWCs, for limited or no additional benefit to New Zealand.

32 The RVA also supports the removal of the requirement for New Zealanders identified as ROPs or IWCs to satisfy the investor test, as raised in the Consultation Paper. In their own right these ROPs/IWCs would not require consent under the Act to acquire sensitive land or business assets. As with the investor test generally, the application of this requirement to New Zealand ROPs/IWCs is unnecessarily broad and leads to the deployment of OIO staff and delays in consent application timeframes in a way that does not further the purpose of the Act. We therefore submit that the investor test (in the narrower form outlined above) should apply only to ROPs/IWCs that are overseas persons themselves.

Impact of investments

33 The RVA considers the existing benefit to New Zealand test is problematic and leads to unnecessary complexity and delays in assessing and processing applications under the Act. The application of the existing test to investments relating to the development of retirement villages or aged care facilities (among other impacts):

33.1 increases the compliance cost and uncertainty associated with acquiring land for the purposes of constructing or extending retirement villages or aged care facilities, contrary to the Government's stated intent to incentivise investment in housing;

33.2 restricts the ability to acquire land for retirement villages or aged care facilities, as vendors do not want to sell to persons who have to acquire on a conditional basis subject to obtaining a consent that is not certain and that takes a material period to obtain; and

33.3 imposes additional costs on the developer of the retirement villages or aged care facilities through increased purchase costs demanded by vendors in compensation for delay and increased risk.

34 Our members have also found the counterfactual test difficult to apply, even though they are in the business of developing and/or operating retirement village and aged care facilities which are of considerable importance to New Zealand (as outlined further below). Applying a counterfactual test to investments in retirement village and aged care facilities when New Zealand has great need for additional well-run retirement villages and aged care facilities is of limited relevance.

35 The RVA supports in principle the adoption of a 'national interest' test (Option 4 in the Consultation Paper) in place of the current benefit to New Zealand test applied under the Act. However, a national interest test would need to be designed with clear parameters so that it does not operate as an open-ended and carte blanche discretion that perpetuates existing transaction uncertainty, or reduces transaction certainty further than is, currently experienced.

36 To this end we suggest a national interest test should:

36.1 require the OIO and/or the responsible Ministers to outline with sufficient clarity:

(a) the factors they consider would influence or contravene the national interest (for example, identifying industries or infrastructure considered to be strategically important to New Zealand);

(b) alternatively specify, investments considered to be desirable from a New Zealand perspective (for example, forestry investments that support current Government policy in this area and retirement villages or aged care facilities); and

36.2 include defined timeframes within which the OIO and/or the responsible Ministers would need to consider whether a proposed investment falls outside the national interest and may be declined, to provide greater certainty to investors and vendors alike.

37 We expect retirement village and aged care developments should generally be treated as being firmly in the national interest. One of the purposes of Treasury's review of the Act is supporting overseas investment in productive assets. The development of retirement villages and aged care facilities in New Zealand is a highly productive activity for the benefit of New Zealand for two main reasons.

37.1 Retirement villages and aged care facilities provide essential accommodation and health services to a fast-growing group of vulnerable New Zealanders. These services include hospital level care and specialised care such as for dementia sufferers that would otherwise need to be provided by the State. The current demand for retirement villages and aged care facilities exceeds supply. This demand will increase materially in the coming years, as the growth in the number of New Zealanders aged over 75 intensifies.

37.2 New retirement villages and aged care facilities are an important part of the solution for New Zealand's housing crisis. Land developed for a retirement village and/or aged care facility will be occupied by more people than other types of development on that land. This in turn frees up a large number of residential homes to be occupied by more New Zealanders than the former owners moving to a retirement village and/or aged care facility.

38 The development of retirement villages and aged care facilities is the most effective means of ensuring sensitive land is occupied and used by New Zealanders, in line with the purposes of the Act. A report commissioned by the RVA from PwC found that retirement village land use was up to three times more efficient than a conventional residential development (e.g. the Auckland Unitary Plan's single house zone envisions one dwelling per 600m^2. An average density retirement village in Auckland has one dwelling per 164m^2)[1]

Sensitive adjoining land

39 Our members' experience is that the current scope of sensitive adjoining land under the Act is broader than appropriate, and leads to the incurring of unnecessary compliance costs through additional applications for consent, again for no benefit to New Zealand.

40 For retirement village and aged care operators, this is seen most acutely where additional land is sought for an existing village. The typical scenario is where the main village land has been acquired in compliance with the Act, and the operator wishes to extend the village by acquiring further land adjacent to or nearby the existing village. In that circumstance we consider it suboptimal for both the operator and the OIO for a full consent application to

[1] *Retirement Village Contribution to Housing, Employment and GDP in New Zealand*, PwC March 2018, p. 18.

be required for the additional land for what is an ancillary part of the village, when the requirements of the Act have been met at the time the main village site was acquired.

41 The RVA submits that much of this adjoining land be removed from the scope of the Act, through pursuing Option 1 in the Consultation Paper. Certain land adjoining highly sensitive land (such as foreshore or lakebeds, or land of great significance to Maori) would continue to appropriately be caught under this option. This approach sensibly differentiates between land of high sensitivity and other land (often a park or reserve) that in many cases will be significantly less sensitive to New Zealanders.

Standing consents

42 The Act currently works in a manner that is contrary to the productive value of retirement villages and aged care facilities to New Zealand. Villages are generally developed in areas that constitute 'residential land' for the purposes of the Act. This is because villages provide homes to people from the surrounding community.

43 The extension of the definition of 'sensitive land' in the Act to include residential land has made the development of much-needed villages and facilities more difficult for operators that are caught as overseas persons. Although the Act now includes a regime that allows an overseas person to apply for a standing consent, that standing consent can only apply to the acquisition of land that is sensitive land solely because it is residential land. The same is true of the bright line test for the development of long term accommodation facilities (including retirement villages and aged care facilities).

44 Given Parliament has recognised the importance of the development of retirement villages and aged care facilities through these standing consent and bright line provisions, this recognition should be extended to apply to all sensitive land. The present approach constitutes an arbitrary distinction that will often exclude land that would be ideal for a new village.

45 There are no genuine policy reasons to differentiate land in this manner. For example, the use of each land type for a retirement village or aged care facility makes the land more available for occupation and use by New Zealanders and increases overall housing supply for New Zealanders.

46 In addition, the conditions that apply to both obtaining and maintaining a standing consent for residential land acquisitions could apply to an extended standing consent regime. An extended standing consent regime could include a further condition excluding certain types of land from its application (for instance, high country stations) to guard against outcomes that clearly sit outside the objectives of the regime.

General

47 The RVA is happy to provide any further information that Treasury may require as part of its considerations of reform to the Act.

Yours sincerely

John Collyns
Executive Director