The Treasury

Overseas Investment Act Submissions Information Release

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BUDDLE FINDLAY
NEW ZEALAND LAWYERS

31 MAY 2019

Consultation Document: Reform of the Overseas Investment Act 2005.

Submission from Buddle Findlay

1. This submission is from Buddle Findlay's specialist overseas investment team. Buddle Findlay is one of New Zealand's leading commercial and public law firms with offices in Auckland, Wellington, and Christchurch.

2. Buddle Findlay has extensive experience advising clients on the application of the Overseas Investment Act 2005 (**Act**) to proposed transactions, from private residential purchases to large-scale commercial deals. We have assisted with the preparation and submission of applications for consent to the Overseas Investment Office (**OIO**) over many years, and have a detailed understanding of the criteria in the Act.

3. We are making this submission on our own behalf, and not on behalf of any client.

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5. This submission does not contain any confidential information.

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INTRODUCTION

1. Thank you for the opportunity to make a submission on the matters outlined in the Treasury's Consultation Document: Reform of the Overseas Investment Act 2005 – April 2019 (**Consultation document**).

2. We will first outline our general comments and provide an overview of our submissions, and then largely address the specific questions in the Consultation document, arranged using the same headings used in that document.

3. We are happy to meet with Treasury officials to discuss our submissions if that would be of assistance.

GENERAL COMMENTS AND OVERVIEW OF SUBMISSIONS

4. In our experience, many overseas investors (and local vendors) find New Zealand's current overseas investment regime perplexing in coverage and rigid in application. The application process is costly, getting consent takes a long time, and outcomes can be unpredictable.

Refocussing the regime on what really matters

5. We welcome this review, and in particular the changes proposed to reduce unnecessary complexity and ensuring that compliance costs are appropriate.

6. There is an obvious tension between that stated purpose, and the review's other key purpose – to ensure that overseas investment is consistent with New Zealand's national interests (such as they are described in the Consultation document). As the Consultation document acknowledges, there is an obvious tension between the competing desires to reduce complexity and costs, and give decision-makers more discretion. It is not clear from the Consultation document how that tension will be resolved.

7. There are a number of areas where we think that the Government could achieve "quick wins" that will reduce complexity and cost by refocussing the regime on what really matters. These include changes to remove the need to screen:

   (a) most types of "sensitive adjoining land";

   (b) relatively short-term leasehold interests;

   (c) investments made by "fundamentally New Zealand companies";

   (d) portfolio investors;

(e) small investments that result in the target entity becoming an overseas person, if there is no relevant increase in control rights; and

(f) small incremental investments to increase existing overseas investments in sensitive assets already held.

8. There is no real policy justification for requiring screening of the above types of investments.

The benefit test

9. We would welcome any changes to streamline and simplify the current benefit factors for sensitive land investments. This would help to ensure that there can be a reasonable degree of certainty as to how the law will apply to particular investments at the outset.

10. In relation to the options proposed, it is unclear why no option is directed simply at the risks identified in paragraph 24 of the Consultation document. The Treasury's analysis instead hinges on a before/after analysis referencing the status quo.

11. We are not convinced that the overseas investment regime is the appropriate place to consider topical political issues such as water and tax-related matters.

12. The merits of giving decision-makers more discretion to decline applications for consent on broader "national interest"-type grounds need to be further examined. We submit that the Government should exercise significant caution in considering the adoption of such an approach. Without appropriately defined boundaries, those kinds of changes would substantially increase uncertainty and is likely to have a chilling effect on investment, including investments by New Zealanders concerned by their ability to extract value from their investment. Importantly, such changes would undermine any other changes made to the regime to reduce complexity and costs.

13. Decision-makers must come to terms with the fact that the decisions they make on overseas investment consents, which, while essentially administrative in nature, inevitably have political consequences. Decision-makers may consider that increasing their discretion is an attractive option. However, in practice, increased discretion will correspondingly reduce decision-makers' ability to attribute any unpopular decisions to the legislative framework, and heighten the risk of judicial review proceedings being brought by disaffected parties, or incentivise investors who require a higher risk premium. Such investors may be of lower

quality than more risk-averse investors with a long-term investment horizon.

Improving the screening process

14. We also support any measures that could be introduced to improve the application process, including:

    (a) refining the "good character" test;

    (b) reconsidering the need for the special land regime and the farm land advertising requirements, and if there remains sound policy justifications for retaining them, condensing and clarifying their application; and

    (c) introducing realistic time frames for decisions on consent applications.

Concluding remarks

15. We look forward to hearing further from Treasury as to how it considers the balance between complexity/cost, and flexibility/discretion, should be struck.

RESPONSES TO QUESTIONS

1. Sensitive adjoining land (page 20)

Do you agree that there is a problem? If so, has this document described it accurately? Can you tell us about your experience, including when it happened? If not, do you support the existing arrangements? If so, why?

Investors often find the screening of adjoining land perplexing

16. As the Consultation document states, the screening of Table 2 land was introduced to the overseas investment regime to ensure that transactions are beneficial to the conservation of, or public access to, Table 2 land. However, we are not aware of any examples where access to the adjoining Table 2 land could only be achieved via the subject sensitive land, nor where environmental concerns could not adequately be addressed through the Resource Management Act.

Mismatch between rationale for screening, and consent criteria and conditions

17. There is a substantial mismatch between the rationale for screening Table 2 land, and the criteria by which an overseas investment in Table 2 land is assessed. The criteria include a large range of factors that relate to matters outside the scope of conservation of, or public access to, Table 2 land. If access is a continued rationale for screening this type of land, the current factors involved in the screening of sensitive adjoining land are therefore not fit-for-purpose.

18. The mismatch is exacerbated by the fact that consent conditions may be imposed that relate to matters other than access or environmental concerns, and even matters that are potentially inconsistent with the policy concerns. For example, a condition to

require the introduction of capital for development of the subject land does not necessarily promote access to the sensitive adjoining land, or manage any environmental concerns.

19. A further practical point is that the Consultation document states that the Act "*… provides an opportunity for decision-makers to negotiate conditions on the investment that provide benefits to New Zealand*" (paragraph 67). This statement does not accurately reflect the process. The OIO, and consequently decision-makers, assess investments based on the information put forward by applicants. Conditions are imposed based on (a) the standard conditions for investments of that type, and (b) the aspects of the investment that were considered by the OIO/decision-makers to be important considerations in making the decision to grant consent based on the applicant's information. It is therefore inaccurate to characterise the process as one in which decision-makers/the OIO and applicants "negotiate" benefits and consent conditions.

Screening of all adjoining land is unnecessary

20. Based on the criteria, we submit that screening all Table 2 land is not necessary to manage the risks of overseas investment, and does not support overseas investment in assets.

Other comments

21. Figure 3 in the Consultation document shows that 14% of sensitive land applications were only screened because they involved Table 2 land. However, Figure 3 does not show the number of transactions that did not proceed (and for which a consent application was not made) because investors did not consider that their investment could meet the benefit to New Zealand test, or were otherwise deterred from proceeding by the time and costs of obtaining consent.

Do you have any comment on the potential effects of the options? Are you able to quantify potential effects on compliance costs?

Option 1

22. Option 1 would largely address the problems identified with screening Table 2 land identified above, and is consistent with the Government's objectives. The risks to New Zealanders' wellbeing posed by overseas investments in Table 2 land are minimal or non-existent (including because benefits and consent conditions are not negotiated). It is not clear that the rationale for screening is strong enough to justify the associated costs.

23. We submit that it is appropriate that any environmental effects on adjoining land continue to be regulated by the Resource Management Act. This legislation applies alongside the overseas investment regime in any case.

24. Under Option 1, compliance costs would be reduced. We envisage that sensitive land certificates would be less costly (for a straightforward investment involving a single parcel of land, a certificate can cost upwards of $700 excluding GST and disbursements). Costs associated with seeking consent would also, of course, be avoided.

Option 2

25. Option 2 does not address the problems identified with screening Table 2 land.

26. If such land is to be screened, consideration needs to be given to how the criteria for consent should apply in relation to such land, given the mismatch identified above.

If the section 37 list were removed, should any of the types of land currently captured by it be retained in Table 2? If so, which types and why?

27. No. Please refer to the preceding discussion.

2. Leases of sensitive land that require screening (page 25)

Do you agree that there is a problem? If so, has this document described it accurately? Can you tell us about your experience, including when it happened? If not, do you support the existing arrangements? If so, why?

Discussion should relate to all non-freehold interests in land

28. As a preliminary comment, the options proposed in the Consultation document refer to leases of land. However, it is not just leases of land that are relevant, but all interests in land that are not freehold interests. The discussion on this topic in the Consultation document should refer to interests in land more broadly.

Three-year time frame is too short

29. We agree that requiring the same level of scrutiny for relatively short-term interests in land as for longer-term or freehold interests incentivises investment in longer-term or freehold interests, and disincentivises investment in short-term interests. This is a perverse result because, to the extent that short-term investments are discouraged by the costs of the consent process, benefits from investments in short-term interests are left unrealised.

30. In our experience, short-term (three to ten year) leases are not often, by themselves, the subject of a consent application. This speaks to the problem that shorter term investments are deterred by the current regime.

Do you have any comment on the potential effects of the options? Are you able to quantify potential effects on compliance costs?

Option 1

31. Option 1 addresses the problem identified in the Consultation document to some extent, and would, in our view, incentivise beneficial short-to-medium-term leases.

Option 2

32. However, Option 2 better recognises the low-risk nature of leases for land that are in an urban area or used for commercial, industrial or residential purposes.

General comments on avoidance

33. The Consultation document states that both options may encourage investors to enter into a series of short-term leases for smaller parcels of land instead of freehold interests in order to avoid screening. We do not agree that is problematic as the general anti-avoidance provision in the Act mitigates this risk, and genuine short-term lease interests involve genuine uncertainty as to whether, at the end of the relevant term, the parties will be able to arrive at a new arrangement.

Do you consider that raising the threshold for exemption from screening to leases with terms of 10 years or more is appropriate? If so, why do you consider this the appropriate threshold? If not, what alternative threshold would you support, and why?

34. We anticipate that removing shorter term leases from the regime would encourage beneficial shorter term investments. Otherwise, investors may not bother entering into a short-term lease that would require consent if the costs of consent mean that they cannot be sure of a return on their investment over the short term.

3. Technical issue: periodic leases (page 27)

Do you agree that there is a problem? If so, has this document described it accurately? Can you tell us about your experience, including when it happened? If not, do you support the existing arrangements? If so, why?

35. We agree that periodic leases should not require consent under the overseas investment regime, irrespective of the type of land.

36. The Consultation document states that the problem is that "*[p]eriodic leases are inherently uncertain because they can be terminated at any time… A requirement for consent seems to be a disproportionate response to the potential risks…*". We submit that this does not correctly identify where the problem lies.

37. The starting point is that under the Act as it stands, the acquisition of a periodic leasehold interest in land by an overseas person – which, by definition, provides no certainty of a term of three years or more – does not trigger the need for consent.

38. The actual problem is that the change introduced to Schedule 3 of the Act in the Stage 1 reforms to attempt to clarify that periodic leases of residential land did not trigger the need for consent implied that all periodic leases other than those of residential land trigger the need for consent. In other words, an unintended consequence of adding a "clarification" provision in Schedule 3 in fact decreased clarity relating to periodic leases of other land.

Do you have any comment on the potential effects of the option? Are you able to quantify potential effects on compliance costs?

39. Given the problem as we have articulated it above, the best course would be to remove the relevant provision from Schedule 3, rather than to include a second "clarifying" provision of the nature suggested.

40. We submit that it would only add to the confusion to add a further unnecessary provision to "remove" the requirement for consent for all periodic leases, irrespective of the type of land. That requirement cannot be "removed" when the Act does not apply in the first place.

Do you think the right reform options have been identified? If so, which of the options identified do you prefer and why? If not, what alternative option would you support and why?

41. Please refer to the discussion above. We support removal of the relevant provision from Schedule 3.

4. The definition of overseas person as it applies to bodies corporate (page 31)

Do you agree that there is a problem? If so, has this document described it accurately? Can you tell us about your experience, including when it happened? If not, do you support the existing arrangements? If so, why?

General comments

42. The law should be clear, and should be easily understandable by all to whom it applies. The consequences of not obtaining consent when consent was required, and therefore breaching the Act, are serious (including criminal and civil sanctions). It is, therefore, critical that investors and companies can accurately establish whether or not they require consent to undertake a particular investment at the outset.

43. We agree that it can be particularly difficult for widely held, listed companies and/or proposed investors in those companies to determine when they require consent. We also submit that, as is implicit in the problem definition, the underlying issue is that the Act over-reaches and catches companies that would be generally regarded as New Zealand companies.

Do you have any comment on the potential effects of the options? Are you able to quantify potential effects on compliance costs?

Option 1

44. Option 1 would increase the percentage of overseas ownership required for a domestically incorporated and listed body corporate to qualify as an overseas person, from 25% to 49% (and, as such, could comprise many overseas person shareholders, or only a handful, or even only one). In relation to this option, we have the following comments:

    (a) We infer that this option would involve changes to both the ownership and control limbs of the definition of overseas person, not just ownership. That is, essentially, that the control tests in section 7(2)(c)(ii) and (iii) of the Act would also be amended to replace "25%" with "49%". We have drawn that inference because, on page 33 of the Consultation document, the shaded box which includes a discussion on the decision not to amend the control thresholds does so only with reference to Options 2 and 3.

    (b) This option does not avoid the threshold uncertainty point – ie, investors (and the relevant entity) will still face uncertainty when an entity's share register approaches the 49% threshold, but we envisage that the frequency with which the uncertainty would arise would be lower if Option 1 were implemented.

Option 2

45. Under Option 2, a domestically incorporated and listed body corporate would be an overseas person only if "substantial holdings" (of 5% of more) by overseas persons in classes of securities that confer control rights (eg, relating to board composition) cumulatively total 25%. We have the following comments on Option 2:

    (a) Insofar as it relates to listed entitles, Option 2 has the benefit of providing potential investors with a better ability to identify when the ownership and/or control threshold is crossed, through substantial security holder notices (provided that the information in the notice, itself, is sufficient to identify whether the relevant shareholder is an overseas person).

    (b) The Consultation document states that "*a higher threshold would increase the risk of overseas persons circumventing the regime by relying on associates to obtain positive control*". However, this is a concern wherever the control threshold is set. It would of course be caught by the

associate provisions and/or would constitute an offence. It does not therefore assist the analysis.

Option 3

46. Under Option 3, domestically incorporated and listed bodies corporate would be overseas persons if:

    (a) more than 49% of economic returns flow to overseas persons; and/or

    (b) overseas persons collectively holds substantial holdings in a securities class that confers control rights at a level of 25% or more.

47. The Consultation document uses "and/or" when describing the elements of Option 3. It is unclear whether the intention is that a body corporate is an overseas person if either threshold is met, or that both must be met.

Do you think the right reform options have been identified? If so, which of the options identified do you prefer and why? If not, what alternative option would you support and why?

48. In light of our comments regarding the 25% control threshold, consideration should be given to increasing that threshold. We submit such a change would only marginally reduce the ability to manage the risks of overseas investment but would increase the attractiveness, and simplicity, of making investments in New Zealand that are likely to give rise to benefit. This aligns with the Government objectives outlined in the Terms of Reference.

Have the right requirements been identified for the exemption in Option 4? If not, what requirements, or additional requirements, do you think should be included?

49. In relation to the requirements for Option 4, we have the following comments:

    (a) The track record/compliance requirements suggested (if they are strict requirements) are impracticable and/or are unclear:

        (i) The rationale for a track record requirement in this context is not clear. We are aware that the criterion is used in the context of forestry standing consents, and the OIO has interpreted the requirement for a "strong track record" as a high threshold. We suggest that a track record requirement should not be part of the test for determining whether an entity is fundamentally a New Zealand entity. Putting such entities to the compliance costs associated with multiple consent applications (which could run into the hundreds of thousands of dollars) is not justified. If the concern

with imposing a track record requirement is to ensure that the entities are of "good character", then it would be more effective and efficient to impose a good character requirement.

(ii) The requirement that "any enforcement action under the Act has been *validly* taken against the entity" [our emphasis] is unusual in that it implies that the OIO may enforce the Act "invalidly". Again, we think that the underlying concern could be addressed by requiring an entity to meet a "good character" test. Enforcement action taken by the OIO against the investor would be relevant to character.

(iii) Further clarity is needed regarding it what "enforcement action" includes. For example, it is not clear whether "enforcement action" would include a warning, compliance advice letter, or the imposition of an administrative penalty, each of which are options in the OIO's enforcement toolbox. We suggest that the "enforcement action" contemplated as relevant should be Court action. Otherwise, the requirement may have a perverse incentive of discouraging informal/out-of-court resolutions, and instead put the OIO to the cost of taking a person to Court.

(iv) If a "good character" requirement was introduced into the exemption, the application of it should not exclude any entities that had ever contravened New Zealand law. That would be impracticable and overly rigid, and (in terms of being required to research and disclose any such breaches) would give rise to the same issues as identified with the current "good character" test.

(v) We understand that the criterion about being listed on a New Zealand securities exchange is an example only. We suggest that it is appropriate that the exemption should be available to all New Zealand entities, not just listed entities. This is because the policy problem identified is essentially one of over-reach, in that the Act catches transactions by fundamentally New Zealand entities.

(b) The risks to New Zealand's wellbeing appear to be able to be managed as part of a bespoke exemption process. In

effect, the availability of an exemption will ensure that, despite an entity technically meeting the "overseas person" definition, the substance of whether that entity should be an overseas person can still be addressed through the OIO's screening process.

5. Screening of portfolio investors (page 38)

Do you agree that there is a problem? If so, has this document described it accurately? Can you tell us about your experience, including when it happened? If not, do you support the existing arrangements? If so, why?

Screening of portfolios investors often unnecessary

50. We agree that requiring the screening of minority investments by portfolio investors as described in the Consultation document does not appear necessary to give effect to the purpose of the Act.

51. Imposing consent requirements places costs on these kinds of investors that appear to be disproportionately high. This seems to be contrary to the Government's objective of imposing costs that are proportionate to the risks associated with overseas investments. Such costs may disincentivise investment in New Zealand by entities that may increase liquidity.

Do you have any comment on the potential effects of the options? Are you able to quantify potential effects on compliance costs?

Option 1

52. Option 1 focuses on the internal policy of the portfolio investor. It is not clear that the policy of the investor is intended to be determined objectively or subjectively, but we submit that the application of the Act should be able to be determined by reference to objective criteria – in other words, what the investor does, rather than what its policy says.

Option 2

53. Option 2 provides objective criteria, but it is unclear to us how likely it is that both criteria would be able to be met. For example, it is unclear how likely it would be that, if, say, 60% of the entity's funds are invested on behalf of New Zealanders, the New Zealand investors would, nevertheless, have control rights of 76% (ie, substantially in excess of any economic interest). Therefore, Option 2 may not be effective to address the problems identified.

Option 3

54. Option 3 appears too narrow to adequately address the problem that the Consultation document identifies. The need for portfolio investors to meet New Zealand's funding requirements and financing gap for large infrastructure projects extends beyond New Zealand superannuation funds.

Option 4

55. Option 4 is insufficient on its own to address the problem identified, because obtaining an exemption still includes a compliance

burden. However, for the reasons outlined above in relation to Option 4 for the New Zealand incorporated companies problem, a specific exemption that operates in conjunction with a class exemption would appropriately balance the desire to ensure that acquisitions of sensitive New Zealand assets are screened with potential overreach.

6. Technical issue: "tipping point" for requiring consent (page 42)

Do you agree that there is a problem? If so, has this document described it accurately? Can you tell us about your experience, including when it happened? If not, do you support the existing arrangements? If so, why?

56. We agree that the current "tipping point" for requiring consent is problematic. Imposing consent requirements on overseas persons in respect of investments that give them no control is unnecessary, impractical and does not serve the purpose of the Act. Screening requirements disincentivise investment because the potential returns for small investments are outweighed by significant compliance costs (and uncertainty of success).

57. We agree that the "tipping point" problem also creates the risk of inadvertent breaches of the Act due to the difficulty of determining when a transaction will trigger a requirement for consent, especially for listed entities.

58. A further problem is that section 12(b)(iii) proceeds on the basis of non-associated persons gaining control of sensitive assets. In this context, it is not clear what risks to New Zealand's wellbeing are presented by multiple non-associated overseas persons holding small interests in New Zealand assets. For example, it is not clear that any of the risks in paragraph 24 of the Consultation document arise as a result of small non-associated investments by overseas persons that do not give the investor an ability to individually procure a particular decision by the company.

59. In addition, the rationale for including section 12(b)(iii) in relation to sensitive land investments, when there is no equivalent consent trigger for significant business assets investments, is not clear.

Do you have any comment on the potential effects of the options? Are you able to quantify potential effects on compliance costs?

60. We support any option that wold result in reduced screening requirements for a small increase in an entity's interest in another entity that owns or controls an interest in sensitive land.

Option 1

61. We do not believe that Option 1 would be effective. First, the Act already has general anti-avoidance provisions. Second, it would

be difficult for an overseas investor who wants to comply to robustly determine in advance whether it would be considered to be delaying a transaction in order to allow the target to buy sensitive land (ie, whether the conduct would be viewed as having an avoidance flavour to it).

62. Option 1, therefore, creates the incentive for a diligent overseas investor to either not make the investment at all (which may lead to benefits being foregone), or to make the investment earlier than is optimal, pushing the compliance costs onto the entity in which it is investing (which may have consequential adverse impacts, such as the target entity facing the need to file an OIO application and hope consent is granted within a time frame that enables it to complete a sensitive land acquisition in accordance with pre-existing contractual obligations).

63. In this context, we disagree with the characterisation of Option 1 being "strongly positive" in delivering predicable/transparent and timely outcomes.

64. We also raise the following scenario, as it is not clear what the policy position would be, it is unclear that there would be any avoidance in terms of section 43, and, in any case, it would be difficult to determine in advance whether the conduct would be viewed as having an avoidance flavour.

65. The scenario is as follows: a New Zealander identifies the opportunity to offer investors exposure to sensitive New Zealand assets – for example, a portfolio of real estate. Option 1 would not appear to prevent a New Zealander from taking on the risk of incorporating a company and acquiring a portfolio of residential properties, and then offering, say, five 20% stakes for sale to any investor.

66. The New Zealander is likely to be indifferent as to whether the acquirers of the 20% stakes are New Zealanders or overseas persons and, in this regard, it seems unlikely that any intention to circumvent or defeat the operation of the Act could be found. Under Option 1, however, it is feasible that the company would become an overseas person and own/control a portfolio including sensitive land, yet no consent would have been required at any point.

Option 2 and Option 3

67. Option 2 has the potential to better address the problems that the Consultation document has identified, but it would be difficult to apply. For example, it is not clear how an overseas person would be able to assess whether its acquisition would be "the first such

transaction after the entity become an overseas person". Further, where there are acquisitions of small interests, it will always be difficult to show that the benefit test has been met.

68. We have the same comments for Option 3 as for Option 2, but also note that limiting the application to publicly listed entities reduces the proposed reform's effectiveness as the problems relate to more than just publicly listed entities.

7. Technical issue: incremental investments above a 25% interest (page 45)

Do you agree that there is a problem? If so, has this document described it accurately? Can you tell us about your experience, including when it happened? If not, do you support the existing arrangements? If so, why?

The Act applies too rigidly to incremental investments

69. We agree with the Consultation document's description of the problems with screening requirements for incremental investments that do not cross important thresholds.

Do you have any comment on the potential effects of the options? Are you able to quantify potential effects on compliance costs?

Adopt all options as a package

70. We submit that all of the proposed options should be adopted as a package. Given that each option only addresses part of the problem that the Consultation document identifies, adopting any of the options in isolation would be ineffective at addressing the problems identified with the current law.

Do you think the right reform options have been identified? If so, which of the options identified do you prefer and why? If not, what alternative option would you support and why?

71. Options 1, 2, 3, and 4 should be adopted as a package.

8. Assessing investors' character and capacity (page 51)

Do you agree that there is a problem? If so, has this document described it accurately? Can you tell us about your experience, including when it happened? If not, do you support the existing arrangements? If so, why?

Current compliance burden is significant

72. We generally agree that the current investor test imposes significant compliance costs. In our experience, compliance with the good character requirements can be extremely time-consuming and expensive. This is exacerbated by the need for repeat investors to provide relevant information every time, and the fact that even unproven or untested allegations of wrongdoing must be disclosed to, and taken into account by, decision-makers.

73. The obligation to disclose all matters potentially relevant to good character for individuals that have extensive experience (eg, as a director or senior manager of a large number of substantial global corporates over a long period of time) is particularly onerous.

"Corporate" characters is taken into account already

74. In relation to corporate character, we observe that the corporate character of the applicant is already taken into account. First, the OIO's template table in which applicants must disclose matters potentially relevant to good character requires the provision of that information in relation to both relevant overseas persons (the person making the investment, usually an entity rather than an individual) and individuals with control. In addition, matters connected with entities unrelated to the application, but connected to an IWC through the individual being or having been a director or senior manager (rather than an owner) of that entity are already assessed by the OIO as being potentially relevant to the character of an individual (this approach is a contributing factor to the onerous nature of the test discussed above).

Business acumen and financial commitment requirements are unnecessary

75. In relation to the "business experience and acumen" requirement, we agree that it does not seem to address a material risk and that decision-makers are not necessarily able to judge an investor's capabilities better than the investor themselves.

76. In relation to the "financial commitment" requirement, we agree that the benefits of that criterion are not clear, that applying for consent alone should be sufficient to meet the criterion, and that the criterion is therefore not necessary.

OIO reliance on the ICIJ database

77. The OIO's templates require any potential ICIJ database entries to be addressed. The validity of using the ICIJ database to assess good character is unclear, and does not appear to produce robust outcomes. The ICIJ database disclaimer itself notes that the ICIJ "*… [does] not intend to suggest or imply that any people, companies or other entities included in the ICIJ Offshore Leaks Database have broken the law or otherwise acted improperly*".

78. If the ICIJ itself makes it clear that it is not suggesting or implying that a person or entity has acted illegally or improperly then there is no basis for the OIO to draw such an inference. However, the OIO's template, in effect, encourages an adverse inference to be drawn.

79. In addition, in practical terms, it can be difficult to formulate responses to an ICIJ database entity for an ROP or IWC when the database simply records the existence of that ROP or IWC or other benign information. If the application submits that a mere entry in the ICIJ database, without more, does not adversely reflect on the ROP/IWC's character, the OIO typically responds asking for more detailed submissions. It is difficult to formulate more detailed submissions when there is no actual allegation of wrongdoing. In

short, applicants do not know to what they are being required to respond.

Do you have any comment on the potential effects of the options? Are you able to quantify potential effects on compliance costs?

Option 1

80. Option 1 would still impose a significant compliance burden on investors. The Consultation document does not set out any rationale for retaining the business experience and acumen criterion.

Option 2

81. Option 2 would address concerns with the current test set out in the Consultation document.

Option 3

82. Option 3 would be the clearest test to apply for both investors and the OIO/decision-makers.

Unwinding transactions

83. The Consultation document expresses the view that, if evidence of relevant poor character emerged in future, it could still be used to unwind a consented transaction. It may not be straightforward to unwind a transaction after the fact in all cases, particularly where, for example, one business has acquired another and their operations have been merged. We also note that ongoing good character requirements should be sufficient to manage this risk.

84. We agree that the following changes would also reduce the compliance burden on investors:

(a) imposing a time limit for the criteria (eg, how recently a breach would need to have occurred for it to be relevant);

(b) removing the requirement for New Zealanders identified as ROPs/IWCs to meet the test;

(c) introducing a kind of "standing consent" for the investor test.

What types of allegation relating to potential criminal or civil offences do you think should be included in Option 1, if adopted, and why?

Option 1 – allegations

85. Under Option 1, we anticipate that the requirement for decision-makers to consider "allegations", not just actual findings of wrongdoing, will be too broad in cases where, for example, an ROP or IWC has extensive experience or operations, as this increases the chances that unmeritorious or unproven allegations have been made at some point, particularly if the ROP/IWC has interacted with a litigious jurisdiction.

86. The suggested areas – fraud, dishonesty, corruption, or tax are reasonable – but we submit that they should be accompanied by a reasonable time limit.

87. That said, the removal of the requirement for decision-makers consider "any other matter" would significantly reduce the uncertainty and complexity arising under the current test.

What factors do you think should be included in the bright-line test in Option 3, if adopted, and why?

88. We think that the qualifier on relevant criminal actions, so that the only relevant ones are those punishable by a term of imprisonment, is important. This avoids the scenario where, for example, an IWC has been a director of a company that has breached the Fair Trading Act for something in the nature of a billing error (even if rectified). We are not suggesting that those kinds of matters are not relevant to character assessment, rather that such convictions should not be an automatic barrier to getting consent. That scenario also illustrates the potential usefulness of some kind of residual discretion in appropriate circumstances.

9. Screening the impacts of investment (page 60)

Do you agree that there is a problem? If so, has this document described it accurately? Can you tell us about your experience, including when it happened? If not, do you support the existing arrangements? If so, why?

General comments

89. The Consultation document presents options and compares them with the status quo.

90. However, we submit that the Treasury should consider an option that involves establishing a test that is directed at the risks of overseas investment. Paragraph 24 of the Consultation document includes a high level articulation of what may be considered as risks to New Zealand. More work needs to be done to properly articulate the risks, and then to design a test directed at assessing whether the particular investment gives rise to those risks.

Identification of the problem

91. We agree that aspects of the "benefit to New Zealand" test are unclear and unnecessarily complex. However, from the decision-makers' perspective, it appears that the problem is not so much that they are unable to take a holistic approach, but rather that the current benefit factors do not enable decision-makers to consider all aspects of an investment that they may wish to.

92. The Consultation document claims that there are "gaps" in the test that "may undermine decision-makers' ability to deny consent to investments that are not in New Zealand's national interests". However, the recent Oceana Gold decision illustrates that decision-makers are open to taking a broad and flexible approach to the benefit test.

93. In other words, we are unsure whether the Consultation document accurately sets out the problems with the current test from the decision-makers' perspective.

Government's ability to add factors

94. We agree with the Regulations Review Committee's criticism that the Government's ability to add factors enables the executive branch of Government to make regulations that effectively amend primary legislation made by Parliament. The factors that are considered when screening the impacts of an investment should be contained in the Act, not the Regulations.

95. If factors are able to be rapidly changed, this creates significant uncertainty as to what the factors will be at any one time. This occurred during the assessment of Canada Pension Plan Investment Board's consent application in 2008 to acquire an interest in Auckland International Airport where, overnight, the Government of the day added a new factor to the Regulations so that the decision-makers could take into account whether the investment would assist New Zealand to maintain New Zealand control of strategically important infrastructure on sensitive land. This kind of uncertainty is in stark contrast with the Government's objective of improving the predictability and transparency of the process and decision-making, and ensuring that discretionary powers are appropriately balanced against the need to create certainty for investors.

Problems with the counterfactual test

96. We agree with the Consultation document's outline of the problems with the current counterfactual test after the *Crafar Farms* decision.[1] The test is complex and difficult to apply. Even experienced investors find the test difficult to address. Further, the presumption that the counterfactual should involve an adequately funded alternative New Zealand purchaser is often unrealistic when no New Zealand purchaser has emerged through a competitive sales process.

97. We agree that the test is difficult to apply in cases where the relevant land could have many uses, as this means there may not be an obvious counterfactual. It also disincentivises overseas investors from investing in well-managed assets, such that New Zealand loses out on incremental benefits that could be secured as a result of an investment that would then potentially accrue to a future New Zealand purchaser of the land.

[1] *Tiroa E and Te Hape B Trusts v Chief Executive of Land Information New Zealand* [2012] NZHC 147.

Factors having negative weighting

98. The Consultation document records that there is uncertainty about the extent to which negative effects can be considered when assessing the potential benefits of a consent application. Although explicit references to negative effects are uncommon, the recent Oceana Gold decision exemplifies that decision-makers do apply negative weightings. In that decision, Minister Sage gave negative weight to her view that the acquisition would result in more emissions, and could "encumber New Zealand's transition to a net-zero economy".

Do you have any comment on the potential effects of the options? Are you able to quantify potential effects on compliance costs?

Option 1

99. Option 1 does not address the problem identified by the Consultation document – that decision-makers consider themselves unable to take a holistic approach. However, as discussed, we think that decision-makers currently do assess the positives and negatives of an application already.

100. Adding more factors would increase the complexity and length of applications. It also seems unlikely that all of the factors that Ministers may want to consider in the future will be able to be pre-emptively included in a reform that includes additional factors.

Option 2

101. A simplified benefit to New Zealand test would likely reduce the rigid nature of the application and assessment process.

102. The inclusion of a substantial harm test would increase the political nature of decision-makers' considerations. While this would create uncertainty for investors, we submit that the level of uncertainty is likely to be lower than in the other options provided.

Options 3, 4 and 5

103. Options 3, 4 and 5 would all involve more uncertainty relative to Option 2. We submit that the Government should exercise significant caution in considering adopting a test that allows decision-makers broader discretion to decline consent. Without appropriately defined boundaries, this will substantially increase uncertainty and have a chilling effect on investment. Importantly, it would also undermine any other changes that are made to reduce complexity and costs.

104. Option 3 would offer the most certainty for investors, because it creates a presumption that consent will be granted unless the decision-maker can show that there will be substantial harm – that is, there is a preference for consent, given benefits have been identified.

Option 5

105. Option 5 would only be workable if mandatory notification was also introduced. That would be a significant change.

Counterfactual: Sub-options A to C

106. Sub-option A is most similar to the pre-Crafar Farm position, which offered a reasonable degree of certainty.

107. Sub-option B is most consistent with the modified forestry test, and accordingly there is likely to be a degree of comfort among investors with this test.

108. If Treasury wishes to consider sub-option C further, then it should articulate with more specificity what is meant by "genuine New Zealand interest".

109. Finally, as we mention above, experienced investors find it difficult to address the counterfactual. That is, even with the benefit of expertise/experience in the relevant industry, addressing the counterfactual to the satisfaction of OIO staff (who are not, and could not be expected to be, subject matter experts) is often a fraught process. We therefore submit that the options must reflect that a good degree of uncertainty is a result of requiring analysts to make detailed assessments as to how a particular business will be operated.

Do you agree that the 'substantial and identifiable benefit' threshold for non-urban land over five hectares should be removed from the simplified benefit to New Zealand test in Options 2 and 3? Why/ why not?

110. We would support the removal of that threshold. In conjunction with the required counterfactual assessment, discussed above, and the OIO's "proportionality" gloss (see the OIO's guidance here), the substantial and identifiable benefit test is a major contributor to the uncertainty that investors face when assessing the prospect of obtaining consent. The threshold also naturally means that investments that would bring benefit to New Zealand will still be declined. While in any particular case, the benefit may be relatively small, across many similar investments, the benefits foregone are likely to cumulatively be real and of substance.

10. Water extraction and the Act (page 82)

111. Our overall comment on this part of the Consultation document is that we are not convinced that the overseas investment regime is the appropriate place to consider issues such as water extraction and bottling. There are separate detailed regulatory regimes and regulators that are better placed than the OIO to consider those matters.

11. Tax and the Act (page 85)

112. Our overall comment on this part of the Consultation document is the same as we expressed in relation to water extraction above.

12. Māori cultural values and the Act (page 88)

113. Our overall comment on this part of the Consultation document is the same as we expressed in relation to water extraction above.

13. Special land provisions (page 91)

Do you agree that there is a problem? If so, has this document described it accurately? Can you tell us about your experience, including when it happened? If not, do you support the existing arrangements? If so, why?

114. We agree that the special land provisions are problematic. We share the views expressed in the Consultation document that the special land process is unworkable in situations where an overseas investment involves anything other than an acquisition of a freehold interest in the relevant land.

115. We also agree with the concerns set out in the consultation paper relating to inconsistency, access, responsibility and surveying/valuation.

116. In our experience, the special land process is a perplexing and unwelcome burden for vendors, especially on vendors who have not previously interacted with the regime.

117. Fundamentally, the special land regime is based on a perception that it will provide the Crown with an opportunity to acquire land that is of special significance to New Zealanders, for example, areas of great natural beauty or habitats of native animals, for the enjoyment of New Zealanders. Based on our experience, in the vast majority of cases in which the special land provisions apply, the special land is not of any interest to the Crown or the public. It is often a small piece of land-locked land and falls into the "special land" category only in the most technical way – for example, a remote portion of a stream that only just comes within the definition of "river" in the Act and only for a very small and remote portion of its length. Another example is a property with a river that zigzags through a number of adjoining properties, and may be, in part, the property boundary (so the *ad medium filum aquae* principle applies, meaning that an owner's title runs only to the midline).

118. In relation to access, sections 17(2)(c)(ii) and 17(2)(e) require public access to be considered. In our experience, the Walking Access Commission often identifies access to waterways as part

of assessing the walking access aspects of any proposed investment.

119. In this context, any consent granted would typically require the consent holder to implement any reasonable walking access recommended by the Walking Access Commission.

120. We urge the Treasury to consider whether there is a sound policy justification for retaining the special land regime. Repealing the regime is not discussed in the discussion paper, which we thought was surprising the very small number of cases in which the Crown has acquired special land since the provisions were introduced in 2005.

Do you have any comment on the potential effects of the options? Are you able to quantify potential effects on compliance costs?

Options 1, 2, and 4

121. Options 1, 2, and 4 would clarify and narrow the scope of the special land provisions, remove unnecessary compliance obligations and streamline the consent process.

122. In relation to option 3, we are not optimistic that the regime could provide for access to any special land acquired by the Crown without creating significant uncertainty and delay (eg, the need to potentially reorganise business operations on the land, or consult with business owners of adjoining land). Our experience with the special land process is that the time frames (particularly the Crown considering its right of waiver, and then seeking a survey and valuation) can be extremely protracted. On that note, the existing regime contains time frames, which, if they are to be retained, should be realistic.

Do you think the right reform options have been identified? If so, which of the options identified do you prefer and why? If not, what alternative option would you support and why?

123. Please refer to the comments provided in response to the two previous questions.

14. Farm land advertising (page 95)

Do you agree that there is a problem? If so, has this document described it accurately? Can you tell us about your experience, including when it happened? If not, do you support the existing arrangements? If so, why?

No issues arise from advertising after conditional deal is signed

124. The Consultation document states that the first reason that the current farm land advertising requirements do not appear to be meeting the Act's policy objectives is that "*the advertising requirement can be met after a conditional sale and purchase agreement has been entered into*". We do not see this as a problem, for the following reasons:

(a) as the Consultation document notes, vendors have an incentive to accept a comparable (or reasonably comparable) offer from a non-overseas person to avoid the uncertainty and delay inherent in obtaining consent under the Act. The OIO's guidance is also clear that a vendor must be able to exit a sale and purchase agreement to accept an alternative offer. In those circumstances, we do not see an issue in having the advertising be conducted after a conditional agreement has been entered into; and

(b) the guidance provided by the OIO about farm land advertising is very clear that the Regulations set out minimum standards for advertising. Overseas persons, in our experience, typically wish to exceed the minimum requirements in order to satisfy the OIO that the requirements have been meet. Indeed, in our experience, it is typical for vendors to use at least two methods to advertise the relevant farm land, and to place advertisements for longer than the minimum specified period (this is the case even if a conditional agreement has been entered into before farm land advertising is undertaken).

125. We agree that the lack of flexibility is a problem but that that can be addressed by making changes to the exemption provisions, including providing guidance on when a discretionary exemption could be granted.

126. More broadly, we submit that Treasury should consider in more detail whether there is a sound policy justification for retaining the farm land advertising requirements. The Consultation document describes the intention of the requirements but does not critically assess whether it is needed.

127. In light of the Government's criteria for the review, compliance obligations should not be retained in the absence of a clear need for them. As mentioned, vendors have a strong incentive to test the market and accept offers from non-overseas persons in any case, to avoid the uncertainty and delay associated with getting consent.

Do you have any comment on the potential effects of the options? Are you able to quantify potential effects on compliance costs?

128. The Consultation document does not set out any evidence that New Zealanders are being deprived of the opportunity to acquire farm land in New Zealand.

129. On this basis, there does not seem to be a clear need for the requirements – there is not a market failure problem that the overseas investment regime needs to fix. Based on this, the appropriate option is Option 2. Removing the requirements would reduce unnecessary compliance costs but not raise any risks to New Zealanders' wellbeing.

130. If there remains a sound policy justification to retain the regime, then we suggest that the next stage of the review clearly explain that justification.

131. If retained, we would support the aspects of Option 1 suggested in the Consultation paper, with the exception of the requirement to advertise before a sale and purchase agreement is entered into with an overseas person. For the reasons described above, such a requirement is not necessary and would be unworkable (potentially significantly increasing the frequency of applications for exemption from the requirement, which is contrary to the review criterion related to reducing unnecessary costs).

132. Clarifying the legislation to align with the OIO's approach in practice by specifying a minimum standard for advertising to include at least two forms and removing the notice/placard requirement is reasonable, on the basis that the notice/placard method is ineffective/not fit-for-purpose, and it is generally undesirable to have such provisions in legislation.

133. We would also support an amendment that would allow an exemption from the requirement to be obtained before an application for consent is made. In our view, it is possible for this to be achieved now, without any amendment to the Act or Regulations, but for clarity, making that explicit would be useful. It would also be helpful to seek an exemption subject to conditions, and for there to be further guidance on the situations in which discretionary exemptions should be granted.

Do you think the right reform options have been identified? If so, which of the options identified do you prefer and why? If not, what alternative option would you support and why?

134. Please refer to the preceding discussion.

15. Time frames for decisions (page 98)

Do you agree that there is a problem? If so, has this document described it accurately? Can you tell us about your experience, including when it happened? If not, do you support the existing arrangements? If so, why?

135. As a preliminary point, we commend the OIO's approach of regularly publicising the average time frame for decision-making.

136. That said, in our experience, the time frames for decisions on consent applications are perceived by overseas persons as very long. This is a source of frustration for investors, particularly when combined with the lack of certainty as to how the benefit test will apply, and when New Zealand assets are only part of a transaction. We agree that the long time frames and uncertainty reduce New Zealand's attractiveness to overseas investors, and impose an undue burden on vendors.

Do you have any comment on the potential effects of the options? Are you able to quantify potential effects on compliance costs?

137. Of the two options presented in the paper, Option 2 appears to be the more workable. We anticipate that having the same statutory time frame for all decisions, as is suggested under Option 1, would result in a scenario where the statutory time frame is too long for some types of decisions (which could discourage the timely processing of applications) and too short for others (invariably leading to multiple requests from the OIO for an extension, with applicants having no real option but to agree).

138. Of course, establishing a set time frame has superficial appeal. However, it is also necessary to ensure that the decision-making process leads to robust results. This is particularly because decision-makers working to a tight deadline may not have time to get comfortable that an investment is likely to lead to a particular benefit and may be more likely to decline consents.

Do you think the right reform options have been identified? If so, which of the options identified do you prefer and why? If not, what alternative option would you support and why?

139. We appreciate that the actual time that it takes for decision-makers to make a decision is a function of the complexity of the framework that the decision-makers have to apply. Appropriate time frames should therefore be considered only after the other changes canvassed in the Consultation document have been thoroughly considered, along with the level of resourcing of the OIO.

Do you agree that consent should be deemed granted if no decision is made within the prescribed time period and, if so, why do you think that?

140. In principle, deeming consent to have been granted if a statutory time frame is passed is feasible. This is what occurs in the case of the Commerce Commission deciding on an application for clearance under the Commerce Act 1986. We submit that the initial statutory time frame would need to be reasonable, having regard to other changes made to the Act, the OIO's level of resourcing and the unpredictable nature of Ministerial availability.

141. The Commerce Act includes regime provision for the relevant time frame to be extended by agreement with the applicant. A similar provision would need to be included in the Act if such a deeming provision was introduced.

142. In practice, including such a regime would lead to extensions. We are unsure whether it would lead to more timely decisions, or just additional administration for the OIO (and applicants). The OIO's practice of regularly publishing its decision time frames, and breaking that down into time that the OIO has spent considering the application and time spent waiting on applicants to provide further information, is helpful. We would like to see that practice continue.

OTHER COMMENTS

143. In this section, we comment on:

(a) the application of the Act to international transactions, particularly those involving only significant business assets;

(b) scope of section 13(1)(c);

(c) the associate provisions; and

(d) changes to the drafting of the intragroup transfers/ corporate dealing provisions.

International transactions

144. In the OIO's guidance about international transactions (available here), it is clear that, for example, the acquisition of securities in a company in an overseas jurisdiction is covered by the Act where the company has New Zealand assets. This differs markedly from the practice of the OIO's predecessor, the Overseas Investment Commission. The Commission took the view that transactions completed wholly overseas were not subject to New Zealand's foreign investment rules.

145. While we consider it is the case that regulators and the Courts have, in recent times, adopted an effects-based approach to jurisdictional issues, the OIO's approach to interpreting and applying the monetary thresholds in section 13, depending on the jurisdiction in which the transaction is occurring, is difficult to reconcile.

146. Specifically, when considering an international transaction involving securities, the OIO's guidance indicates that it is the consideration/value of the target (and its 25% or more subsidiaries) that must be assessed with reference only to the New Zealand assets. In practical terms, therefore, it seems that

the acquisition by an American company of 25% or more ownership or control interest in another American company, with the consideration being $120m, and the transaction occurring entirely outside New Zealand, would be caught only if the value of the New Zealand part of the business, or the consideration attributable to the New Zealand part of the transaction, are NZ$105m, but would not be caught if the New Zealand part of the business is valued at $80m, or the consideration attributable to the New Zealand part of the transaction is under NZ$100m.

147. In contrast, assume the American company wants to buy a New Zealand-incorporated company that has global business operations. If the consideration is NZ$120m the transaction would be caught, even if the assets (eg, buildings, stock, land) in New Zealand are only NZ$80m, and the consideration attributable to the New Zealand portion is likewise under NZ$100m.

148. On the other hand, if the transaction was an asset transaction, then consent would not be required to acquire a company with a New Zealand head office and $120m of assets worldwide where only $80m (or $10m, or any other number less than $100m) are in New Zealand.

Property/section 13(1)(c)

149. Section 13(1)(c) regulates the acquisition of "property" "used in carrying on business in New Zealand". The definition of "property" is expansive, and the interpretation of "used in carrying on business" is somewhat uncertain in context. This means that the OIO has considered applications for common financing arrangements, such as securitisation schemes for receivables, when it is not clear that this is required to give effect to the purpose of the Act. We encourage examination of this provision.

Intragroup transactions/ corporate dealing

150. In the enactment of the Overseas Investment Amendment Regulations, one element of the former regulation 33(1)(a) (intragroup transfers) exemption appears to have inadvertently been omitted.

151. Specifically, former regulation 33(1)(a) allowed for the transfer of sensitive assets between entities (ie, members of the same group) with a common parent company.

152. Under the new regulation 37(1)(a), only transfers between a subsidiary and its parent are exempted. Therefore, two transfers would be required (subsidiary A to parent, parent to subsidiary B) to achieve what the previous regulations exempted in one transaction.

Associate provisions

153. As mentioned, we welcome changes directed at increasing certainty, consistent with the review criteria. Alongside considering the options in the Consultation document, it is important to consider the associate provisions as well. This is because imposing a clearer, more targeted test to determine whether someone is an "overseas person" is likely to be undermined if the associate provisions are not clarified. The associate provisions are extremely broad and imprecise. If those provisions are not clarified and targeted to align with changes to the definition of "overseas person", and other changes, we expect that those changes will not provide as much certainty as they otherwise could.

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