The Treasury

Overseas Investment Act Submissions Information Release

December 2019

This document has been proactively released by the Treasury on the Treasury website at

https://treasury.govt.nz/publications/information-release/overseas-investment-act-submissions

Information Withheld

Some parts of this information release would not be appropriate to release and, if requested, would be withheld under the Official Information Act 1982 (the Act).

Where this is the case, the relevant sections of the Act that would apply have been identified.

Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Key to sections of the Act under which information has been withheld:

[3] 6(b)(i) - to avoid prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the Government of any other country or any agency of such a Government

[23] 9(2)(a) - to protect the privacy of natural persons, including deceased people

[25] 9(2)(b)(ii) - to protect the commercial position of the person who supplied the information or who is the subject of the information

[26] 9(2)(ba)(i) - to protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied

Where information has been withheld, a numbered reference to the applicable section of the Act has been made, as listed above. For example, a [23] appearing where information has been withheld in a release document refers to section 9(2)(a).

Accessibility

The Treasury can provide an alternate HTML version of this material if requested. Please cite this document's title or PDF file name when you email a request to information@treasury.govt.nz.

Have your say on the Overseas Investment Act 2005

Reform of the Overseas Investment Act 2005: Facilitating productive investment that supports New Zealanders' wellbeing

Submission Form

Details of submitter

Name of organisation:	Bell Gully
Contact person:	Andrew Petersen / Glenn Shewan
Contact person's position in organisation:	Partner / Special Counsel
Contact number:	[23]
Contact email:	[23]
Region/country:	

Confidentiality request

If you want all or part of your submission to be kept confidential and not uploaded onto the Treasury's website, please mark the applicable box below:

Entire submission confidential	No
Part of submission confidential[1]	No
Name only confidential	No

[1] The text that you do not want published must be clearly marked in the submission.

Introduction to submitter

Bell Gully welcomes the opportunity to make submissions on Treasury's consultation paper (the **Treasury Paper**). Bell Gully is a leading New Zealand law firm and our overseas investment team is recognised as a leader in the field, with overseas investment expertise across a broad range of sectors, including residential property developments, agriculture, commercial property, energy, forestry, retail, tourism and the wine industry. While we have consulted with clients across a range of industries in relation to the Treasury Paper, this submission sets out Bell Gully's view based on our experience in applying the existing regime.

Responses to consultation questions

1. Sensitive adjoining land (p. 20)

Do you agree that there is a problem, and

- if so, has this paper 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?

Bell Gully agrees with the problem identified in the Treasury Paper and does not support the existing arrangements. Bell Gully has been involved in a number of applications whereby the transaction only required OIO consent by virtue of sensitive adjoining land. The application of the Act on those transactions did not result in any additional protections for the relevant adjoining land or in any way negatively impact the relevant adjoining land. We query what the policy objective was for including adjoining land (there does not appear to have been any direct benefit to any adjoining land based on the applications we have been involved with). By way of one example, we have been involved in two transactions (involving the same property) where the property was only sensitive because it adjoined a public park. The application for consent had to demonstrate benefit to New Zealand, which focused on the property itself rather than the adjoining park land and what overseas ownership of the property might do to the adjoining land. It was very difficult to demonstrate benefit to New Zealand given the nature of the property and the requirements of the benefit to New Zealand test. The transactions had no detrimental impact on the park at all, so we do not see what the policy rationale is to make such properties sensitive simply because they adjoin a public park.

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

Option 1 will be easier for LINZ accredited agents / solicitors to assess compared with Option 2 which will still require a reasonable amount of due diligence to assess whether or not the relevant land is sensitive, and we still query what the policy objective is to have the types of land contemplated in option 2 where the application process does not focus on the adjoining land but rather more broadly on benefits to New Zealand that focus on the property itself and the broader business. Option 1in the Treasury Paper would significantly reduce the regulatory burden for a number of transactions, with sensitive land applications often costing applicants over $100,000 in

external fees (lawyers, consultants and the OIO application fee) as well as requiring applicants to commit to projects that they may not have otherwise undertaken. We are not sure that Option 2 would reduce the number of applications as this would leave a broad category of adjoining land types (with no obvious rationale for their inclusion for the reasons set out above).

Do you think the right reform options (pp. 22 – 23) have been identified, and:

- if so, which of the options identified do you prefer and why?
- if not, what alternative option would you support and why?

Bell Gully prefers Option 1 as it is the clearest and simplest option from a due diligence perspective and will benefit a broader range of transactions that are currently captured but that do not include or adjoin truly sensitive land.

If the section 37 list were removed, should any of the types of land currently captured by it be retained in Table 2? (p. 23)

- If so, which types and why?

Bell Gully supports the removal of the section 37 list as it creates different outcomes for different areas of New Zealand (i.e., the same parcel of land could be sensitive in Auckland because of the way the Unitary Plan is written, but not sensitive in another part of New Zealand). However, Bell Gully queries whether Option 2 is required at all and if so what the policy objective is. The current benefit to New Zealand test does not address a requirement to protect or enhance the adjoining land (other than perhaps through the provision of public walking access over the relevant land, but that is typically not enough alone for an overseas person to show the benefit to New Zealand required to obtain consent). The threshold question is what is the Act trying to achieve by including these types of adjoining land, and what the application process should be to deal with the adjoining land rather than then having to show benefit to New Zealand that has no relationship to the adjoining land.

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

Do you agree that there is a problem, and

- if so, has this paper 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?

Bell Gully agrees that there is a problem with the current screening regime in relation to leases. The problem has been accurately described in the consultation paper.

The current screening regime places an undue burden on overseas persons, particularly those that have a large portfolio of leased properties. Short term leases pose no risk to sensitive land nor New Zealand's interests generally. Iconic New Zealand brands that have been doing business in New Zealand for decades, but which are "overseas persons" for the purposes of the Act, find themselves at a material disadvantage when competing with other iconic brands that happen to be "New Zealand persons", for day-to-day commercial leases that constitute sensitive land. Furthermore, the current screening of short term leases can place significant delays on an overseas person's ability to occupy leased premises that may be essential for the ongoing viability of the New Zealand business, often forcing overseas persons to seek properties that are not sensitive land even though they may not be as suitable as the property that happens to be sensitive land.

We do not consider the current screening regime is consistent with the purposes of the Act.

a) Screening leases encourages overseas persons to buy sensitive land as opposed to leasing it given the requirement to show benefit to New Zealand typically forces the purchaser to invest in development of the property in some form (and a tenant will typically not want to invest in the property to the extent that an owner would).
b) Short term leases should not face the same level of scrutiny as freehold or longer term leases where the underlying freehold land will remain with the current owners and there is no permanent disposition.
c) Any risk to sensitive land subject to a short term lease is appropriately managed by way of the tenant's contractual compliance commitments with the lessor as well as by the occupier having liability under the Resource Management Act 1991.

As an example, a client had to obtain consent for a 5 year lease of rural land. This required the investor to show benefit to New Zealand, with the overlay of the "substantial and identifiable benefit" hurdle, even though the land was only required for a 5 year term. At the end of the 5 year term, the land reverts to the New Zealand owner, who is then free to sell it to anyone on the open market (so it could end up in overseas ownership in any event if another overseas party can show substantial and identifiable benefit to New Zealand).

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

The options in the Treasury Paper would significantly reduce the regulatory burden for a wide range of transactions, with sensitive land applications often costing applicants over $100,000 in external fees (lawyers, consultants and OIO application fee) as well as requiring applicants to commit to projects that they may not have otherwise undertaken.

In particular, the options in the Treasury Paper will benefit iconic New Zealand brands that have been operating in New Zealand for many years / decades but happen to be overseas persons because of their shareholding.

Do you think the right reform options (pp. 25 – 26) have been identified, and:

- if so, which of the options identified do you prefer and why?
- if not, what alternative option would you support and why?

Bell Gully's preferred option is for Option 1 to be adopted, but for the term to be extended to 35 years rather than 10 years, in line with the period that is considered to trigger a subdivision. This should incentivise overseas persons to enter into leasehold arrangements as opposed to purchasing freehold interests which, in turn, results in the freehold interest in sensitive New Zealand land remaining with New Zealanders (where the relevant land is owned by a New Zealander).

If the longer term was not acceptable then Bell Gully would support Option 2.

Do you consider that raising the threshold for exemption from screening to leases with terms of 10 years or more is appropriate, and:

- if so, why do you consider this the appropriate threshold?
- if not, what alternative threshold would you support, and why?

As set out above, Bell Gully considers the appropriate threshold to be 35 years. This should encourage foreign investment and may result in the freehold interest in sensitive land remaining with New Zealanders (where it is already owned by New Zealanders). That term also gives overseas tenants sufficient term to be able to invest in the property and its business, knowing that it has a reasonable time period to recoup its investment as tenant. It may also create an opportunity for New Zealand parties to buy real estate as an investment for rental to overseas entities, thereby increasing the ownership of land by New Zealanders.

3. Technical issue: periodic leases (p. 27)

Do you agree that there is a problem, and

- if so, has this paper 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?

Bell Gully does not consider there to be a problem with periodic leases. Market practice has never considered periodic leases (other than residential leases) to trigger the Act.

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

N/A

Do you think the right reform option (p. 27) has been identified, and:

- if so, why?
- if not, what alternative option would you support and why?

N/A

4. Definition of overseas person as it applies to bodies corporates (p. 31)

Do you agree that there is a problem, and

- if so, has this paper 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?

Bell Gully agrees with Treasury's identification of the numerous issues associated with the current definition of "overseas person" in the Overseas Investment Act 2005 (the **Act**) as it applies to listed bodies corporate and other New Zealand incorporated bodies corporate.

Bell Gully regularly acts for New Zealand listed bodies corporate and New Zealand companies that have their "centre of gravity" in New Zealand, with a large proportion of New Zealand ownership, New Zealand headquarters and boards located in New Zealand made up primarily of New Zealanders.

New Zealand listed bodies corporate

Bell Gully has engaged with and assisted the Listed Companies Association (**LCA**) in preparing its submission and generally supports its suggested approach to the definition of "overseas person" as it applies to listed entities. A large part of the LCA submissions are repeated in this response (to the extent relevant to listed entities) given Bell Gully's involvement in assisting with that submission.

The current definition of "overseas persons" imposes significant regulatory and commercial burdens on New Zealand listed entities, including:

1. some listed entities making upwards of four applications a year, with sensitive land applications costing upwards of six figures of external costs (lawyer and OIO fees) in addition to the large burden placed on executive time and focus;
2. committing capital to less attractive projects to help demonstrate a "benefit to New Zealand" in the context of a sensitive land consent application;
3. disadvantaging listed companies' commercial position when submitting offers or bids in a competitive process because:
    - vendor's prefer unconditional offers (allowing quicker timeframes and greater certainty);
    - particularly in respect of sensitive land applications, the relative cost of an application (including the need to demonstrate a "benefit to New Zealand") compared to the asset can have a material effect on the value of the offer and its ultimate success;
4. potentially forcing listed companies into sub-optimal premises or locations because preferred locations are "sensitive" and would require an application (as set out below, a large number of standard commercial premises, such as warehouses etc. are deemed to be sensitive, meaning it is unduly burdensome for an overseas person to enter into leases for such premises).

New Zealand incorporated bodies corporate (not listed)

The current definition of “overseas person” places a disproportionate regulatory burden on certain New Zealand incorporated bodies corporate that are fundamentally New Zealand companies that regularly acquire interests in sensitive New Zealand assets in the day-to-day operations of their businesses.

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

The Options put forward are likely to result in a reduction of the significant costs incurred by listed companies when they have to submit an application for consent to buy or lease sensitive land or significant business assets.

Do you think the right reform options (pp. 32 – 35) have been identified, and:

- if so, which of the options identified do you prefer and why?
- if not, what alternative option would you support and why?

New Zealand listed bodies corporate

Bell Gully considers it important for the definition of overseas person, as it applies to companies with a primary listing on the NZX, to recognise:

a) that there is day to day variability in shareholdings outside of a listed entity’s control – because shares are freely tradeable;

b) the actual impact on “control” of listed entities that are associated with small (less than 25%) financial product holdings by “overseas persons” even if combined holdings by overseas persons account for a majority of holdings; and

c) the practical difficulties of ascertaining beneficial ownership given the day to day variability in shareholdings (and deferred settlement of on-market trades on a T+2 basis), as well as the routine use of custodians, nominee companies and trusts in the context of listed companies.

A significant component of overseas ownership is passive portfolio ownership. A recent analysis by JBWere indicated that ownership of the New Zealand issuers considered (comprising 95.6% of the S&P/NZX All Index based on total market capitalisation) only included 7.8% ownership by “offshore strategic stakes”, but 31.1% ownership by “other offshore owners” – primarily offshore managed funds, with a small portion of offshore retail investors.

<u>Bell Gully's preferred amendment (not considered in the Treasury Paper)</u>

Bell Gully's preferred amendment is set out below. Bell Gully's preferred amendment is not discussed in the Treasury Paper.

> An overseas person means, in relation to a [*body corporate with a primary listing on the NZX Main Board*] (**A**), if an overseas person has obtained (either alone or together with its associate(s)) a 25% or more ownership or control interest in A and:
>
> (i) the overseas person obtained consent for that transaction under section 12(b)(i) or 13(1)(a); and
>
> (ii) the overseas person has notified A that it has obtained (either alone or together with its associate(s)) a 25% or more ownership or control interest in A in accordance with [*reference to new section introducing a primary obligation on overseas person to notify the listed company*].
>
> (the **Preferred Amendment)**

The section referenced above imposing a primary obligation on overseas persons could be drafted as follows:

> *An overseas person who (either alone or together with its associate(s)) has an 25% or more ownership or control interest in a listed issuer must disclose that fact to the listed issuer, within 5 trading days of this section becoming applicable as a result of—*
>
> *(i) the listing of the listed issuer; or*
>
> *(ii) the overseas person (either alone or together with its associate(s)) obtaining the 25% or more ownership or control interest in the listed issuer.*

The Preferred Amendment would exclude New Zealand listed bodies corporate from the definition of "overseas person" if no one "overseas person" (alone or together with its associates) holds more than 25% of the shares in the New Zealand listed company (or the New Zealand listed entity had not been notified of such holding, whether directly or through the OIO consent process).

The definition of "associate" in the Act is broad. To make it work, there would need to be some exclusions for the types of relationship excluded from the definition of "relevant interest" provided for in section 238 of the Financial Markets Conduct Act 2013 (**FMCA**) or section 6(3) of the Foreign Acquisitions and Takeovers Act 1975 (Cth).

The Preferred Amendment could be subject to a "call in" right by the OIO or responsible Minister(s). This would allow the OIO/Ministers to notify a listed entity that the OIO/Ministers consider that the entity should be an "overseas person" for the purposes of the Act on the basis that it is being controlled by overseas persons, with statutory guidance, and procedural protections, included in relation to the circumstances where this call in right may be used. An appropriate model for such a regime is Sub-Part 3 of Part 9 of the FMCA.

The key benefits of the Preferred Amendment include:

1. only treating listed bodies corporate as "overseas persons" if they are in fact effectively controlled by single, identifiable "overseas person", consistent with the concept of "control" under the Takeovers Code;[2]

2. providing certainty to listed bodies corporate when considering whether they are an "overseas person". A listed body corporate (**A**) will only become an "overseas person" if another "overseas person" (**B**) obtains a controlling stake in A. This would generally require B to obtain consent under the Act. In obtaining consent, B effectively notifies A that it is now an "overseas person". In circumstances where B was not required to obtain consent (e.g. where the value of A's shares and assets was less than $100 million and it did not hold sensitive land), B would instead be required to directly notify A of its controlling stake; and
3. removing the issues identified by Treasury in relation to the 'tipping point' regime.

As set out in detail below, while still an improvement to the current definition of "overseas person", we believe that the Options considered in the Treasury Paper continue to leave listed entities subject to inappropriate uncertainty as to whether they might be an "overseas person" at any given time (or may at any moment become an "overseas person") and does not accurately capture when a listed entity becomes controlled by an "overseas person".

<u>Bell Gully's alternative option (as considered in the Treasury Paper)</u>

If the Preferred Amendment is not adopted, the Bell Gully's preference is to combine Options 1 and 2 in the Treasury Paper such that a listed body corporate will only be an "overseas person" if:

a) there is more than 49% overseas ownership of a class of voting financial products in the listed body corporate; and
b) the cumulative *substantial holdings* by overseas persons total 25% or more.

However, as foreshadowed above, Options 1 and 2 in in the Treasury Paper give rise to various practical difficulties for listed bodies corporate.

1. Practical difficulties with Option 1:

   - Listed entities do not have accurate or timely information of where their underlying shareholders live. Given the widespread use of custodians, nominee companies and trusts for listed company share ownership, the share register for a listed company does not enable the company to identify the geographic location of the beneficial owners.[3].

[2] Under the Takeovers Code, control is deemed to pass once a person holds or controls more than 20% of the voting rights in the company. A person cannot acquire more than 20% of the voting rights in a code company except in accordance with one of the permitted exceptions under the Takeovers Code (being a full or partial takeover offer or an acquisition or allotment approved by disinterested shareholders).

[3] Although the 'tracing' regime in ss 289-291 of the FMCA provides a listed issuer with certain powers to request details of beneficial ownership under the Financial Markets Conduct Act, these powers are time consuming and costly and impractical to use on a regular basis. Accordingly, Bell Gully does not believe that they provide a practical solution to the problem identified.

2. Practical difficulties with Option 2:

    - Listed entities are not able to identify from substantial product holder disclosures whether a person with a *substantial holding* is an overseas person or not. In addition, substantial product holder disclosures require disclosure of "relevant interests" in financial products, which may not in fact accord to ownership or control interests for the purposes of the Act. Absent changes to the substantial product holder disclosure regime requiring persons to identify whether they are an overseas person for the purposes of the Act, Option 2 leaves listed entities uncertain as to whether they are an overseas person or not.

It is important that both Option 1 and Option 2 need to be satisfied before a listed entity becomes an "overseas person". This is because:

1. in relation to Option 1, a number of listed companies (particularly larger entities with significant indexed funds as shareholders) will still have more than 49% overseas ownership and this Option alone ignores the fact that those overseas shareholdings may be comprised of many unrelated de minimis holdings; and
2. in relation to Option 2, given the relatively concentrated nature of shareholdings on NZX, having an interest of 5% or more would not be uncommon. As global passive fund management continues to aggregate it is likely over time that fund managers, such as Blackrock or Vanguard, could routinely hold passive positions in S&P/NZX10 and S&P/NZX20 issuers well above a 5% level.

Irrespective of the definition of overseas person ultimately adopted, Bell Gully considers it important, and most beneficial to New Zealand that Option 4 in the Treasury Paper is implemented with clear guidelines and requirements, set out in more detail below.

As noted above, Bell Gully's strong preference is the Preferred Amendment, rather than combining Options 1 and 2.

New Zealand incorporated bodies corporate (not listed)

Bell Gully considers it important that the exemption power proposed in Option 4 in the Treasury Paper is implemented to exempt fundamentally New Zealand companies who regularly acquire interests in sensitive New Zealand assets in the day-to-day operations of their business (not just for listed companies).

Have the right requirements (pp. 34 – 35) been identified for the exemption in Option 4?

- if not, what requirements, or additional requirements, do you think should be included?

Bell Gully is supportive of clear guidelines on when the exemption in Option 4 should apply. While Bell Gully agrees with many of the requirements in the Treasury Paper, it considers the requirements below inappropriate or unworkable for listed bodies corporate for the following reasons.

1. *it is at least 51 per cent owned by New Zealanders* – Given the daily fluctuations of ownership in listed entities and the difficulties set out above in relation to identifying the beneficial owners, this requirement should not apply to listed entities. If the Option 4 exemption is granted to a listed entity, it is not clear if the entity would need to analyse its shareholder register on a frequent basis to confirm it remains at least 51 per cent owned by New Zealanders, which would be unduly burdensome.

   Furthermore, a listed entity can have a very strong connection to New Zealand, with its headquarters, employees and business operations being primarily in New Zealand. Accordingly, having a 51 per cent ownership threshold is likely to make the exemption unworkable for many listed entities that, in the ordinary meaning of the word, have a strong connection to New Zealand but have a majority of overseas ownership (or cannot rule out that they have a majority of overseas ownership).

2. *no 'foreign government' or its associate(s) owns equity in the entity* – The broad wording of this requirement would capture a large number of passive investment vehicles potentially "associated" with a foreign government, such as pension funds and superannuation funds. Such entities are common shareholders in listed entities.

   If this requirement is to remain, it should be accompanied by a 25% or more ownership threshold for a single overseas government investor.

5. Screening of portfolio investors (p. 38)

Do you agree that there is a problem, and

- if so, has this paper 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 Treasury Paper correctly identifies that, under the current regime, investments in New Zealand entities by passive portfolio investor entities that are "overseas persons" (e.g., any of the 'big 4 banks') can result in target entities becoming "overseas persons", even if the portfolio entities are investing on behalf of New Zealanders (such as in KiwiSaver schemes). This can result in essentially "New Zealand money" causing an otherwise New Zealand entity to become an overseas person.

Accordingly, the existing arrangements can result in seemingly nonsensical outcomes whereby a passive portfolio investor that is predominantly beneficially owned by New Zealanders and exercises no "control" can cause an entity to be an "overseas person".

The existing exemption in Schedule 3 of the Regulations is unworkable for the reasons set out in the Treasury Paper, particularly post the 2018 amendments to the Act's exemption-making power.

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

See above.

Do you think the right reform options (pp. 39 – 40) have been identified, and:

- if so, which of the options identified do you prefer and why?
- if not, what alternative option would you support and why?

Bell Gully considers the most attractive option in light of the purpose of the Act and the current political climate is a slightly modified Option 1, along with the first limb of Option 2.

Accordingly, Bell Gully's preferred option is for a class exemption for a portfolio investor where:

a) at least 51 per cent of the entity's funds are invested on behalf of non-overseas persons;
b) the entity's policy is to limit its interest in New Zealand companies to portfolio minority investments. It does not seek to control the companies it invests in; and
c) the entity does not seek board representation disproportionate to its shareholding.

(the **Preferred Portfolio Option**)

Bell Gully considers the inclusion of limb a) in the Preferred Portfolio Option (which was taken from Option 2 in the Treasury Paper) to provide a stronger justification for the introduction of a self-assessment class exemption for portfolio companies as it is clearly targeted at preventing the screening of essentially "New Zealand" money. Furthermore, the Preferred Portfolio Option removes Option 1's (as it is set out in the Treasury Paper) heavy reliance on the internal policies of portfolio investments.

Given that Option 1 in the Treasury Paper already limits the interests to portfolio *minority* investments that do not seek to control a company, the restriction on board representation should only prevent board representations that are disproportionate to the portfolio entity's shareholding.

While largely dependent on any changes to the definition of "overseas person", if the second limb for Option 2 in the Treasury Paper is adopted (which Bell Gully considers unnecessary) it should only apply if a single overseas person (together with its associate(s)) has negative control over any entity in which a portfolio entity invests. An entity is not "controlled" (either positive or negative control) if various, non-associated overseas persons hold minority control rights exceeding 25% in aggregate.

Option 3 in the Treasury Paper is too narrow as it excludes portfolio investment entities that are beneficially owned or controlled by New Zealanders that are regulated under a different regime. There does not appear to be a clear justification for this.

6. Technical issue: Tipping point for requiring consent (p. 42)

Do you agree that there is a problem, and

- if so, has this paper 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?

Bell Gully agrees with the 'tipping point' issue as identified in the Treasury Paper.

In addition to the issue identified in the Treasury Paper, another 'tipping point' issue arises in the context an initial public offering (**IPO**) or capital raisings (either by way of a rights issue or a private placements). If a New Zealand entity with sensitive land is issuing shares and, as a result of issuing shares, becomes an "overseas person", the entity issuing the shares must obtain consent under the Act. This can result in substantial uncertainty, complications and valuation concerns for issuers during IPOs and capital raisings for the following reasons.

a) Uncertainty – it is extremely difficult for an issuer to determine whether persons subscribing for shares in an IPO are "overseas persons" in order to ascertain whether it needs to apply for consent under the Act. In the context of capital raisings, issuers are not always able to control whether an "overseas person" shareholder obtains a disproportionate amount of the newly issued shares, tipping the issuer to become an "overseas person" and triggering a consent requirement.

b) Complications – if an entity becomes an overseas person as a result of an IPO or capital raising, the need to obtain OIO consent creates substantial timing complications and is likely unworkable. In such circumstances an issuer would likely breach the Act and require retrospective consent, or would not be aware that it had breached the Act.

c) Valuation concerns – an issuer is likely to discount subscriptions for shares from "overseas persons" if it is at risk of becoming an overseas person. Accordingly, the valuation of an IPO or capital raise may be impacted due to the narrower pool of demand.

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

See above.

Do you think the right reform options (p. 43) have been identified, and:

- if so, which of the options identified do you prefer and why?
- if not, what alternative option would you support and why?

Bell Gully prefers Option 1 in the Treasury Paper. Option 1 is consistent with the purpose of the Act as it:

a) does not apply when an overseas person (together with its associate(s)) obtains or has control (negative or positive) of the target;

b) removes the difficulty of demonstrating a benefit to New Zealand in circumstances where the overseas person "tipping" the entity does not have a controlling interest; and

c) significantly simplifies the regime by only capturing deliberate attempts to undermine the Act's purpose and intent.

For the reasons set out above in relation to IPOs and capital raisings, Option 1 should be extended to replace section 22(1)(b) which requires the issuer of securities to obtain consent if it becomes an overseas person because of the issue or buyback.

7. Technical issue: Incremental investments above a 25 per cent interest (p. 45)

Do you agree that there is a problem, and

- if so, has this paper 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 Treasury Paper correctly identifies the issues relating to incremental investments above 25 per cent.

Bell Gully regularly advises clients on the issues identified in the Treasury Paper and has submitted numerous applications and exemptions arising from these issues. Bell Gully has been involved in various transactions that have come up against Technical Issue 1, Technical Issue 2 and Technical Issue 3 in the Treasury Paper. If it were to be of assistance, Bell Gully would be happy to provide further details of these examples to Treasury.

A common circumstance that gives rise to this issue under the current regime is where an overseas person (A) has obtained consent for an investment in Company B, Company B wants to raise capital from its shareholders but one of the shareholders doesn't take up its pro rata entitlement resulting in A (who participated in the capital raise) increasing its shareholding and requiring consent. It is often difficult in a sensitive land context to show a "benefit to New Zealand" in these circumstances.

Equally, where there is a "rebalancing" of shares between upstream shareholders who have not previously themselves obtained consent. Even minor changes in shareholdings can be captured as upstream shareholders do not benefit from the creep exemption.

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

See above.

Do you think the right reform options (pp. 47 – 48) have been identified, and:

- if so, which of the options identified do you prefer and why?
- if not, what alternative option would you support and why?

Bell Gully supports the inclusion of all four options in the Treasury Paper in any reform of the Act.

The Treasury Paper correctly identifies significant, largely technical, issues with the current regime. The combination of the four outlined options will address these issues and reduce the number of technical and unnecessary applications arising from minor existing shareholding changes.

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

Do you agree that there is a problem, and

- if so, has this paper 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?

Bell Gully agrees with Treasury's identification of the many issues associated with the current "investor test" in the Act. Bell Gully considers the investor test:

1. to be overly burdensome compared to the value it provides in assessing and mitigating against the risks that overseas investors may pose to New Zealand;
2. to impose significant legal costs and compliance on overseas persons that are disproportionate to the risks posed; and
3. to create a range of unintended consequences, to the disadvantage of New Zealanders.

Overly burdensome compared to the value provided

Bell Gully considers the following aspects of the investor test to be overly burdensome and result in compliance costs that are disproportionate to the risks imposed by overseas investors.

1. *The "whether convicted or not" disclosure requirement* – this disclosure requirement is overly burdensome. It captures conduct that would not go to an IWCs good character and requires IWCs to personally respond to a wide range of allegations (often from non-reputable "blogs") that have never amounted to an actual conviction, penalty or fine. This can result in further costs (legal, internal and for the particular IWC) in order to identify what the outcome was of an historic allegation and it places a significant burden on directors of multinational corporations in particular who are often subject to various unsubstantiated allegations that have never resulted in a conviction.

2. *Financial Commitment* – Bell Gully considers the financial commitment criterion to provide no additional value in assessing the risks that overseas investors may impose on New Zealand. In the corporate transaction context, by the time a potential overseas investor has instructed legal counsel, prepared an application for consent and paid the substantial filing fee, the overseas person has typically entered into a conditional transaction agreement or taken sufficient steps to commit themselves financially to an investment. In Bell Gully's experience it is unlikely that any overseas person would get to the point of obtaining consent under the Act if it does not have the financial capability to proceed with an investment. Bell Gully is not aware of any applications it has been involved with where this criterion has been an issue.

3. *The Immigration Criterion* – Bell Gully considers this criterion to be unnecessary as it provides no additional value to the 'good character' test as an ROP/IWC captured by the section 15 or 16 of the Immigration Act 2009 would need to disclose the matters that gave rise to an immigration issue under the 'good character' criteria in the Act.

   It is burdensome for IWCs, who are typically not familiar with the Immigration Act, to review the relevant sections of the Immigration Act and understand the immigration law regime prior to executing the good character statutory declaration. Bell Gully is not aware of a situation where an IWC could not execute a good character statutory declaration due to the Immigration Act criterion, where the matter would not otherwise have been disclosed to the OIO absent the Immigration Act criterion.

4. *Business Experience and Acumen* – Bell Gully considers this criteria to be of only limited use. While it does provide some value in addressing the likelihood an overseas investor will productively and efficiently use a sensitive asset, it is inconsistent with most character test regimes and does not assess any material risk (as addressed in the Treasury Paper).

   If the business experience and acumen test is to remain, it should only apply to 'sensitive land' applications whereby the business experience and acumen of the investor is potentially of greater relevance to the "benefit to New Zealand" claimed.

5. *The inclusion of New Zealand listed companies in the scope of the investor test* – the NZX and listed companies have strict disclosure and vetting requirements for directors. Furthermore, listed company directors will always have significant business experience and commercial acumen. With the conduct of listed companies remaining under constant public scrutiny, the requirement to announce material events, and the significant vetting of listed company directors that already takes place, a streamlined "investor test" process should apply to listed companies. The current detailed "investor test" process is overly burdensome and provides little benefit in the context of New Zealand listed companies.

Unintended consequences that disadvantage New Zealand

1. *The application of the investor test to New Zealand IWCs* – The investor test currently unintentionally applies to New Zealand ROPs/IWCs who would, but for their association with the overseas person, be entitled to purchase sensitive assets without passing a good character test. This is inconsistent with the purpose of the Act, that it is a privilege for overseas investors to invest in New Zealand assets. New Zealand associates of overseas persons are disadvantaged compared to what they could do in their own right. Furthermore, the Act acts as a disincentive for overseas persons to partner with New Zealanders, as the compliance cost is the same as partnering with overseas persons. This disadvantages New Zealand as the Act could work to incentivise overseas persons to partner with New Zealanders, as there would be no additional compliance cost.

In Bell Gully's experience, there have been multiple instances whereby the character of a New Zealand IWC has delayed a transaction.

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

Bell Gully considers that adopting the options in the Treasury Paper will:

- improve the efficiency of the OIA application process;
- decrease the administrative burden on IWCs and ROPs; and
- decrease the legal and other costs incurred in preparing an application and engaging with the OIO once filed on various "allegations" that did not result in a conviction (this has in some cases added a reasonable amount of time to the processing period).

Do you think the right reform options (pp. 56 – 57) have been identified, and:

- if so, which of the options identified do you prefer and why?
- if not, what alternative option would you support and why?

Bell Gully considers it important that any reform to the investor test addresses the issues outlined above. In particular that the reforms narrow the scope of the good character test, restrict the application of the investor test so that it does not apply to New Zealand IWCs/ROPs, and remove the aspects of the test that add no value.

While Options 1 and 2 in the Treasury Paper are good starting points for reform of the Act, and a significant improvement to the investor test under the current regime, New Zealanders continue to be subject to the investor test and a number of the issues with the investor test identified above remain.

Bell Gully prefers Option 3, provided there is some discretion to still provide consent (e.g., where there has been an historical criminal conviction that has no relevance to the person's good character now, or civil penalties paid by an entity in certain situations). Option 3 removes the costly and unpredictable "good character" Google search requirement (with search results changing depending on what computer the searches are done on and the day), and gives overseas persons certainty as to what is required to satisfy this test while significantly reducing the cost of compliance.

Bell Gully considers that a checklist / bright-line test will be a sufficient test of an overseas person's good character while restricting the burden and legal costs inflicted on investors as much as possible.

Bell Gully notes the Option 3 does not consider what will happen when an overseas person fails an aspect of the proposed bright-line test. Bell Gully considers it important that a failure to meet all of the checklist points does not result in a complete failure of the test, and that failing a single aspect (or a few aspects) results in a closer assessment of the good character of the investor.

What types of allegation relating to potential criminal or civil offences do you think should be included in Option 2, if adopted, and why?

Bell Gully considers the only offences that should be included in Option 2 are adverse criminal findings against an IWC in a personal capacity and civil offences that relate to fraud, corruption, or tax avoidance. Bell Gully stresses that the test should only ask for offences that the IWC has been convicted of.

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

Bell Gully's preferred bright-line investor test is set out below.

(2) For the purposes of this section, the investor test is met if the relevant overseas person, or (if that person is not an individual) each individual with control of the relevant overseas person—
  (a) is a New Zealand citizen or ordinarily resident in New Zealand; or
  (b) is not a New Zealand citizen or ordinarily resident in New Zealand and:
    (i) has never been convicted of a criminal offence punishable by term of imprisonment;
    (ii) has never been found liable of a civil offence that relates to fraud, corruption, or tax avoidance;
    (iii) has never been disqualified from directing a business;
    (iv) has never been subject to a confiscation order; and
    (v) is not an undischarged bankrupt.

(3) If subsection (2)(b) applies, and the relevant overseas person has not met the factors in subsection (2)(b)(i) to 2(b)(v), the investor test shall be met if the Minister is satisfied that the person is of good character.

Bell Gully considers these factors to be sufficient in assessing overseas investor's character and capacity. Any additional factors would be unnecessary and overly burdensome on investors, and would likely result in more unintended consequences. Bell Gully does not consider these factors to result in different conclusions if an overseas person's character was considered under the current good character regime.

9. Screening the impacts of investment (p. 60)

Do you agree that there is a problem, and

- if so, has this paper 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?

We believe there is a problem with the application of the benefit to New Zealand test, as set out in paragraph 182 of the Treasury Paper. The benefit to New Zealand test creates uncertainty and has imposed unnecessary costs and has been a time consuming exercise. It is possible that this has deterred overseas investment (we are aware of some vendors and some overseas clients in recent years deciding to not proceed with a transaction because of the overseas investor aspect).

We have been involved in many successful applications and a small number of unsuccessful applications, so we have excellent first-hand experience with the various application processes and issues. The biggest issues have been timing, the complexity in writing an application to address the benefit to New Zealand factors, and having to compare that to the counterfactual which in some cases has been a hypothetical alternative New Zealand purchaser. The counterfactual has been particularly problematic for a number of asset classes where the reality is that there is not much more that can be done with the particular property / asset over and above what previous owners have done, or the investor wants to invest and support the existing management's plans. That should not necessarily discount a foreign private equity firm or investment fund from investing in assets and continuing to support the management's growth plans (which is usually the case)

However, we do not believe that the test's design has undermined the decision makers' ability to deny consent to investments that are not in New Zealand's national interest. This has been shown by a few declined applications in the last 12 months, and the number of applications that are withdrawn where an applicant is not able to show benefit to New Zealand. There may have been a very small number of applications where the Ministers may have preferred to have declined the consent but could not so we think the perceived "problem" is a minor issue in the overall scheme of the operation of the Act. Most applications that have received consent (particularly in the commercial transactions) would not have caused an issue for New Zealand's national interest. For example, the purchase of a commercial building over $100 million by an international property fund from another overseas person would have needed a significant business assets consent, but we do not believe that is the type of investment that the decision makers would view as contrary to New Zealand's national interest. As such, we think there needs to be care that any amendment does not significantly increase decision making power applicable to all transactions when the reason for that increased power is focused on a minority of the transactions that have occurred or may occur going forward.

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

Some of the options may reduce the amount of work required for an “ordinary course” good investment into New Zealand. However, some of the options may actually have the opposite effect and create more cost, uncertainty and risk for the investment community. We comment on each option below. Option 1 would require the applicant to identify the negative effects that its investment may create, which is not currently part of the application process. This would clearly increase work for all benefit to New Zealand applications. It would also add further factors that are likely to have an unintended consequence for some overseas investors who are doing good things in New Zealand because they would have to do more work than they already do to ultimately achieve consent. Option 2 would hopefully reduce complexity for the majority of applications as the substantial harm test is unlikely to affect most applications. This seems to provide the decision makers with the specific increased power that is clearly focused on three key issues (public order, public health and safety and security). Option 3 may create more complexity depending on how the benefit to New Zealand test and the national interest test work together. If the national interest test is limited to a negative test (i.e., the applicant only needs to show that its investment is not contrary to the national interest) rather than having a positive test then that may work. The list of the higher risk applications is also much broader than we were expecting. We were surprised to see the inclusion of media, telecommunications, transport and finance on the sensitive list given the significant level of overseas ownership / investment in those industries / activities already and the perceived benefits that investors in those industries have created to date (including competition in the New Zealand market). Option 4 as contemplated could create more uncertainty if the national interest test is both a positive and negative test, compared to the Australian test where an overseas investor would have to prove that the transaction is not contrary to the national interest. If the test is both positive and negative then the application process could remain complex and the timing issues could remain. Paragraph 211 of the Treasury Paper seems to suggest that the national interest test could consider many of the things that are already covered by the benefits test together with additional items that are not currently part of that test. Bell Gully is also concerned with the breadth of the Ministerial discretion and the inherent uncertainty that could create for transactions, and the application of this to significant business assets transactions. Option 5 would seem to have a significant reduction in complexity and number of applications if applications are only called in if they are against New Zealand’s security interests or public order. A mandatory notification regime would require more work for investors but less than any of the other options if it only addresses security interests or public order.	

Do you think the right reform options (pp. 67 – 76) have been identified, and:

- if so, which of the options identified do you prefer and why?
- if not, what alternative option would you support and why?

As noted above, Bell Gully would support an alternative option to the national interest test in Option 4, provided it only applied to truly sensitive industries / activities, and just to sensitive land, rather than all transactions, and it was only a negative test rather than having to show a transaction was positively in the national interest. As an example, how would an international real estate fund show that its purchase of a commercial building with a value of $101 million is in New Zealand's national interest (as opposed to showing that the purchase is not contrary to New Zealand's national interest). However, this is just one example and we advise clients investing in a broad range of sectors where the exact same considerations would apply. We are concerned that a national interest test may end up looking like the benefit to New Zealand test (based on the description of relevant considerations in paragraph 211 of the Treasury Paper). That would provide a significant additional burden on the application process compared to the situation today, and would be inconsistent with the same requirements in Australia.

Bell Gully prefers either Option 2 or Option 3 (subject to our comments above and below about the national interest test). Options 2/3 are preferred on the basis that the substantial and identifiable test is removed, and Sub-Option A of the counterfactual test is applied. The counterfactual test is particularly problematic for many applications especially where the counterfactual is a hypothetical alternative New Zealand purchaser who is assumed to be well funded, but a sale process has resulted in no credible / actual New Zealand bids.

Option 5 could also work if this was to replace the benefit to New Zealand test entirely – that wasn't entirely clear from the table on page 67 which suggests that the existing consent framework would be retained. Clear guidance would be required on what types of transaction could be called in.

Overall, Bell Gully considers that substantial additional detail should be provided as to the proposed options before preferred amendments are pursued. This issue is critical to encouraging beneficial overseas investment and stakeholders need to be able to assess in detail how various proposals would operate across a variety of application types and industry sectors.

In summary, Bell Gully supports:

- a greatly simplified benefits to New Zealand regime for sensitive land applications;
- a counterfactual test that uses the status quo as the point of comparison (other than in exceptional circumstances);
- a very narrow and clearly defined set of criteria establishing when Ministers could block a transaction on the grounds of "substantial harm" or because it was against the "national interest". This should be limited to exceptional circumstances.

Do you think the Act should expressly enable decision makers to consider any negative effects of a proposed investment, as described in Option 1? Why/Why not?

Bell Gully has concerns about introducing a requirement to consider the negative effects of a proposed investment. This will add substantially to the application process, in the context of the decision makers looking for increased decision making power in only a small number of cases. This seems contrary to the objective of the review.

Potential harm from an investment is also already covered by many existing statutes (e.g., Resource Management Act, Commerce Act, Financial Markets Conduct Act, Health and Safety at Work Act).

Do you think the right risks have been identified in the definition of substantial harm in Option 2, and:

- if so, why do you think this?
- if not, which other risks do you suggest and why?

Bell Gully supports the risks identified, as these seem to be the true sensitive issues that the decision makers should be concerned about.

Do you think the right factors have been identified in the simplified benefit to New Zealand test in Options 2 and 3, and:

- if so, why do you think this?
- if not, which other factors do you suggest and why?

Bell Gully queries whether the reference to “economic benefits” could be prescribed broadly rather than being prescriptive and limited, to allow investors to show how they benefit the New Zealand economy through a wider variety of economic benefits. This would then allow investors to really focus on the actual benefits that their particular benefit creates, which could include access to foreign capital which will be utilised in New Zealand for growing a business or developing land and access to international markets for exports (variations on the “increased investment for development purposes”, “increased export receipts” and “increased processing of primary products” factors).

Removing the counterfactual is critical to ensure that well run businesses / properties can still be traded on the international market.

Bell Gully has no issue with including factors related to water extraction and Māori cultural values as they relate to the physical and historical characteristics of the relevant sensitive land, provided these were matters that an investor could show benefit against, rather than having these as negative assessments.

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:

Yes. In practice, Bell Gully has not noticed a material difference in how the substantial and identifiable test is applied versus other applications. The substantial and identifiable test is uncertain in terms of the level of expected benefits that are required on a case by case basis. There can be a significant difference in benefits depending on the particular circumstances of the investment (and land size / purchase price are not necessarily the appropriate basis to measure benefits against).

Do you think the right industries have been identified as industries of strategic importance in Option 3, and:

- if so, why do you think this?
- if not, which other industries do you suggest and why?

No, as noted above Bell Gully queries the inclusion of infrastructure, media, telecommunications, transport and finance given the historical "positive" overseas investment in those industries. Bell Gully also notes that there are many instances where investments include an element of foreign government investment, generally pension or sovereign wealth funds. This is perfectly normal and such investments have never raised any threat to national security or otherwise to our national interests.

A "negative" national interest test may mean that the list becomes less relevant (and gives the decision makers the ability to say no to a transaction only if demonstrably contrary to national interest). A positive national interest test would be a concern for many overseas investors in the industries listed in paragraph 212 of the Treasury Paper as it would create a significant amount of uncertainty for existing investors in those industries.

If a national security and public order call-in power were adopted (as proposed under Option 5), do you have a view on:

- which agency or agencies should be responsible for assessing prospective transactions (for example, the OIO, security agencies or an alternative) and, if so, why do you think this?
- how the government could become aware of transactions that could be called in for screening (that is, a compulsory, voluntary or combined approach, or another option entirely) and, if so, why do you think this?
- which Minister should be responsible for making decisions under this test and, if so, why do you think this?
- whether the responsible Minister (whoever that should be) should have to consult other Ministers before denying consent to a transaction using this power and, if so, which Ministers and why do you think this?

Bell Gully does not have a view on the relevant agency.

Bell Gully expects that a voluntary approach could work similar to the Commerce Act.

Given the focus on national security and public order, this would seem to be the Minister or Ministers whose portfolio(s) touch those areas. They would need access to the right team to assist with assessing national security / public order. We assume that the relevant Minister or Ministers would then not need to consult with other Ministers.

10. Water extraction and the Act (p. 82)

Do you agree that there is a problem, and

- if so, has this paper 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?

Bell Gully does not agree that the problem identified by the Treasury Paper is a matter that is best managed through the overseas investment regime.

Such matters are best dealt with by the Resource Management Act 1991 (or appropriate reforms to such legislation as may be as necessary) and planning regulations (which deal with the relevant quantities of water which can be extracted) which have a clear role in regulating water extraction by anyone (whether New Zealanders or overseas persons).

Do you think the right reform options (p. 83) have been identified, and:

- if so, which of the options identified do you prefer and why?
- if not, what alternative option would you support and why?

If an option is to be implemented, then Bell Gully prefers Option 1 as this appears to address the perceived concern regarding water bottling / bulk export. Option 2 goes too far given water extraction (such as through a bore or via water take from a river) affects so many businesses.

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

Overall Bell Gully thinks Option 1 is unlikely to affect many applications. Option 2 could have the impact of affecting a large number of applications and making them more complex which is contrary to a key objective of the review.

11. Tax and the Act (p. 85)

Do you agree that there is a problem, and

- if so, has this paper 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?

Bell Gully does not agree there is a problem.

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

Option 1 would add significantly to the administrative burden for investors and we query how this would be reviewed (would the IRD get involved, how would any non-compliance be assessed in the context of materiality against the tax rules in other jurisdictions, and many international conglomerates have world-wide tax affairs that are not assessed by one sole regulator.)

Option 2 may be difficult in practise as many corporations are likely to have at some point suffered short fall penalties or potentially breached tax legislation in a non-material way.

Option 3 would add significantly to the time period and is not practical given the time issues already faced on applications.

Do you think the right reform options (pp. 85 – 86) have been identified, and:

- if so, which of the options identified do you prefer and why?
- if not, what alternative option would you support and why?

No, New Zealand tax compliance is a matter for the IRD to monitor. New Zealand is not responsible for monitoring tax compliance in other jurisdictions.

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

Do you agree that there is a problem, and

- if so, has this paper 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?

Bell Gully supports the inclusion of Māori cultural values in the regime provided this is done in an appropriate way. Bell Gully has not had any particular experience with Māori cultural values at the OIA application stage of a transaction.

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

Option 1 – we expect that any purchaser is required to honour lawful existing arrangements that are recorded in writing (this would be a matter for the seller of the land to transfer to any purchaser whether overseas or New Zealand). We query what this option is really trying to address.

Option 2 – we can see this having application and being appropriate, without overly complicating the application process.

Option 3 – this is very broad but it could be workable if it is expressed as a benefit factor rather than a negative (i.e., if a purchaser supports Māori cultural values then it would be given credit, but if it was neutral then it would not be a negative).

Do you think the right reform options (p. 89) have been identified, and:

- if so, which of the options identified do you prefer and why?
- if not, what alternative option would you support and why?

Yes, as above.

What types of activity do you think should be defined as relevant arrangements under Option 1, and why do you think this

As noted above, we are not sure why this is required if the lawful arrangement is already documented and binds the seller of the land.

13. Special land provisions (p. 91)

Do you agree that there is a problem, and

- if so, has this paper 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?

Yes, the special land provisions create additional cost and delays for investors. It can often be very difficult to determine whether or not there is actually special land involved. Often the only way to determine this definitively is by engaging a surveyor, which is costly and would add to the timetable. Our understanding is that the special land provisions do not apply to leasehold or indirect interests, but clarifying this would be helpful. The application of the special land to forestry transactions is particularly problematic given the number of waterways that often exist on forestry land, and the difficulty in identifying waterways from aerial searches given that the land is usually covered in forest or native bush, and the land holdings are often vast so a physical inspection or survey is simply not feasible nor timely.

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

Option 1 – this would not have a great effect as this is the current practice. However, expressly confirming this would be helpful. Option 2 – our understanding was that an offer back of special land was effectively a requirement to obtain consent. Again, clarification in this area (one way or the other) would be beneficial. Option 3 – we think this could delay the application process if this was required as part of the process rather than after the transaction has completed. Access issues are very fact / property

dependent so we are concerned with having an obligation to agree to access arrangements, rather than leaving this to a case by case negotiation. Option 4 – this would seem to simplify the process slightly (in practice these things are happening anyway in the majority of cases we have been involved with).

Do you think the right reform options (p. 93) have been identified, and:

- if so, which of the options identified do you prefer and why?
- if not, what alternative option would you support and why?

See above.

14. Farmland advertising (p. 95)

Do you agree that there is a problem, and

- if so, has this paper 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?

Another issue that isn't identified is around the actual definition of farm land. It can be difficult to determine whether or not land is farm land where a property has a mixed use (e.g., a lifestyle block where 80% of the land is used for cropping to supplement the owner's income or a 20ha lifestyle block where animals are used to keep the grass under control but the land is not otherwise an economic farming unit – rather it can only be used as a lifestyle residential property and ancillary grazing). We agree with the other problems identified.

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

We think both options are better than today although Option 1 could result in an inefficient sale process and take away a seller's right to sell off market and in a private manner should they wish.

Do you think the right reform options (p. 96) have been identified, and:

- if so, which of the options identified do you prefer and why?
- if not, what alternative option would you support and why?

Yes, we prefer Option 2 as we think under Option 1 there are going to end up being a large number of exemptions to deal with the various situations where farm land advertising does not make sense.

15. Timeframes for decisions (p. 98)

Do you agree that there is a problem, and

- if so, has this paper 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?

Timing has been a long-standing issue. There are a number of aspects to this:

- On transactions where there is clearly a strong case for consent, the process has been delayed because of the volume of applications and (historically) under-resourcing at the OIO.
- Where an application is more borderline, it has taken a significant amount of time to either achieve consent or to ultimately find out that the application will be declined. Some of those investors may have preferred knowing that likely decline result earlier to avoid the costs of the lengthy application process that then ensued.
- Sellers do not like the uncertainty of the time period and ultimate result.

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

Timing has a material effect on transactions. Any option that gives more time certainty is positive for compliance costs.

Do you think the right reform options and sub-options (pp. 99 – 100) have been identified, and:

- if so, which of the options and sub-options identified do you prefer and why?
- if not, what alternative option and/or sub-option would you support and why?

Yes, we support Option 2 as we appreciate that there is a different amount of work required on the OIO's part to assess different types of applications.

What do you consider to be the appropriate timeframes and why?

We can see a case for the time periods being even shorter than those proposed in Option 2, if the test and application process are simplified. For example, we could see the following time periods being achievable:

- **Options 2 or 3** (Simplified benefit to New Zealand test with substantial harm test or national interest test): 30 working days with a possible extension right of up to 20 working days (which would apply if the substantial harm / national interest test was triggered).
- **Option 4** (National interest test): if this was a negative test only, then the time period could be shortened to be in line with the Australian time periods. Otherwise the time period may need to be longer as set out in Option 2 in paragraph 255 of the Treasury Paper.

- Forestry and residential / investor test applications: 20 working days with a possible extension right of 10 working days.
- Residential applications: 10 working days.

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?

Yes, we think this is a good way to effect greater certainty over the time periods. Without this consequence the commitment to defined time periods would have little consequence.

Experience with the Overseas Investment Office

If you have any feedback on your operational experience with the Overseas Investment Office, please share it with us below so they can use it in their continuous improvement programme:

We have always found the OIO good to deal with. Their service focus has become much more noticeable over the recent years, helped with additional resourcing. Any changes to the legislation needs to bear in mind the potential impact on the OIO as that can have a material impact on timetable if the changes require major changes to the OIO's processes or significant additional resourcing.

Other comments on the regime?

If you have any other comments on New Zealand's overseas investment regime, please share them with us below:

Exemption in relation to securitisation transactions

As discussed at our initial meetings, the current framework under the Overseas Investment Act and Overseas Investment Regulations does not adequately cater for securitisation transactions. In essence these are funding transactions and therefore should benefit from the exemption granted under Regulation 41 for permitted security arrangements. However, this exemption is not available in relation to a securitisation transaction because in most cases, the financing is provided to a special purpose trust which purchases receivables (rather than advancing the receivables directly to the underlying borrower). As such, the wording in the exemption does not cater for these types of transactions.

In our opinion, the policy which justifies an exemption for ordinary course lending should apply equally to securitisation transactions. We think a general class exemption is the best way to address this issue and would be happy to provide suggested drafting.

For the sake of completeness, we note that amendments to cater for securitisation transactions have been included in other legislation including tax legislation, Companies Act and CCCFA.

Australian non-Government investor exemption

There is an issue with this exemption because it does not apply if an Australian investor who would otherwise meet the requirements of the exemption wishes to incorporate a New Zealand wholly owned subsidiary to make the investment. We understand that this was an unintended consequence of the drafting of that exemption.

Exemption for overseas persons who already owned residential property before 22 October 2018

We query whether there should be an exemption for overseas persons who held residential land prior to 22 October 2018, should they wish to sell that existing residential property and acquire an alternative residential property. That would not seem to be impacting the supply of housing stock (the original home was purchased legally and would be sold to a New Zealand person of a person who obtained OIO consent and then substituted for an alternative home). Otherwise any overseas person who owns residential land that was acquired legally prior to 22 October 2018 is effectively tied to that residential property that has already been acquired and they have no ability to change their home in New Zealand (other than to sell the home).

Non-urban land

The definition of non-urban land is unclear and results in some applications having to be made even where the status of the land is not entirely clear. Bell Gully supports a test that links the definition of non-urban land to zoning or use.

Underwriting exemption

There is an issue with the underwriting exemption in that it will apply to the issue of securities but not to the transfer or sale of securities. There does not appear to be a particular policy reason for this different outcome even though some underwriting transactions are structured as the sale of shares.

Network utility operator exemption

Regulation 57 of the Regulations exempts network utility operators from requiring consent to the acquisition of residential (but not otherwise sensitive) land. Given the nature of network utility operators in the various utility areas referred to in Regulation 57, we think there is a strong case for those operators to also be exempt from requiring consent to the acquisition of any sensitive land. Utility operators do not generally acquire large parcels of land, but the nature of their interests mean that they can require consent for leases or acquisitions of small areas of land on islands and on buildings that may sit above the seabed. This creates unnecessary cost and transaction risk for utility operators.

Takeovers Code

We think that there needs to be more alignment between the actions permitted under the Takeovers Code for a substantial shareholder and the requirements for consent under the OIA. We have applied for and obtained consent in the past to allow substantial shareholders to increase and decrease their shareholding that arises due to the corporate actions of an entity (e.g., dividend reinvestment plans, share buy backs etc). We would be happy to provide more detailed information to Treasury separate to this submission.