The Treasury

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

This is a joint submission from Sealord Group Limited (**Sealord**), Moana New Zealand (Aotearoa Fisheries Limited) (**Moana**) and Te Ohu Kaimoana. We welcome the opportunity to make a submission on the matters raised in the Treasury's consultation document *Reform of the Overseas Investment Act 2005: Facilitating productive investment that supports New Zealanders' wellbeing* dated April 2019" (**Consultation Document**).

Sealord is one of New Zealand's leading seafood companies. Established in 1961, a 50 per cent interest in Sealord was acquired by Māori in 1992, which is currently held by Moana – New Zealand's largest Māori-owned fisheries company that holds its shares in Sealord for the benefit of all Māori. This acquisition (sometimes referred to as the **Sealord Deal**) was a key component of the settlement of Māori fisheries claims under the Treaty of Waitangi, as reflected in both the 1992 Fisheries Deed of Settlement and Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, and was a major step in promoting Iwi participation in fisheries.

Te Ohu Kaimoana is a charitable trust established under the Māori Fisheries Act 2004. Its charitable purpose is to advance the interests of iwi individually and collective, primarily in the development of fisheries, fishing and fisheries-related activities. Te Ohu Kaimoana is managed by a Corporate Trustee, which is tasked with acting as the eyes, ears and mouthpiece for the collective interests in fishing and fisheries-related activities of the 57 mandated iwi organisations who are the beneficiaries of the 1992 Fisheries Settlement. In doing so, it works with Moana and Sealord and the wider industry to ensure sustainability of the fishery resources.

Sealord is an overseas person for the purposes of the overseas investment provisions of the Fisheries Act 1996 (**Fisheries Act**) and the Overseas Investment Act 2005 (**Act**), as a result of the introduction of Nippon Suisan Kaisha, Limited (**Nissui**) as a cornerstone international partner in 2001. Sealord has access rights to the fishing quota held by Pupuri Taonga Limited as trustee of the Pupuri Taonga Trust.

The focus of this submission is on matters covered in the Consultation Document that are relevant to requirements for consent under the section 57B of the Fisheries Act, namely:

- the definition of overseas persons as it applies to body corporates, with a focus on Iwi entities;
- the investor test;
- the benefit test and counterfactual; and
- timeframes.

The definition of overseas persons as it applies to body corporates

We agree with the issues identified by the Treasury that:

- The current definition of overseas person is overly broad, capturing body corporates that some could consider fundamentally New Zealand companies and imposing costs on the affected entities and the broader New Zealand economy.

- In particular, the current 25 per cent threshold does not fit well for some entities, including Sealord because it does not properly balance the public interest in managing the potential risks of foreign investment with the regime's compliance costs. Options proposed to address this issue include a 49 per cent threshold for listed companies, and an exemption application process that could apply to unlisted companies where certain criteria are met.

Extending Option 4 to allow for specific exemptions for Iwi entities

For the reasons set out below, we submit that the 25 per cent threshold does not work well for entities with significant Iwi ownership. The threshold does not recognise the nature of Iwi collaboration with overseas investors nor specific issues that Iwi face in managing and growing their assets for their whanau and future generations. That is, the reasons for providing an alternative pathway for Iwi entities are as compelling, if not more, that than the other categories referred to in the Consultation Document.

In our submission, Option 4 could be readily expanded to allow for an exemption application process that is fit for purpose for Iwi entities. In order to address the current adverse impacts of the Act, and for the reasons set out below, the criteria for Iwi entities should allow an exemption for entities where Iwi has a 50 per cent or greater ownership or control interest. There is strong justification for moving from the proposed 49 per cent criterion in Option 3 and 4 to 50 per cent for Iwi entities including because:

- Treaty Settlements have provided Iwi with an opportunity to provide for current and future generations. In order to maximise this opportunity and improve outcomes for Iwi, capital investment is critical. The ability to achieve these goals are considerably constrained if access to overseas capital is restricted by a requirement for Iwi to retain majority ownership.

- The most beneficial opportunities often come by way of a joint venture type of arrangement. That is, the 50/50 ownership model can provide opportunities for investment and development that would not be available with a lesser overseas interest.

- In terms of New Zealand ownership and control, because at least 50 per cent is held by Iwi, the shareholding Iwi remain equally able to influence the appointment of directors and the management and direction of the entity. That is, the overseas person cannot determine the management of an asset or property without Iwi agreement.

- A specific Iwi threshold is also appropriate where at least 50 per cent of the entity in question are held by an Iwi block (unlike other New Zealand incorporated companies where there may be numerous New Zealand shareholders with dispersed shareholdings that does not allow them to operate effectively as a block for a specific interest). Clearly, a New Zealand incorporated entity with at least 50 per cent Iwi ownership has strong New Zealand connections, with a low risk that that an investment in that company by overseas persons is against the public interest.

- An exemption application process would enable an application to be made and for the relevant Minister(s) (with input from the Overseas Investment Office (**OIO**)) to review the arrangements and determine whether the ownership arrangement was for the benefit of Iwi. Conditions and reporting arrangements could be applied to ensure the arrangement remained for the benefit of Iwi and that Iwi had at least equal control (that is, the overseas person had no majority interest in control).

In relation to such exemptions, it will be critical that the legislation explicitly ensures that the exemption counts when the exempted entity enters into a transaction with another New Zealand entity (for example, the acquisition by the exempt entity of a shareholding in another entity will not require consent or result in that entity becoming an "overseas person" solely because of its association with the exempt entity). An example of such a provision can be found in the definition of "specified persons" in the Overseas Investment Regulations 2005, the effect of which is to extend the exemption afforded to an entity listed in Schedule 3 or Schedule 4 to persons who would become overseas person only because of a direct or indirect connection with the exempt person.

Our experience is that the Act is often unnecessarily working against the enhancement of Iwi interests. The importance of the Treaty of Waitangi and the Sealord Deal is reflected in the benefits cited in Sealord's existing overseas investment permission (granted at the time of Nissui's investment in 2001), "specifically: benefits to Maori as they enhance their ability to grow their fishing assets".

A critical feature of the Sealord Deal was the 50/50 joint venture approach (initially with Brierleys Investments Limited). It was this investment structure which best enabled Iwi to maximise opportunities for their fisheries settlement.

However, Sealord is now currently disproportionately constrained in its ability to support Māori economic development and partner with Māori as a means to deliver on key goals. Rather, the operation of the Act serves to undermine the ongoing benefits the transaction was intended to bring.

We would be pleased to meet with the Treasury to discuss this issue further if that would assist.

Other comments on options 1 to 4

In addition to our comments above, we support Option 1, which increases the percentage of overseas ownership from 25 per cent to 49 per cent. However, in our view, that Option should include all domestically incorporated bodies corporate (not just listed companies). Broadly, we think this is consistent with the regime's policy (by focusing on entities where the majority of returns are enjoyed by overseas persons), would enable the OIO to focus its resources on higher risk applications and would reduce compliance costs for investors.

We understand that the Treasury has relied on disclosure rules for listed entities as part of its reasoning for increasing the ownership threshold for listed entities only, as that mechanism allows listed entities to be monitored where foreign ownership interest is close to positive control. We think that similar comfort could be provided by requiring non-listed bodies corporate to notify the OIO:

- when there is a change in ownership or control by an overseas person that meets or exceeds 25 per cent (i.e. where that change would not otherwise require a consent application); and/or

- where an overseas person has a 25 per cent to 49 per cent ownership or control interest in the non-listed body corporate, when they have entered into a transaction regulated by the Act.

We also submit that it is unnecessary to require that an applicant has received consent for at least two investments.

The investor test

We agree the issues identified with the investor test and strongly supports the proposed objective to simplify this process.

Our preferred approach is Option 3 which provides a clear checklist-style approach that will address the current uncertainty and complexity arising from the current approach. The application to fishing

quota (taking into account that fishing quota is a very different class of asset compared to sensitive land) would need to be clarified as this is not specifically addressed in the Consultation Paper.

We strongly support the removal of the requirement for assessing New Zealanders who otherwise are not the intended subjects of the Act.

The benefit test and counterfactual

We agree there are significant issues with the application of the benefit factors and counterfactual test that are not helpful in achieving the right balance between encouraging investment that benefits New Zealand and protecting New Zealand's assets.

In our view, the test set out in the Fisheries Act (quota and ACE) is distinct from the test that applies to land interests under the Act. The Act includes a benefit to New Zealand test for significant land whereas the overseas investment provisions of the Fisheries Act provide for a national benefit test. This also reflects the differences in the nature of the interests that the legislative tests apply to. Accordingly, the decision on counterfactual in the Crafar Farm case has no application to Fisheries Act applications given the different legislative test under consideration in that case. That said, in our submission, the legislation should clarify that the counterfactual does not apply to fisheries assets. Rather the test for fisheries assets should assessed with reference to the factors and national interest test set out in section 57B of the Fisheries Act with the overlay of a counterfactual that has minimal relevance in this context.

We strongly support the no detriment test for transactions between overseas persons**.**

Timeframes

In our experience the current timeframes, including the uncertainty regarding how long applications will take to be processed by the OIO, have resulted in transactions that would likely benefit New Zealand not proceeding because the vendors were not prepared to wait for the overseas purchasers to obtain consent.

Conclusion

We welcome the objective to better achieve the right balance between incentivising investment that benefits New Zealand and protecting New Zealand's sensitive assets. Given our experience of the fisheries industry, and the unique issues that arise in relation to overseas investment in that sector, we would be happy to discuss any of these issues further and/or provide additional information if that would assist.

Steve Yung	Steve Tarrant	Dion Tuuta
		
Chief Executive Officer **Sealord Group Limited**	Chief Executive Officer **Moana New Zealand**	Chief Executive **Te Ohu Kaimoana**