

The Treasury

Reform of the Overseas Investment Act Information Release

July 2020

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- [23] 9(2)(a) - to protect the privacy of natural persons, including deceased people
- [29] 9(2)(d) - to avoid prejudice to the substantial economic interests of New Zealand
- [31] 9(2)(f)(ii) - to maintain the current constitutional conventions protecting collective and individual ministerial responsibility
- [33] 9(2)(f)(iv) - to maintain the current constitutional conventions protecting the confidentiality of advice tendered by ministers and officials
- [34] 9(2)(g)(i) - to maintain the effective conduct of public affairs through the free and frank expression of opinions
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- [37] 9(2)(i) - to enable the Crown to carry out commercial activities without disadvantage or prejudice
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Reference: IM-5-3-8

Date: 8 May 2019

To: Associate Minister of Finance (Hon David Parker)

Deadline: For DEV 11am Wednesday 10 April

Talking points: Cabinet Paper, Phase two of the Overseas Investment Act reform – Release of the Consultation Document

Background

- Last year, Cabinet completed the most significant reform of the Overseas Investment Act ('Act') in more than a decade. Following that reform, Cabinet approved release of the Terms of Reference for the Phase Two reform.
- The Phase Two reform responds to concerns that the Act is overly complicated and may discourage some productive investment in New Zealand, and that there are significant gaps in the Act's coverage e.g. national security and ability to consider an investment holistically.
- The Consultation Document has been informed by preliminary targeted consultation with regular users of the Act. It describes each of the concerns identified by the public and officials and seeks feedback on potential options for reform.
- This is a significant opportunity to improve the Act and input from stakeholders, including investors, Māori and the wider public, will be important to ensure the reform process is well informed.
- To ensure the consultation is accessible and genuine officials have prepared a range of accompanying materials for a non-specialist audience. Treasury will conduct public hui and town hall style discussions tailored for specialist and non-specialist audiences.

What does the Consultation Document consider?

- **what we screen:** whether we should reduce the extent to which we screen some sensitive adjoining land and short term leases. There is a concern that the current treatment imposes disproportionate compliance costs, when compared to the risks those interests pose.

- **who we screen and when:** where we draw the line as to what level of control makes a company 'foreign-owned' and therefore subject to screening, and whether we should screen smaller, low risk transactions.
- **how we screen:**
 - options for improving the investor test – in particular, whether the good character test targets the right characteristics;
 - options for improving the benefit to New Zealand test, including whether it should allow consideration of 'negative benefits' and explicitly refer to additional factors such as tax, water or Māori values;
 - whether New Zealand should introduce a holistic national interests test;
 - whether New Zealand should introduce a national security 'call-in' power for transactions not currently captured by the Act.
- More generally, there are two themes that run through the Consultation Document (and the Act):
 - for a range of topics in the 'what we screen and who we screen' sections, reform options offer potential to improve the efficiency of the Act without compromising the Government's ability to manage risk; however
 - when considering 'how we screen' many options involve a trade-off between increased discretion for Ministers and a consequent reduction in certainty, which would reduce New Zealand's attractiveness for foreign investors.
- The Consultation Document is oriented towards seeking feedback and expresses no preferred options or package for reform.

Addition of 'public order' to national security call-in power

- I have asked officials to expand the call-in power proposal in the Consultation Document so that it is a national security **and public order** call-in power. This would enable the Government to call in transactions in the media sector that the Act currently does not capture, and to consider whether they raise national security or public order risks.
- [1,36]
- Such a measure would not be unique internationally.
 - Australia's Foreign Investment Review Board screens all foreign investments of at least 5 per cent in Australian media businesses, regardless the value of the investment.
 - In late 2018 Germany decided to include media companies in the scope of its foreign investment screening regime. This allows the German

Government to consider whether the acquisition of a domestic company by a non-EU resident poses a threat to German “public order or security”.

What doesn't the consultation paper consider?

- This Consultation Paper is not a ‘first principles’ reform. It does not:
 - consider the Act’s purpose or substantive matters associated with the 2018 changes to the Act (e.g. residential home and forestry);
 - revisit what the Act classifies as sensitive assets or change the Government’s position with respect to rural land.

Tax, Water and Māori cultural values (if raised):

- The Consultation Document tests the nature of public concerns about foreign investment and water extraction, consideration of Māori cultural values, and tax residency/contribution. Feedback is sought on whether the Act should explicitly consider these issues, and on the options identified.
- **Limitations of the Act:** For each of these areas, other primary legislation provides mechanisms to address potential concerns more comprehensively (for example through the Resource Management Act and Income Tax Act). The range of options for incorporating consideration of these issues in the Act is limited.
- **Involvement of other agencies:** Officials analysis’ of the issue and options available have been informed by discussions with (Ministry for the Environment for water, Te Arawhiti and Te Puni Kōkiri for Māori cultural values, and Inland Revenue for tax). Inland Revenue has informed Minister Nash that it is not in favour of introducing a tax dimension to the Act.

Timeframes for consultation (if raised)

- The timeframe for consultation for submissions is short but necessary to ensure that the Government can enact reforms this Parliamentary term. The timeframes for the reform are ambitious, and any delays during the policy development and legislative process could compromise the Government’s ability to deliver the reform by mid-2020.
- Officials will be conducting hui and town hall style discussions around the country to encourage feedback.