Some Significant Changes to New Zealand's Overseas Investment Regime

The Overseas Investment Amendment Bill (No. 2) (*Bill*) was introduced to Parliament on 19 March 2020, with the intention to carry out further reforms to the overseas investment regime in New Zealand, and implement changes known as the Phase 2 reforms.

The Phase 1 reforms, which placed restrictions on the sale of residential land to overseas persons and streamlined the consent process for forestry investment, were implemented in the 2018 changes to the Overseas Investment Act 2005 (*Act*).

The Bill proposes to introduce a number of changes to the Act to enable a more streamlined approach to overseas investment. It does this by ensuring that the risks posed by foreign investments can be managed effectively, while better supporting productive overseas investment through easing of the regulatory burden of the screening process.

We summarise below some of the key amendments:

1. National Interest Test

The introduction of a national interest test will allow the Minister responsible for the Act, the Minister of Finance, to deny consent to any investment ordinarily screened under the Act that is considered to be contrary to New Zealand's national interest (including security, economic and other interests). This is similar to the Australian regime but gives the Minister much broader discretion to consider what is in the national interest in each case. By leaving some significant detail to determination by regulations, there is scope here for this to be influenced by government policy of the day rather than be limited to traditional "national interest" (ie. security or intelligence) concerns.

Transactions of national interest are broadly defined as transactions already requiring consent under the Act which result in:

- an investment by a non-New Zealand government investor;
- an investment in a strategically important business; or
- any other investment that the Minister considers could be contrary to New Zealand's national interest, provided that the Minister has notified the applicant that the transaction is being considered as such.

Categories of strategically important businesses that the national interest test will apply to are, subject to the detail of regulations yet to be developed:

- businesses that develop, produce or maintain military or dual-use technology;
- critical direct suppliers to intelligence or security agencies;
- telecommunications infrastructure or service providers;
- businesses that generate or distribute electricity;
- businesses involved in designated ports and airports;
- systematically important financial institutions or financial market infrastructure;
- media business that have an impact on New Zealand's media plurality; and

- large irrigation schemes.

On 13 May 2020, Associate Finance Minister David Parker announced that the introduction of the national interest test will be accelerated, so as to have it in place quickly to help deal with fall-out from the Covid-19 pandemic.

In addition, the national interest test will temporarily apply to any foreign investment, regardless of its nature or value, that results in a 25% ownership of a New Zealand business. It will also apply to increases of an existing interest to or beyond 50%, 75% or 100% in a New Zealand business. The Associate Minister has said that the aim here is to minimise the possibility that cornerstone businesses in our productive economy are sold in a way contrary to our national interest while the pandemic is causing the value of many businesses to fall.

In practice, this is to operate as a simple notification requirement and the process is to be quick to ensure investment is not unduly delayed.

These temporary powers will be reviewed every 90 days, and will remain in place only as it is necessary to protect essential New Zealand businesses from the effects of the Covid-19 pandemic. The national interest test will remain (with a minimum threshold of $100 million) once the temporary measures end.

The Government aims to have the temporary measures in place by mid-June.

2. Call-in Power

The Government has proposed a “call-in” power which allows for review of certain investments which would not ordinarily be captured by the Act. This power would allow the Government to call in certain transactions, place conditions on or prohibit certain transactions from proceeding where they pose a risk of harm to New Zealand’s national security or public order. Notification to Land Information New Zealand of these transactions before they are given effect to may be either mandatory or voluntary, depending on the category of the business involved.

The call-in power would apply to those types of business captured under the national interest test (excluding large irrigation schemes), and will extend to investments in business that hold or generate certain types of sensitive data (for example health or financial data). It is expected that this power would be used only in rare circumstances where necessary to protect New Zealand’s interests.

3. Lower Risk Transactions

The Bill proposes that certain lower risk transactions will no longer require consent under the Act. These types of transactions include:

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Investments in land that are only screened because the land adjoins land that is sensitive in its own right (sensitive adjoining land). The adjoining land criteria has been narrowed, with the aim of reducing the number of transactions requiring consent under the Act. This is a significant change, to be welcomed, as a number of land transactions have to date been covered only because of the nature of adjoining land;

- Commercial leases or other interests in land of less than 10 years (whether this threshold is reached through a single interest or cumulative interests), being an increase from 3 years in the current legislation – again another significant easing although still not long enough to exclude most major commercial or industrial leasing;

- Investments involving fundamentally New Zealand entities (refer below); and

- Small transactions which do not grant an overseas investor any control of sensitive assets.

4. Narrowing of the meaning of “overseas person”

One important proposed change is to the definition of an “overseas person” as applied to a corporate entity. This is expected to reduce the number of corporate entities requiring consent under the Act.

Currently, entities that are 25% or more overseas owned will be an “overseas person” under the Act. The changes proposed mean that a corporate entity will be an “overseas person” only if it is *more* than 25% overseas owned. This makes sense, 25% being one of several common lower control thresholds for a minority investment that do not give any real control usually, save sometimes on very important decisions. More than 25%, in contrast, denotes the power to block a special resolution.

Perhaps more significantly, a New Zealand listed company will only be considered an “overseas person” if more than 50% of its shares are owned by an overseas person or two or more overseas persons cumulatively (the ownership test), or where overseas persons who hold 10% or more shares control the composition of 50% or more of the company’s governing body, or exercise control of more than 25% of the voting power at meetings of the company (the control test).

5. Farm Land Advertising

Farm land in New Zealand will be subject to more thorough advertising requirements to allow New Zealanders more of a chance to purchase the land on the open market before it is sold to overseas investors. This includes increasing the minimum timeframe in which advertising must take place, ensuring that the advertising takes place prior to the parties entering a sale and purchase agreement and allowing alternative forms of advertising where appropriate.

6. **Streamlined Application Process**

The Bill proposes to simplify the application process itself, by:

- Completing more targeted assessments of an investor’s character and capability in the good character investor test, by only considering serious proven matters, allegations of serious matters where proceedings have begun, and any enforceable undertakings entered into by the investor.
- Importantly, the Bill no longer requires investors to carry out a full screening process for subsequent investment applications if they have been screened and approved in a prior investment. The investor simply has to prove that there has been no change to the investor test factors, or that any changes do not make the investor unsuitable to own New Zealand land.
- Simplifying the ”benefit to New Zealand” test in some very practically significant ways:
    - Changing the counterfactual assessment requirement so that a “before and after” the investment assessment is completed, rather than “with and without” (it seems this is effectively a quiet reversal of the hugely problematic *Crafar Farms* ruling, that resulted in a significant degree of crystal ball gazing about what other potential investors would have done to add benefits);
    - Introducing a proportionate approach to the test, taking into account the sensitivity of the land and the nature of the overseas investment – a very commonsense amendment;
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- Removing the requirement for ”substantial and identifiable” benefit for non-urban land greater than 5 hectares;
- Introducing a test for determining whether there will be a negative impact on water quality or sustainability where the investment involves extraction of water for bottling or bulk consumption; and
- If the acquisition involves more than 5 hectares of farm land, there is a higher threshold for demonstrating the benefit to New Zealand as a reflection of its significant economic and cultural importance.

- Following criticism of the lack of formal time frames, the Bill introduces statutory time frames for decisions to be made by the regulator. These will be set out in Regulations. Applicants will not be entitled to any relief if the timeframes are not met, and the timeframes do not create any legally enforceable right against the relevant Minister or regulator.

7. **Increased Cost of Non-Compliance**

The penalties for non-compliance with the Act have been significantly increased, raising the cap from $300,000 to $500,000 for individuals and from $300,000 to $10 million for all other applicants. The Overseas Investment Office will also be able to enforce undertakings given by overseas investors in Court, and may seek injunctive relief from the High Court in relation to steps to be taken (or not taken) by such investors.

The Government had planned to pass the Phase 2 reforms of the Act prior to the general election in September 2020, but the timeline for the Bill and its passage to enactment are now unclear due to the Covid-19 situation. We will await further announcements on this Bill.

These are fairly significant amendments to the regime and it is surprising how quietly they have been slipped into Parliament and how little commentary they have attracted. Overall, though, they are to be welcomed.

Alternative Monetary Threshold for Australian Investors

In addition to the proposed changes to the Act, on 15 April 2020 the alternative monetary thresholds in respect of overseas investments in significant business assets by Australian investors were announced for the period 1 January 2020 – 31 December 2020. These thresholds are:

- $536 million in respect of Australian non-government investors; and
- $112 million in respect of Australian government investors.

These thresholds are adjusted each year in accordance with the formula set out in the Overseas Investment Regulations 2005, and are relevant in the application of section 13 of the Act.

Please contact us if you would like further information on the changes proposed in the Bill, the recent announcement regarding the alternative monetary thresholds in respect of Australian investors, or the temporary Covid-19 measures.