

Submission by



to the

Treasury

on the

**Reform of the Overseas Investment Act 2005
Consultation Document**

May 2019

**REFORM OF THE OVERSEAS INVESTMENT ACT 2005
CONSULTATION DOCUMENT
SUBMISSION BY BUSINESSNZ¹**

1.1 INTRODUCTION

- 1.2 BusinessNZ welcomes the opportunity to comment on the Reform of the Overseas Investment Act (OIA) 2005 Consultation Document ("the Consultation Document").
- 1.3 BusinessNZ understands the significant benefits of foreign direct investment (FDI) some of which are outlined in the Consultation Paper (paras 20 – 23) and so are not repeated here. Suffice to say, NZ has been built largely on the back of foreign investment.
- 1.4 Of importance, but perhaps not widely understood by the general public, is the Consultation Document's statement that overseas persons operating in NZ are – like domestic investors and businesses – subject to NZ legislation and associated regulations.
- 1.5 However, the OIA imposes additional legislative requirements on overseas persons as successive governments have supported the proposition that it is a privilege for overseas persons to own or control sensitive NZ assets – that is, certain types of land, significant business assets (generally those worth at least \$100 million) and fishing quota.
- 1.6 There is concern over the delay and cost of meeting the complex requirements of the OIA's screening process. The Discussion Document notes of this process: *"Some international surveys have ranked New Zealand's investment screening regime among the most restrictive regimes in the world"* (Consultation Document para 34.)
- 1.7 Given the complexity and effort in direct investment opportunities, investors place a high value on certainty of receiving the necessary regulatory clearances.

¹ Background information on BusinessNZ is attached as Appendix 1.

- 1.8 Some quite recent decisions have resulted in uncertainty for investors when engaging in relatively straightforward investing. The recent OceanaGold decision is a case in point, with the Minister of Land declining the Waihi mining company's application to purchase nearby farmland to expand its operations even though the Associate Minister of Finance supported it.
- 1.9 The inconsistency of Ministerial decision-making in this case is of concern given that investors require a reasonable degree of certainty when deciding to make investment decisions.
- 1.10 Markets dislike risk and require either higher compensation to reflect it, or simply exit the market and seek better and more consistent investment opportunities somewhere else. To some extent, the Consultation Document reflects these reactions, noting that international surveys rank NZ well down the list of countries welcoming foreign investment, an indication that NZ struggles to attract the most valuable forms of investment.
- 1.11 Notwithstanding the above, BusinessNZ supports the move to consider options for removing some fundamentally NZ entities from the OIA regime and simplifying the investment process for overseas persons who have already obtained consents. These are positive steps forward.
- 1.12 On the other hand, while BusinessNZ understands the Government's continuing commitment to a regime that considers ownership of NZ's most sensitive assets is a privilege, it is very concerned that providing for greater ministerial discretion could result in increased investor uncertainty and, potentially, have a chilling effect on investment decision-making.
- 1.13 Given this organisations broad membership, members of the wider BusinessNZ family will have a range of views on particular consultation topics and/or specific points of interest to them. Many will provide their own separate submissions to the Treasury on matters of concern. Some submissions will focus on more specific issues where the individual organisation has particular expertise. For example, BusinessNZ would commend the NZX Ltd submission on alternative options for defining 'overseas person'.
- 1.14 BusinessNZ would welcome the opportunity to discuss our submission with the Treasury.

RECOMMENDATIONS

BusinessNZ **recommends** that:

The Treasury undertake a “first principles” review of NZ’s foreign investment regime to determine the adequacy or inadequacy of the OIA and associated regulations in meeting the overall objective of improving the well-being (economic, environmental, cultural, and social) of New Zealanders.

Without prejudice to the above recommendation

BusinessNZ **recommends** that:

Government proceeds with proposals for removing certain fundamentally-NZ entities from the OIA regime and for simplifying the investment process for overseas persons who have already obtained consents, these being positive steps towards reducing compliance costs.

BusinessNZ **recommends** that:

Government does not pursue any mechanism which would provide, on a case by case basis, for greater ministerial discretion over issues considered sensitive, such as water consumption etc. To do so would create uncertainty for investors and likely have a chilling effect on FDI important for NZ’s overall well-being.

BusinessNZ **recommends** that:

Officials particularly note the responses outlined in Section 3 of this submission (Comments on the Consultation Document Proposals).

2.0 GENERAL DISCUSSION

- 2.1 BusinessNZ believes the Government needs to appreciate fully how the Consultation Document's proposals will affect not only the country's overall productivity and growth, but also the creation of new jobs and forms of employment. Businesses make decisions based on an operation's total cost, including unnecessary and repetitive compliance costs. With large operations, the opportunity costs will also be examined, particularly if timeframes are pushed out by a significant margin or regulatory consent requirements mean uncertainty of outcome.
- 2.2 Before coming to any decision as to the merits or otherwise of making changes to the OIA, it is crucial policymakers take a step back and ask certain fundamental questions, including but not limited to:
- Is there a problem *in New Zealand* with current requirements (i.e. is there evidence of "market failure" which needs to be addressed)?
 - If there is a problem, is the problem significant?
 - What are the costs and benefits (including unintended costs) of making changes to the OIA?
 - Will the proposals to adopt greater requirements effectively address the alleged problem (and if so at what cost)?
 - Are there potential options for improving outcomes which don't impose significant costs (e.g. by improving information to market participants)?
- 2.3 It is possible to take the rather simple but perhaps logical approach that there should be no (specific) rules applying to foreign ownership, given New Zealand's general position in respect to world trade.
- 2.4 But while the above might be a logical starting point, it is important to accept the political reality that we are not starting with a blank sheet of paper.
- 2.5 Issues that concern many businesses include those relating to the timely analysis of consents (which it is understood the Government is currently addressing) while the potential for greater uncertainty over the merits of recent decisions, resulting in uncertainty as to the rules of the game is of particular concern.

- 2.6 The recent decision to block Waihi mining company OceanaGold’s application to purchase nearby farmland in order to expand its operations is particularly troublesome.
- 2.7 FDI has been critically important for New Zealand’s success. In the absence of domestic savings, overseas investors have put up venture capital and funding for projects that might otherwise have gone unfunded.
- 2.8 Media attention, largely focused on high-profile land sales, tends to provide a very distorted view of Foreign Direct Investment (FDI) in NZ.
- 2.9 To put things in context, to date, foreign interests’ land-based acquisitions have not been significant, as the table below shows. The stock of land-based foreign holdings in 2018 was less than \$8 billion (7.3% of the total). Around \$39 billion (36%) was invested in finance and insurance, \$16 billion (14.8%) in manufacturing, and around \$12 billion (10.9%) in the retail and wholesale trade sector. Information media and telecommunications accounted for around \$4.2 billion (4.1%) with the balance of FDI (\$13.0 billion) relatively evenly spread amongst the other sectors. Just over \$16 billion (15% of the total) was not allocated to any industry. It is somewhat ironic that the public’s concerns appear to revolve around land sales when in fact these are very low in percentage terms, compared with acquisitions in other sectors.²

Total FDI in NZ

Industry	\$ (Billions)	% of total
Financial and insurance services	39.2	36.2
Manufacturing	16.1	14.8
Agriculture, forestry and fishing	7.9	7.3
Retail trade	6.1	5.6
Wholesale trade	5.7	5.3
Information media and telecommunications	4.2	3.9
All other industries	13.0	12.0
Unallocated to industry	16.3	15.0
TOTAL	108.5	100.0

Source: Adapted from StatsNZ Balance of Payments and International Investment Position: Year ended 31 March 2018

² For more detailed information on Total Investment by foreign interests in New Zealand (including FDI) and New Zealand’s Total Investment Abroad (including FDI) see Statistics NZ’s publication “Balance of Payments and International Investment Position: Year ended 31 March 2018” (September 2018).

3.0 COMMENTS ON THE CONSULTATION DOCUMENT PROPOSALS

3.1 The Consultation Document summary asks for feedback on three areas:

- What should we screen (including discussion on purchases of land next to sensitive land, and leases of sensitive land);
- Who should we screen (drawing a line on the level of control or ownership that makes a “New Zealand company”);
- How can we improve the screening process (assessing an investor’s character and capabilities and an investment’s potential impact).

3.2 For the sake of clarity, BusinessNZ’s responses below will follow the same format as the Summary. BusinessNZ has not addressed all issues covered by the Consultation Document, only those considered to have more generic application. However, as stated earlier, other organisations and member companies will also be making submissions and may provide more depth on certain issues, including on those this submission has chosen not to cover.

What should we screen?

Sensitive adjoining land

3.3 BusinessNZ agrees with the sentiment some stakeholders have expressed that the current definition of sensitive adjoining land is broader than necessary, requiring, for example, overseas investors to go through the consent process if wanting to buy commercial land in an industrial area next to a local recreation reserve. The consent process must be followed even though the proposed purchase would not affect public access routes to the reserve.

3.4 But provided there is access to a reserve, whether sensitive adjoining land is owned by domestic persons or overseas investors should make no difference. In other words, in situations of this kind, overseas investment proposals should not be subject to the screening process.

Leases of sensitive land that require screening

3.5 BusinessNZ notes that an overseas investor planning to lease a piece of sensitive land for a period of at least three years must obtain a consent (if there is a right to renew or extend the lease for longer this is counted as part of the lease period).

- 3.6 The Consultation Document indicates that such requirements are necessary because leases can run for a considerable period giving lessee investors similar rights of access and control as those associated with land ownership.
- 3.7 The Consultation Document also considers a requirement to obtain a consent to lease might instead, encourage overseas investors to buy land outright since the same screening process applies.
- 3.8 In BusinessNZ's opinion, the rationale for individuals (whether overseas or domestic investors) leasing sensitive land or purchasing it outright will be affected by a range of factors with constraint largely irrelevant given any owner of land has to abide by NZ laws and obligations. The distinction between leasing and ownership is of little consequence since neither owners nor lessees can physically uproot the land and take it somewhere else.
- 3.9 Notwithstanding para 3.8, Option 2 in the Consultation Document (requiring screening from 10 years for more sensitive land and 35 years for other land) would be preferable to the current approach since it establishes more realistic timeframes.

Who should we screen?

Where do we draw the line as to what constitutes a New Zealand owned or controlled company?

- 3.10 The Consultation Document states that defining who is an "overseas person" is relatively straightforward where the investor is an individual; it becomes much more complicated when the investor is a business entity with multiple owners (including some who may be New Zealanders or other NZ entities).
- 3.11 It is therefore a concern that current rules sometimes apply to companies most would consider NZ companies, thereby imposing on them significant transaction and compliance costs. Screening of transactions can be required although no overseas investor will gain a meaningful level of control, or a change in control, over a sensitive asset.
- 3.12 The four options proposed in the Consultation Document include:
- Increasing the percentage of overseas ownership required for a domestically incorporated and listed company to qualify as an overseas person from 25% to 49%.

- Targeting the regime at domestic and listed companies where “substantial holdings” (5% or greater) in classes of securities that confirm control rights - cumulatively totalled at 25% - are overseas owned (similar to the Australian approach), or more than 49% of the economic returns flow to overseas owners and/or assets held collectively provide them with 25% control.
- The final option would keep the current definition of overseas persons and allow locally incorporated bodies to apply for an exemption from the OIA if they have a strong connection to NZ and a strong record of compliance.

3.13 While BusinessNZ has no strong view on any option, it considers none is ideal given the realities of markets where shareholders can change daily. This makes it largely impossible for listed issuers, in real time, to confirm either their ownership or what proportion of their shares is held overseas.

3.14 BusinessNZ would commend the alternative (two) options outlined in the NZX submission namely that: (1) The definition of ‘overseas person’ does not apply to NZX Issuers, on the basis that they are fundamentally NZ companies and subject to a high level of regulation around their ownership structure; and (2) that the definition of ‘overseas person’ does not apply to an NZX Issuer, unless it has a holder who is an overseas person who (together with its associates) holds more than 25% of the NZX Issuer.

3.15 The rationale for suggesting this approach is comprehensively covered in the NZX submission to Treasury so is not repeated here.

Portfolio Investors

3.16 The Consultation Document considers the application of the rules to “portfolio investors” is another challenge. A portfolio investor is an entity that obtains a significant minority interest (generally less than 10%) in a body corporate, investment fund or individual project but with no, or a limited, ability to influence or exercise material control. With no controlling interest, and with long-term returns generally the priority, such an entity’s investments are deemed passive investments. But if a portfolio investor is an “overseas person”, consent may be needed.

3.17 The proposed options outlined in the Consultation Document are targeted at encouraging this kind of investment, with four outlined, namely:

- Establish a class exemption for entities which do not seek a controlling share of the asset, or representation on the board;
- Establish a class exemption for entities which have at least 51% of their funds invested on behalf of New Zealanders and where control rights are 76% beneficially held by New Zealanders;
- Create a narrower exemption available only to domestically regulated superannuation funds – e.g. Kiwisaver schemes;
- Amend the Act to allow individual exemptions for investments beneficially owned or controlled by New Zealanders. This could operate either in isolation or in conjunction with any of the above.

3.18 BusinessNZ would recommend that the Treasury consults closely with companies and institutions likely to be impacted upon by any such specific changes to ensure any proposals going forward are generally acceptable to the industry and reasonably meet any compliance cost concerns.

Tipping point for requiring consent

3.19 This concerns the acquisition of a small interest in an entity that already owns or controls a sensitive asset where the acquisition results in the entity becoming an overseas person. For example, where Person A applies to buy 1% of Company B and Company B is already 24% overseas owned.

3.20 Options to deal with this “tipping point” outlined in the Consultation Document include:

- Simplify the regime by targeting the Act at deliberate attempts to gain control of sensitive land without having to satisfy the benefit to NZ test. This would be achieved by replacing section 12(b)(iii) with a general anti-avoidance provision, or
- Require consent where, at completion of a transaction, the acquirer holds at least 5% of the securities in that class tipping the entity into overseas person status, or
- Establish such control thresholds but limit them to publicly listed companies.

3.21 Again, BusinessNZ would commend the submission of the NZX on this specific point, namely that as noted in para 3.14 and 3.15 that the recommended amendment to the definition of ‘overseas person’ such that NZX Issuers are excluded from the definition, would remove the need for ‘tipping point’ consent for investors in NZX Issuers.

How can we improve the screening process

- 3.22 BusinessNZ notes one of Consultation Document's objectives as being to look at proposals for balancing certainty for overseas investors (in terms of the timeframes for decisions and likelihood of success) with enabling holistic decisions to be made about prospective investments on a case by case basis.
- 3.23 The Consultation Paper is seeking feedback on whether NZ should introduce a wider, but rarely to be used, discretion to decline investment approval for significant assets.
- 3.24 BusinessNZ is extremely concerned about the possibility of providing any greater discretion to decline investment approval for significant assets than currently applies as outlined in further detail later in this submission.
- 3.25 How would "significant asset" be defined? What does "rarely" really mean? Would these be subject to the political views of the government Minister(s) making the decisions at the time?
- 3.26 Any new discretion would need to be clearly defined and accompanied by significant rights of appeal.

Assessing investors' character and capacity

- 3.27 BusinessNZ notes that in order to satisfy the "investor test", the current regime requires overseas investors to provide information about themselves.
- 3.28 The investor test is transaction-based, requiring repeat investors to satisfy the test for each new transaction.
- 3.29 One approach outlined in the Consultation Document is for test criteria to be simplified or alternatively turned into a "checklist", setting out the specific information the investor must provide (such as not having certain criminal convictions etc.).
- 3.30 BusinessNZ would support removing the requirement for "approved" investors to go through the "investor test" for every activity they undertake.

- 3.31 BusinessNZ notes that a separate issue raised in the Consultation Document is whether the “good character” component of the investor test (or a checklist, if adopted) should more explicitly allow an investor’s history of paying tax to be considered before granting consent.
- 3.32 The Consultation Document raises a concern about overseas persons acquiring sensitive NZ assets and not necessarily paying enough tax in NZ (page 85). Currently the OIA allows, but does not explicitly require, tax arrangements to be considered under the good character test.
- 3.33 The Consultation Document proposes three potential options for reform:
- Option 1 would expressly include tax compliance history as part of the investor test. While tax compliance history can already be considered under the good character test, this option is designed to ensure the decision-maker considers investor tax arrangements (for example, residency in low-tax jurisdictions, tax disputes and shortfall penalties) when determining an overseas person’s character.
 - Option 2 would require, as part of the investor test, each ROP/IWC to certify that, in any jurisdiction, it (or any entity under its control): is not involved in any tax avoidance scheme, has not breached any tax legislation (including whether it has been subject to shortfall penalties, or an equivalent, for non-compliance), and is not currently involved in a dispute with any tax authority.
 - Option 3 would require investors to obtain binding rulings from Inland Revenue on the treatment of transactions under NZ tax laws – for example, the structure and funding of arrangements used to acquire land.
- 3.34 BusinessNZ has concerns about all the proposed options given the possibility of interpreting them in a number of ways. They appear unnecessarily vague and complicated in compliance terms rather than seeking to simplify the process of gaining investor assurance of compliance with NZ laws.
- 3.35 As well, there appears to be no discussion or consideration of what might be considered a “big” or a “small” offence and how the definition might affect the right of an overseas person to seek investment approval.
- 3.36 In terms of Option 3 (seeking binding rulings from IRD), what specifically would an investor be seeking a binding ruling on? The list could be endless.
- 3.37 BusinessNZ notes that at this stage, the Consultation Document describes the options only in very general terms. This could cause problems if an option were

to be enacted without much change since it would be difficult to know what must be specifically disclosed or certified as part of an application for consent.

- 3.38 Some have suggested it might be possible to provide for materiality thresholds and/or to consider whether disclosures and certification should apply only to non-compliance resulting in prosecution or to a finding of tax avoidance.

Screening the impacts of investments

- 3.39 It is noted that in addition to meeting the “investor test”, an overseas investor wanting to buy an interest in sensitive land must generally also show the investment itself will likely benefit NZ.
- 3.40 A broad range of factors is considered in the above context e.g. economic, environmental and cultural factors.
- 3.41 The Consultation Document’s list of factors is broad with some being unclear and overly complex, creating uncertainty, imposing unnecessary cost and resulting in time-consuming processes likely to scare off would-be investors.
- 3.42 BusinessNZ notes that while the Consultation Document accepts the above points, it considers the current test does not take into account important features of an investment, as whether it poses a risk to national security or some aspect of the economy (the ongoing supply of critical services such as electricity for example). Moreover, the Consultation Document expresses concern that the current regime does not enable decision-makers to consider the effect of a prospective investment on, or consistency with, matters such as Maori cultural values.
- 3.43 Dealing first with the “national security” or supply of electricity issue.
- 3.44 BusinessNZ is aware of a range of ownership structures among NZ electricity lines businesses ranging from Energy Trusts, local government ownership, through partial private ownership to full private ownership with some companies listed on the NZX. In all cases, the service providers must abide by the same regulatory provisions applying to electricity supply irrespective of ownership model, including pricing decisions from the Commerce Commission. BusinessNZ is therefore at a loss as to what the Consultation Document’s specific concern might be when it comes to matters such as electricity supply where all involved are covered by the same rules.

- 3.45 Provision for greater Ministerial discretion would pose an even greater risk than currently for would-be investors, resulting in greater uncertainty and higher compliance costs. BusinessNZ is very concerned at any moves that would give greater discretion to refuse consent.

Options range from tweaking our current rules.....to introducing a new 'backstop' power.....

- 3.46 Under the Consultation Document, what is seen as addressing the above concerns could range from keeping the current "benefit to NZ test", with changes allowing decision-makers to consider some additional matters - such as national security - to introducing a new "backstop" power enabling decision-makers to look at further matters associated with more sensitive transactions.
- 3.47 The Consultation paper considers the backstop could be designed in two ways:
- A narrow design allowing Ministers to **deny consent** for investments that pose a risk of **substantial harm** to such things as public health and safety, or
 - A broad design allowing Ministers to **provide consent** for more sensitive transactions only if these are in NZ's **national interest**.

.....to only allowing investments that are in NZ's national interest.....

- 3.48 This option would mean decision-makers would have full discretion to disallow all transactions, not just the more sensitive, unless these were perceived to be in NZ's national interest. Ministers could determine outcomes on a case-by-case basis. This is a substantially more onerous threshold for foreign investment than the national interest test in Australia, under which an investment can proceed unless it is **contrary to** the national interest.³

.....and thinking about how the rules allows consideration of issues relating to water extraction and Maori cultural values

- 3.49 As previously noted, BusinessNZ considers providing Ministers with an open-ended discretion would be problematic.

³ The Consultation Document does not explain the reason for diverging from the approach in Australia and there does not appear to be a good reason for doing so. There is no benefit in requiring the overseas investor to prove that the transaction is in the national interest, because at the point the national interest test applies the applicant will already have satisfied the good character and benefit to NZ criteria. If the transaction has already been classified as beneficial, and the investor is of good character, it is unnecessary to then assess whether it is positively in the national interest.

- 3.50 While BusinessNZ understands the Government's position - that it is a privilege to own NZ's most sensitive assets - it is very concerned moves to provide for greater Ministerial discretion could result in more uncertainty for investors with a potentially chilling effect on investment.
- 3.51 The public perception of "bottled water" is a classic case in point, the amount of water bottled and sold on to overseas markets being trivial in the context of total freshwater use in NZ. Giving Ministers even more discretion would simply exacerbate concerns over investment certainty.
- 2.52 Issues surrounding freshwater use/extraction are already covered under the Resource Management Act (RMA) therefore there is no justification for treating foreign investors any differently than domestic users of freshwater.

Appendix One - Background information on BusinessNZ



[BusinessNZ](#) is New Zealand's largest business advocacy body, representing:

- Regional business groups [EMA](#), [Business Central](#), [Canterbury Employers' Chamber of Commerce](#), and [Employers Otago Southland](#)
- [Major Companies Group](#) of New Zealand's largest businesses
- [Gold Group](#) of medium sized businesses
- [Affiliated Industries Group](#) of national industry associations
- [ExportNZ](#) representing New Zealand exporting enterprises
- [ManufacturingNZ](#) representing New Zealand manufacturing enterprises
- [Sustainable Business Council](#) of enterprises leading sustainable business practice
- [BusinessNZ Energy Council](#) of enterprises leading sustainable energy production and use
- [Buy NZ Made](#) representing producers, retailers and consumers of New Zealand-made goods

BusinessNZ is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy and services for enterprise, BusinessNZ contributes to Government, tripartite working parties and international bodies including the International Labour Organisation ([ILO](#)), the International Organisation of Employers ([IOE](#)) and the Business and Industry Advisory Council ([BIAC](#)) to the Organisation for Economic Cooperation and Development ([OECD](#)).