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Legal and Regulatory Advisors

The Overseas Investment Bill – Phase II Reform

1 May 2020

Introduction

The Overseas Investment Amendment Bill (No 2) 2020 (the **Bill**), which implements a second phase of reform to New Zealand's Overseas Investment Act 2005 (the **Act**), was introduced to Parliament on 19 March 2020.

The purpose of the Phase II reforms is two-fold - to ensure that risks posed by foreign investment can be managed effectively *while* better supporting productive overseas investment by appropriately reducing the screening of low risk transactions.

The Bill largely reflects the position set out in the 2019 Cabinet Paper. The proposed changes generally make the regime more permissive of foreign investment albeit that a new national interest test and associated call-in power have been introduced. We are generally supportive of the approach taken in the drafting of the Bill (with some concerns as referred to below).

We summarise some notable aspects of the Bill below.

Additional requirements

National Interest Test

The Bill introduces a "national interest" test which allows the relevant Minister to deny consent to any investment *ordinarily caught under the Act* that is considered to be contrary to New Zealand's national interest. This power has been modelled on the Australian regime and gives the Minister a broad discretion to consider what is in the national interest in each case.

The test applies to both overseas investments in New Zealand's "strategically important business" assets and to investments where foreign governments have a greater than 10% interest in the investor. In addition, the Minister also has a broad discretion to identify any other overseas investment transaction as a transaction of national interest.

We had expected the Bill to clarify the criteria to be applied by the Minister in determining whether to decline a consent to a transaction of national interest. However, this has not been provided in the Bill, with the operative provision simply providing that "[t]he Minister may decline consent to a transaction of national interest if the Minister considers that the transaction is contrary to New Zealand's national interest".

Call-in power

A new national security and public order "call-in power" has been introduced. This will allow the Government to review transactions in circumstances *not ordinarily caught by the Act*, and applies to:

- most investments in "strategically important businesses"; and
- the acquisition of more than 10% shares in listed companies or where there is disproportionate control of a listed company, and, for media businesses with significant impact, to acquisitions of more than 25%.

The Government is conferred broad powers to impose conditions on, prohibit, or dispose of such investments where they pose a significant risk to national security or public order.

This power can be applied retrospectively and, as such, a notification system has been provided for whereby if a transaction is notified to the Minister and allowed to proceed, it cannot subsequently be unwound. Notification is mandatory for military or dual use technology, and critical direct suppliers. For all other transactions notification is discretionary.

The transaction uncertainty introduced by the call-in power will be of concern to investors (and their advisors), particularly in transactions involving (or worse, arguably involving) "strategically important businesses". That uncertainty remains following completion of a transaction given the potential for the Minister to unwind the transaction.

Defining "strategically important businesses"

Helpfully, the Bill defines what businesses are considered "strategically important" for the purposes of applying the national interest test and invoking the call-in power. The definition includes businesses involved in military or dual-use technology, "critical

direct suppliers", ports or airports, electricity, water, telecommunications and financial market infrastructure.

The Bill provides that a list of "critical direct suppliers" will be published so that potential investors are able to identify if their transaction will be caught. As an example, the list will include direct suppliers of goods or services to an intelligence or security agency.

Reduced requirements

Reducing the scope of the Act

As anticipated in the 2019 Consultation Paper, the Bill also simplifies the regime by no longer requiring certain transactions considered lower-risk to be screened. Some of the changes that will be of most interest to our readers are:

- **Acquisitions of land adjoining sensitive land** – in addition to land being "sensitive land" as a result of having certain characteristics itself, it may also be "sensitive land" if it adjoins land with certain characteristics (eg the adjoining land includes foreshore or is a regional park). The list of adjoining land types has been amended in the Bill to remove the less sensitive land types, particularly lower level reserves. Accordingly, the Act will no longer screen transactions that do not include land that people would consider "sensitive" – such transactions are commonly caught, much to the dismay of parties (and their advisors).

- **Leases** – leases that are for a total term of less than 10 years (including rights of renewal, and now including any prior lease of the land whilst the tenant was an overseas person) will no longer need consent under the Act. This extends the current length (being 3 years (including rights of renewal)), although that length will remain for residential land. Again, we welcome this amendment (although we note that during the consultation period, greater lengths were considered) as it better reflects interests more akin to ownership and also better allows applicants to show a "benefit to New Zealand", a test difficult to meet during a short tenure.

- **NZ listed issuers -** the Bill changes the "tipping point" for when New Zealand listed issuers will be considered overseas persons. Such entities will no longer be "overseas persons" if they are at least 50% New Zealand owned and overseas persons overseas persons holding 10% or more do not collectively (a) control the composition of 50% or more of the governing body; or (b) control the exercise of more than 25% of the voting rights.

- **Fundamentally New Zealand entities** - New exemption-making powers are added to allow the relevant Minister to exempt persons, transactions, rights, interests or assets that they consider to be fundamentally New Zealand owned or controlled, or to have a strong connection to New Zealand. Although we support the inclusion of this exemption, we had hoped the Bill would provide greater clarity as to when an overseas person will qualify for the exemption.

Simplifying the existing tests

For transactions still caught by the Act, the Bill seeks to simplify the screening process where appropriate. Such changes include:

- **Investor test:**

    - the "good character" aspect of the investor test is replaced with a more targeted, and explicit, test for assessing an investor's character and capability. Under the changes, only consideration of serious proven matters, allegations of serious matters where proceedings have begun, and any enforceable undertakings entered into by the investor is required. We approve of these changes – the Act will continue to restrict the ability of persons that have committed, or been charged with, serious allegations (which the New Zealand public would expect) rather than relying on the current vague "good character" wording (which captures matters the public arguably wouldn't expect to be captured).

    - Repeat investors can rely on a previous assessment against the investor test where its acquisition and governance structure has not changed, and can obtain pre-clearance of an acquisition and governance structure prior to transacting.

- **Benefit to New Zealand test** - the Bill seeks to streamline the process for determining whether an investment in sensitive land will benefit New Zealand, including by:

    - replacing the 21 current factors used to determine benefits to New Zealand and replacing these with 7 broader factors (including economic benefits and benefits to the natural environment). Although the list of factors has decreased, they have also broadened with the effect that most benefits previously captured will fit into the 7 factors. There does seem to be an

- increased focus on natural environment factors;
- changing the counterfactual assessment to a simpler test. Under this test, the Ministers must compare "before and after" the investment, rather than using the current hypothetical assessment of what would occur without the foreign investment, as has been used since the Court decision in the *Crafar Farms* case; and
- removing the "substantial and identifiable" benefits test (for non-urban land greater than 5 hectares) and replacing this with a proportionate approach for all sensitive land transactions whereby the Ministers take into account whether the benefit is proportionate to the sensitivity of the land and the nature of the overseas investment transaction.

Statutory time frames

The explanatory note to the Bill contemplates that statutory time frames for assessment of applications will be introduced by Regulations. This is probably the most common complaint of our foreign investment clients – we await more detail on the proposed regime with interest.

Timing of reforms

The Bill was meant to have its first reading on 31 March 2020, however this was put on hold as a result of the country's Level 4 lockdown. The Government's intention has been to pass the legislation before the September elections, and the Government has not yet suggested that this view has changed.

The proposed time frame has always been tight, and given the disruption caused to parliamentary proceedings by COVID-19 there is a risk that the Bill will not pass before Parliament rises on 6 August 2020.

Further detail

The above is necessarily a summary only. Please do not hesitate to get in touch if you would like any more detail on the reforms, or to discuss any of the matters discussed above or any of the other reforms.

Webb Henderson's New Zealand office specialises in strategic legal advice for corporate and commercial transactions, projects, and banking and finance transactions, with particular emphasis in foreign investment and restructuring and insolvency transactions.

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Garth Sinclair

Email: garth.sinclair@webbhenderson.com
Phone: +64 9 970 4414
Mobile: +64 275 816 311

Graeme Quigley

Email: graeme.quigley@webbhenderson.com
Phone: +64 9 970 4412
Mobile: +64 27 572 7479

Nicole Xanthopol

Email: nicole.xanthopol@webbhenderson.com
Phone: +64 9 970 4419
Mobile: +64 21 589 646

Michael Gartshore

Email: michael.gartshore@webbhenderson.com
Phone: +64 9 970 4109
Mobile: +64 21 792 255

Henry Willis

Email: henry.willis@webbhenderson.com
Phone: +64 9 970 4413
Mobile: +64 21 187 5868