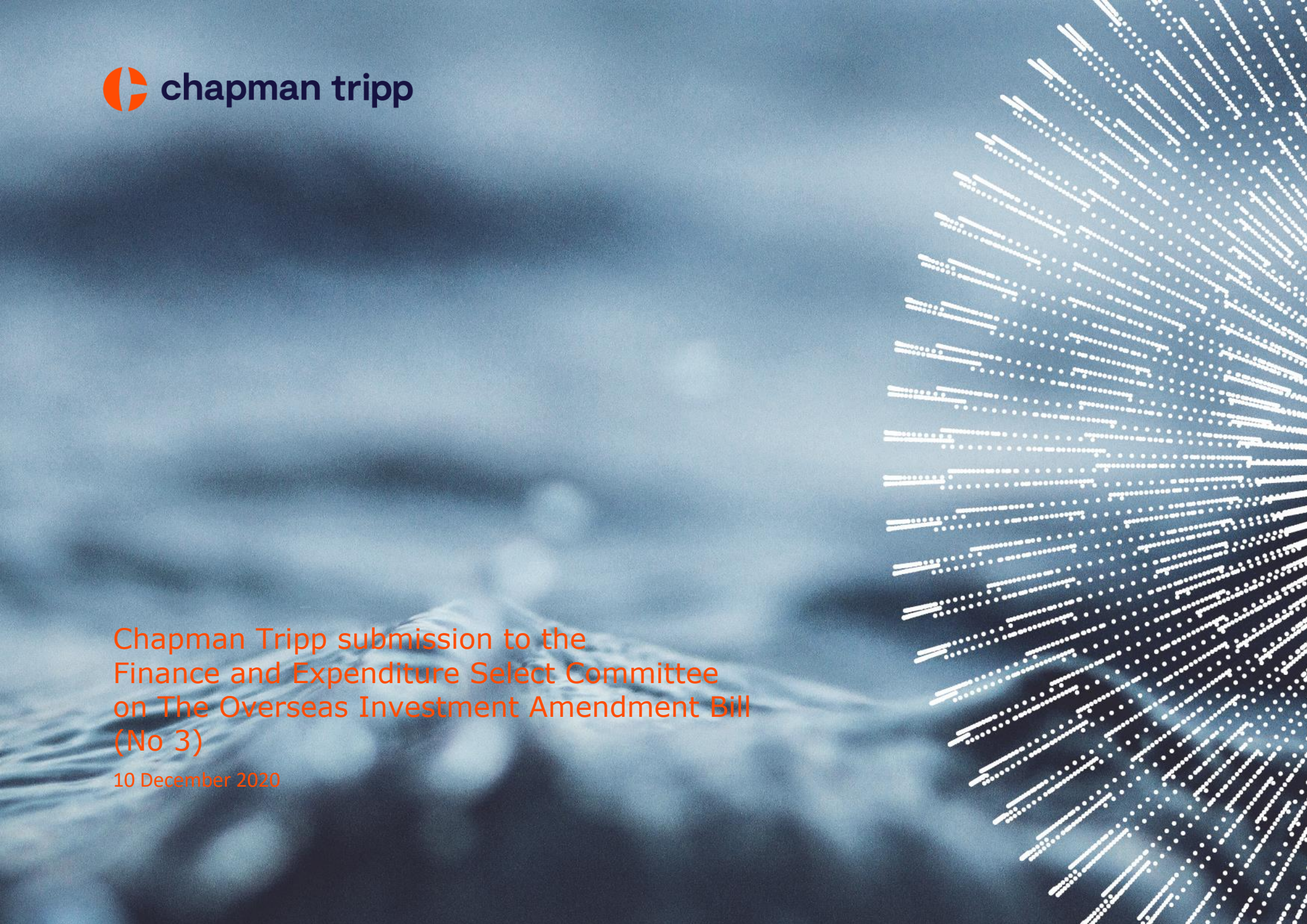

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Chapman Tripp submission to the Finance and Expenditure Select Committee on The Overseas Investment Amendment Bill (No 3)

10 December 2020

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The Overseas Investment Amendment Bill (No 3)

Introduction

This submission is from Chapman Tripp.

About Chapman Tripp

Chapman Tripp is a full service law firm. We have offices in Auckland, Wellington and Christchurch.

Our practice includes providing legal advice on a range of overseas investment matters currently subject to the Overseas Investment Act 2005 (the ***Act***) proposed to be impacted by the Overseas Investment Amendment Bill (No 3) (the ***Bill***). We know the issues that tend to arise under the Act and have an interest in ensuring the Act functions well.

Overview of submission

Chapman Tripp supports many of the amendments proposed in the Bill. In particular, we welcome improvements to the benefits test and the associated counterfactual.

However, we also consider there are other changes that should be made to the Act to ensure that it regulates appropriate types of investors and transactions and operates effectively in the context of practical realities faced by overseas investors. The changes we are proposing reflect both long-standing issues with the current operation of the Act and issues created by the Overseas Investment (Urgent Measures) Amendment Act 2020 that were unable to be addressed in the short consultation period for that legislation.

We have structured our submission as follows:

- Part A: more significant proposed amendments to provisions of the Bill and the Act that we consider do not achieve policy objectives, or where policy settings should be reconsidered;
- Part B: technical changes in respect of the Bill to ensure it is fit for purpose;
- Part C: other technical changes to improve the clarity and functioning of the Act and the Overseas Investment Regulations 2005 (the ***Regulations***); and
- Appendix: proposed drafting changes referred to in Parts A to C.

Our submission has been prepared by partners and senior lawyers expert in this area and does not purport to represent the views of our clients. We would like to appear in front of FEC to discuss key points of our submission and any questions Members may have.

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Part A: More significant policy matters

Topic	Provision	Comments
Foreign Portfolio Ownership and additional provision for exemption	S 7 of the Act (as proposed by the Bill) s 61B of the Act	In connection with the changes proposed by the Bill in respect of listed issuers, we consider that the Bill should be amended to: • Expand the scope for individual exemptions in s 61B of the Act to include a new paragraph to empower the Minister to exempt New Zealand listed issuers that would not otherwise satisfy the ownership test where the issuer can satisfy the Minister it is an overseas person merely because of cumulative portfolio investment and otherwise should be treated as a fundamentally "New Zealand person". Previously the Overseas Investment Office had some published criteria when it would consider a person as a fundamentally "New Zealand person" – many of those criteria would remain appropriate for individual exemption applications but include for example, a majority of New Zealand national directors, a New Zealand national chair, and headquarters in New Zealand. • Provide a safe harbour to allow New Zealand listed issuers to rely on previous public disclosures by substantial product holders as evidence of whether or not they are an overseas persons (analogous to s 283 of the Financial Markets Act 2013 (FMCA) as it applies to issuers). • Consequentially amend s 290-291 of the FMCA to allow listed issuers to require recipients of tracing notices to declare whether or not, and if so, the extent to which, they are overseas persons. Numerous listed bodies corporate in New Zealand are categorised as "overseas persons" under the current definition in the Act. However, most New Zealand listed entities have their "centre of gravity" in New Zealand, with a large proportion of New Zealand ownership, New Zealand headquarters and boards and senior management located in New Zealand and comprising primarily New Zealander employees. Furthermore, being listed entities, New Zealanders have the ability to acquire further interests in the entity at any time by buying shares on market. The current definition of "**overseas persons**" imposes significant regulatory and commercial burdens on New Zealand listed entities, including: • some listed entities making upwards of four applications a year, with sensitive land applications often costing in excess of $100,000 of external costs (lawyer and OIO fees) in addition to the large burden placed on executive time and focus and sometimes significant delays completing transactions; • committing capital to less attractive projects to help demonstrate a "benefit to New Zealand" in the context of a sensitive land consent application;

Topic	Provision	Comments

		• disadvantaging listed entities' commercial position when submitting offers or bids in a competitive process because:
		  ○ vendor's prefer unconditional offers (allowing much quicker timeframes and greater certainty), and
		  ○ particularly in respect of sensitive land applications, the relative cost of an OIO application (including the need to demonstrate a "benefit to New Zealand") compared to the asset can have a material effect on the value the offer and its ultimate success; and
		• potentially forcing listed entities into sub-optimal premises or locations because preferred locations are "sensitive" and would require an application.
		
		We consider it important for the definition of overseas person, as it applies to entities with a primary listing on the NZX Main Board financial product market, to recognise:
		• that day to day variability in shareholdings outside of the listed entities' control – because shares are freely tradeable;
		• the limited actual impact on "control" of listed entities that are associated with small (less than 25%) financial product holdings by "overseas persons" even if combined holdings by overseas persons account for a majority of shareholdings; and
		• the practical difficulties of ascertaining beneficial ownership given the day to day variability in shareholdings (and deferred settlement of on-market trades on a T+2 basis), as well as the routine use of custodians, nominee companies and trusts in the context of listed entities.
		
		A significant component of overseas ownership is passive portfolio ownership. A recent analysis by JBWere indicated that ownership of the New Zealand issuers considered (comprising 95.6% of the S&P/NZX All Index based on total market capitalisation) only included 7.8% ownership by "offshore strategic stakes", but 31.1% ownership by "other offshore owners" – primarily offshore managed funds, with a small portion of offshore retail investors.
		
		Proposed change: Add an additional section 61B(c)(viiiA) to make it clear that listed issuers that do not qualify for the automatic relief can still apply for an individual exemption as follows:
		
		(viiiA) New Zealand listed issuers, or transactions, rights, interests, or assets in respect of New Zealand listed issuers, where the Minister considers the New Zealand listed issuer to be fundamentally New Zealand owned or controlled or to have a strong connection to New Zealand, having taken into account the extent and nature of portfolio ownership:

Topic	Provision	Comments
Counterfactual	s 16(1A) of the Act (cl 8(1) of the Bill)	In general, we welcome the proposed changes to the counterfactual test and agree they should simplify and clarify the investment criteria for overseas investors acquiring interests in sensitive land. However, we also think that there is merit in also adopting the 'no detriments' test for transactions between overseas persons that was considered in Treasury's April 2019 Consultation document. Under that test, a purchaser would be required to retain (or, if the transaction occurred further upstream, not modify) current benefits associated with the sensitive land. Adopting the 'no detriments' test as a supplementary consent pathway would further reduce the risk of well-managed assets being stranded because a purchaser cannot demonstrate benefits under the statutory factors. We acknowledge this risk is already addressed in part through proposed new section 17(1)(a) of the Act, which gives the reduced risk of illiquid assets as an example of an economic benefit to New Zealand. However, a standalone consent pathway based on a 'no detriments' test would likely improve predictability and timeliness for relevant transactions, and in particular could be drafted in a manner that offshore, upstream transactions between overseas persons do not need to artificially try and meet the standard benefit test. ***Proposed change*:** we appreciate that careful thought would need to be given to the drafting of a 'no detriments' test. Given the short time available for submissions, we have not prepared specific drafting for this recommended change, but would be happy to assist Treasury on this aspect going forward. A 'no detriments' test would need to apply to both direct and upstream shareholding changes in the entity that holds the land, as well as direct transfers of land, and in circumstances where the investment in the land pre-dated the application of the benefit to New Zealand test to that investment.

Topic	Provision	Comments
Benefit to NZ factors	s 17(1) of the Act (cl 9 of the Bill)	Depending on the interpretation given by the OIO to new section 17(1)(g) of the Act, there may be certain types of transactions in respect of which it is difficult to demonstrate benefit to New Zealand by reference to the proposed factors in section 17(1). Section 17(1)(g) replicates the benefit factor set out in regulation 28(a) of the Regulations. If the OIO interprets section 17(1)(g) as being no wider in scope than the current regulation 28(a) – noting in particular that the current Ministerial Directive Letter to the OIO places generally low importance on certain matters that would fall within regulation 28(a) – investors would not be able to rely on other general benefits that are currently expressed in the Regulations (for example, the matters in regulations 28(c) and 28(e)). To date, those factors have been important for the following types of transaction: • upstream, offshore transactions where the New Zealand assets are not the focus of the transaction or a substantial part of the target business or assets (i.e. where it would not be reasonable to expect an investor to have developed an investment plan specific to New Zealand in order to obtain consent for a broader, often global, transaction); and • transactions that trigger a consent requirement in only a technical manner, for example a group restructuring that falls outside of the regulation 37 exemption for corporate dealing. We acknowledge that the new proportionate approach in section 16A(1A)(b) should go some way to address this issue, but do not think it can be considered a complete solution by itself if section 17(1)(g) will be construed narrowly. ***Proposed change*:** we would welcome clarification on the intended application of section 17(1)(g), to ensure that the benefit claims an investor makes under that provision are not limited to those an investor could currently make under regulation 28(a). Alternatively, while we do not advocate a general broadening of section 17(1), that provision could be supplemented by a couple of additional general benefit factors taken from regulation 28 (we propose regulations 28(c) and 28(e)) to ensure the benefit test has sufficient flexibility for transactions that cannot fit neatly within the current list of factors in new section 17(1).

Topic	Provision	Comments
Total term of interest in land	s 12(1)(a)(ii) of the Act (cl 6 of the Bill) Schedule 1A of the Act (cl 23 and Schedule 2 of the Bill)	The practicalities of applying Schedule 1A are likely to be challenging to apply. We do not consider that there is real mischief in prior lease or other regulated interest terms that necessitates the enactment of the complexities of Schedule 1A. We envisage challenges with applying schedule 1A where records of prior interests held are unclear or where an interest holder becomes an overseas person during the term of an otherwise unregulated interest. We are also concerned by: • the reclassification under Schedule 1A of periodic tenancies as an interest in land where such tenancies have no certainty of tenure and have previously not been treated as an interest in land regulated by the Act; and • the way in which determining whether an interest in land regulated by the Act is being acquired operates retrospectively – consideration of whether a regulated interest is being acquired practically should only look forward at the interest being acquired. We also consider that setting the total lease term at 10 years is too short to reflect the commercial realities of leasing and fitout commitments. In our view, leases and other interests should only be captured by the Act where they are of sufficient duration that they confer a degree of lasting influence or control. We recommend creating a further split category of screening for non-residential leases of more than 12 years for non-urban land over five hectares and of more than 35 years for all other classes of land (consistent with the subdivision requirements of the Resource Management Act 1991). ***Proposed changes*:** we recommend that new Schedule 1A is not enacted and that new sections 12(1)(a)(ii)(B) and (C) are amended to delete the words "(as calculated in accordance with **Schedule 1A**)" and to add the words "(including rights of renewal, whether of the grantor or grantee)" after "or more" after the end of each of those paragraphs. We also recommend that section 12(1)(a)(ii)(C) is amended by deleting the words "*10 years or more*" and replacing them with "*12 years or more for in respect of non-urban land over 5 hectares or 35 years or more for any other sensitive (but not residential) land*."

Topic	Provision	Comments

Farm land advertising	s 16(1)(f) of the Act (cl 7 of the Bill)	We encourage the removal of the farm land advertising obligations from the Act. They are an unwarranted imposition on vendors who, if they think they would likely get a better offer from a New Zealander, would have advertised regardless of the requirements of the Act. The advertising requirements impose costs on vendors without any obligation on the vendor to accept any offer from a New Zealander.
		
		To the extent that a farm land advertising regime is retained:
		
		• There should not be a requirement that advertising is undertaken prior to entry into a transaction. Such a requirement risks imposing costs on vendors in circumstances where they do not have the benefit of certainty of a signed transaction in the event that the advertising does not result in satisfactory offers for the land.
		
		• The requirement to advertise *farm land securities* (as currently set out in the Regulations) should only apply in narrow circumstances, for example if the securities are New Zealand securities in an entity whose main asset is the farm land in question. As well as needing to comply with the requirements of the Regulations, vendors need to ensure that any advertising of *farm land securities* does not breach the Financial Markets Conduct Act 2013, which imposes yet further unnecessary compliance costs in circumstances where such advertising is unlikely to influence the vendors' decision-making on a transaction. Further, it is unreasonable and of no substantive benefit to New Zealanders to require securities in offshore entities to be advertised in New Zealand simply because there is a downstream interest in farm land.
		
		***Proposed change*:** we recommend that the farm land advertising regime is removed from the Act through the repeal of sections 16(1)(f) and 20 of the Act and the deletion of clauses 7 and 10 of the Bill (and other required consequential changes).
		
		To the extent the farm land advertising regime is retained, we recommend that:
		
		• clause 7 of the Bill is deleted (and section 16(1)(f) of the Act is therefore not amended), such that there is no requirement to advertise prior to entry into a transaction;
		
		• the requirement to advertise *farm land securities* is narrowed – preferably through drafting in the Act or Regulations, but otherwise by an amendment to the class exemptions in the Notice of Exemptions from Farm Land Offer Criterion – such that it only applies where:
		
		  ○ the securities are those of: (i) a New Zealand entity whose farm land assets comprise more than 25% of the value of all of that entity's assets; or (ii) a direct or indirect parent entity of such New Zealand entity, where the securities in the relevant New Zealand entity comprise substantially all of that parent entity's assets; and
		
		  ○ those securities represent more than 50% of the relevant entity's securities; and
		
		• the Ministers/OIO ensure that the exemption process contemplated by new section 20 of the Act is clear, cost effective and quick.

Topic	Provision	Comments
Non-NZ Government Investors	s 6(1) of the Act – definition of *relevant government enterprise*	It is important that investors have certainty on whether a transaction will be subject to the national interest test, particularly now that the regulations impose an additional $52,000 national interest assessment fee on consent applications where the test applies. However, the definition of *relevant government enterprise* makes it difficult for some investors to determine (with certainty or, in some cases, at all) whether they are a "*non-NZ government investor*" for the purposes of the Act, and therefore whether the national interest test may apply to a transaction. While we appreciate that the definition in the Act follows the definition that was already in use in the Regulations, the use (and implications) of the definition in the Act is fundamentally different to that of the Regulations: • under the Regulations, the *relevant government enterprise* definition is essentially used as an additional gating item before an *enterprise* is able to rely on the application of higher monetary thresholds (or other concessionary treatment) such that no consent requirement arises under the Act for relevant transactions. Based on our experience, those higher thresholds are not regularly used by investors – in part, due to the arbitrary inability to rely on them if conducting a transaction through a New Zealand subsidiary, but also because the definitions are difficult to apply in practice to widely held entities; and • under the Act, the *relevant government enterprise* definition helps determine whether the national interest test applies to a consent requirement, and therefore whether a significant additional fee must be paid by the investor. The practical difficulty in applying the definition arises from the circularity that occurs in conjunction with the definitions of *non-NZ government investor* and *relevant government investor* (such that upstream holdings need assessing beyond the immediate investor entity), and the fact that the ownership and control interests of *relevant government investors* must be considered on an aggregated basis. Widely held entities, such as listed companies, private equity funds or other collective investment vehicles, would need to be in a position to assess the status of a significant number (and, in some cases, most or all) of their investors, in order to determine their own status. Such an assessment is impractical, as it would require an entity to have sufficient information on its investors to: (a) know which limb of the *relevant government enterprise* definition to apply when assessing that investor; and (b) understand the ownership and control structure of that investor. Further, for listed companies there would be additional challenges faced, such as: (i) a listed company's shareholding changing on an ongoing basis; (ii) many shareholders likely using a custodian to hold their shares; and (iii) in many cases, the direct shareholders of the listed company will not, ultimately, be the entities that need to be assessed for the purposes of the definition. The way the *relevant government enterprise* definition is drafted means, therefore, that it will capture entities that would not properly be considered government enterprises. We consider that the policy objectives can be achieved, while also giving investors greater certainty of the relevant threshold, by focusing the definition on individual relevant government investors (and their associates).

Topic	Provision	Comments
		***Proposed change*:** we recommend the definition of *relevant government enterprise* is amended as set out in the Appendix. We have proposed a 10% threshold (as opposed to 25%) in the various limbs of the definition, to align with the position taken in section 20A(1)(b) of the Act and deal with the policy concern we consider the Act is seeking to address. This will ensure that a widely held entity only needs to perform the relevant analysis on significant investors.

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Part B: More technical changes

Topic	Provision	Comments
Exempted interest – Land covenants	s 6(1) of the Act	The Act currently captures land covenants over sensitive land over the relevant term. However, we consider that a land covenant ordinarily confers a lesser bungle of rights on the covenantee than would be the case under an easement (which can often allow rights of access onto the relevant land). We do not consider that land covenants should be regulated or restricted by the Act. ***Proposed change:*** add an additional alternative to the definition of "*exempted interest*" by adding: "*(c) a land covenant*:"
Modified benefit test for farm land	s 16(1D) of the Act (cl 8(1) of the Bill)	There are circumstances beyond a transaction being "minor or technical" or resulting only in immaterial changes in ownership or control where it would be inappropriate to apply the modified benefit test to farm land. Upstream, offshore transactions that trigger a consent requirement should not be subject to a modified benefit test due to a downstream interest in farm land, unless acquiring ownership or control of that farm land is a significant purpose of the transaction ***Proposed change*:** we recommend adding the following wording as limb (c) of new section 16(1D): "*the transaction is not occurring in New Zealand and acquiring ownership or control of the relevant land would not reasonably be regarded as a significant purpose of the transaction*"
Exemptions from farm land offer criterion – timeframe	s 20(11) of the Act (cl 10 of the Bill)	We support the inclusion of an ability to apply for an exemption from the farm land advertising requirements at any time as this will enable greater certainty through the consent process. Proposed section 20(11) of the Act requires that exemptions to the farm land offer criterion granted under section 20 may only continue in force for up to 5 years. We consider that such time limitation should not apply to class exemptions made under section 20(1)(b), but only to individual exemptions granted under section 20(2). This will ensure that the class exemptions do not inadvertently expire from a failure to re-consider and re-enact such exemptions at least every 5 years. ***Proposed change*:** we recommend making the following changes to new section 20(11): "*An exemption under ~~this~~ section <u>20(2)</u> may continue in force for not more than 5 years (and at the close of the date that is 5 years after the exemption first comes into force, the exemption must be treated as having been revoked unless it is sooner revoked or expires).*"

Topic	Provision	Comments
Investor test – application to assess whether test met	s 29A(1) of the Act (cl 14 of the Bill)	We support the principles of proposed section 29A to provide improved certainty for investors, improvement to processing times and removing frustrations repeat investors have previously experienced with having to prepare and submit investor test information on repeat applications and have that information assessed on each application (regardless of whether anything has changed). However, given it appears to apply on a per individual / entity basis (i.e. each relevant individual or entity would need to make a separate application), the effectiveness and use of new section 29A(1) is likely to be significantly reduced if the process is overly complex, time-consuming or costly. ***Proposed change*:** at a minimum, an entity should be permitted to apply for an assessment of itself and its directors (or equivalent individuals). Given this process has the potential to improve the processing time and cost of consent applications (if framed and used properly), the cost structure and statutory timeframe applicable to assessments under section 29A(1) should be set at a level to encourage its use.
Sensitive Land tables	Schedule 1 Part 1, table 2 of the Act (cl 22(3) of the Bill)	We support the changes to Schedule 1, Part 1, table 2, but seek a minor amendment to provide clarity and consistency in terminology. ***Proposed change*:** Row 7: replace "*sea*" with "*marine and coastal area*" as "*sea*" is not defined in the Act.

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Part C: Technical changes to the Act / Regulations

Topic	Provision	Comments
Limited partnerships	s 6(1) and 7(2) – definitions of *relevant government enterprise* and *overseas person*	Given the wide use of limited partnerships as investment vehicles, we think the Act should clearly state how limited partnerships should be assessed by including a separate limb within the *overseas person* definition. The current 'body corporate' limb of the *overseas person* definition has not been drafted to fit the circumstances of a limited partnership, where limited partners are passive investors and a general partner exercises control over the limited partnership. In addition, for the same reasons, the definition of *relevant government enterprise* should also include a distinct limb covering limited partnerships. Note our comments are not restricted to limited partnerships established under the New Zealand Limited Partnerships Act 2008, but rather a limited partnership established under any jurisdiction. ***Proposed changes*:** we recommend the definitions of *relevant government enterprise* and *overseas person* are amended as set out in the Appendix.
Body corporate – overseas person definition	s 7(2)(c)(i) of the Act	Under section 7(2)(c)(i) of the Act, a body corporate ('A') is an *overseas person* if an overseas person or persons "have" 25% or more of "any class of" A's securities. This gives rise to two issues: • The word "have" is clear when applied to s 7(2)(c)(ii) (having "the power to control…") and 7(2)(c)(iii) (having "the right to exercise or control…"), but is ambiguous when used in the context of securities, as it is unclear whether this is referring to legal title or beneficial ownership. We understand the OIO's view is that it captures both and suggest the wording for this limb should be made unambiguous (given issues caused by custodians being treated as "having" securities have now been ameliorated through class exemptions in the regulations). • Securities includes convertible securities that do not give rise to an ownership or control interest. For example: o Issuer A has 100 ordinary shares on issue. Issuer A then issues 10 options to an overseas person (which will convert to ordinary shares on a one for one basis). o The overseas person does not obtain a 25% or more ownership or control interest, as it does not have a 25% or more beneficial entitlement to Issuer A's securities (in aggregate), and therefore does not require consent to obtain the options (other than under section 12(b)(iii) if Issuer A owns sensitive land). o However, Issuer A will become an overseas person as a result – as the overseas person issued the option will "have" 100% of a "class of" Issuer A's securities, despite not having a 25% or more ownership or control interest (the more appropriate trigger point in this respect).

Topic	Provision	Comments
		○ Perversely, Issuer A would cease to be an overseas person were the options to be exercised, as it would then only have ~9% overseas ownership. ***Proposed change*:** amend section 7(2)(c)(i) of the Act (or new section 7(2)(d)(i) of the Act, as applicable) to read: "*(i) legal title to, or a beneficial interest in or entitlement to, more than 25% of ~~any class of~~ A's securities; or*". This change is included in our proposed definition of *overseas person* set out in the Appendix.
What are overseas investments in in significant business assets	s 13(1)(a) of the Act	Unlike each of the other paragraphs in section 13(1), section 13(1)(a) does not make any reference to New Zealand. Practice has evolved over the life of the Act in conjunction with the OIO to interpret section 13(1)(a)(ii) in relation to New Zealand assets only but we consider this is an imperfect solution and that the legislation should be clear to ensure appropriate transactions are captured. ***Proposed change**:* At this stage, we do not have proposed drafting but would be happy to work with the Treasury on any proposed drafting.
Revocation or variation of conditions of consent	s 27(3A) of the Act	By virtue of changes made under the Urgent Measures Act, certain investors are no longer treated as "overseas persons" under the Act. Those investors can apply for a variation of existing consents to have conditions of consent revoked on the basis that the relevant transaction would no longer require consent. However, section 27(3A) of the Act was not addressed by the Urgent Measures Act, meaning that those investors that benefit from no longer being overseas persons cannot have certain conditions lawfully revoked. Most notably, the residential land outcome conditions. As a consequence the OIO will not revoke a mandatory condition like the residential outcome requirement or amend the time period in a residential outcome condition to render the condition ineffective. This produces a perverse outcome as a residential outcome condition under an existing consent cannot be removed as clearly intended by the Ministerial directive and the legislative intent evidenced by the fact a new acquisition under the standing consent would not have the residential outcome requirement imposed. ***Proposed change:*** Section 27(3A) should be amended to read: "*Subsection (3) does not apply in respect of a condition that addresses a purpose or effect that this Act would require a condition be imposed in relation to in any a consent granted at the time of the variation or revocation proposed under this section but the relevant Ministers …*"

Topic	Provision	Comments
Consent application – information requested	s 23(4) of the Act	In the context of a consent application, a person should not be in breach of the Act under section 45 for a failure to comply with section 23(4) of the Act, given the information requested by the OIO could be information that the applicant cannot obtain within the timeframe, or at all. Further, it should be open to an applicant to take a different course of action (for example, withdrawing its application) without being in breach of section 45 of the Act. ***Proposed change*:** amend section 23(4) to read: "*A person required to provide information under subsection (3) must comply with the regulator's notice within the time, and in the manner, specified in it. A person who fails to comply with this section does not commit an offence under section 45.*"
Emergency notification regime – jurisdictional limit	s 82(2)(a) of the Act	The wording of section 82(2)(a) means that the notification requirement technically applies to offshore acquisitions of securities even if the target has no assets in New Zealand. This provision should be amended to make it clear that it relates to New Zealand investments only. ***Proposed change*:** amend section 82(2)(a) (using similar wording to sections 13(1)(c) and 82(2)(b) of the Act) as follows: "*the acquisition by an overseas person, or an associate of an overseas person, of rights or interests in securities of a person (A), where A holds or controls property (including goodwill and other intangible assets) in New Zealand used in carrying on business in New Zealand, if, as a result of the acquisition the overseas person or the associate (either alone or together with its associates) has…*"
Permanent call-in power – acquisition of listed company shares	s 53(4) of the Urgent Measures Act – new s 82(2)(a) of the Act	The wording of new section 82(2)(a) of the Act as set out in section 53 of the Urgent Measures Act (i.e. the provision that will apply with the permanent call-in power) means that the acquisition of any shares in an offshore listed entity that is directly or indirectly carrying on a *SIB* (for example, it has a New Zealand subsidiary on the list of *critical direct suppliers*) will be subject to the call-in regime. This is because the definition of *listed issuer* (in respect of which the call-in regime is only triggered where there's an acquisition of 10% or more) is confined to NZX-listed entities, so an entity listed on another stock exchange falls within section 82(2)(a)(iii). This is clear overcapture, and can be resolved easily by extending the effect of new section 82(2)(a)(ii) to apply to issuers listed on stock exchanges other than the NZX. ***Proposed change:*** *We would be happy to discuss drafting to give effect to our submissions directly with Treasury officials.*

Topic	Provision	Comments
Permanent call-in power – acquisition of assets	s 53(4) of the Urgent Measures Act – new s 82(2)(b) of the Act	The wording of new section 82(2)(b) of the Act as set out in section 53 of the Urgent Measures Act (i.e. the provision that will apply with the permanent call-in power) means that the acquisition of <u>any</u> asset used by a business carrying on a SIB – including non-core or minor assets and assets easily replaceable – is subject to the call-in power. For the call-in power to apply, the asset being acquired should be critical to the carrying on of the SIB and one that cannot readily be replaced. ***Proposed change*:** add "*that is critical to the carrying on of that SIB and cannot readily be replaced*" to the end of new section 82(2)(b).
Higher monetary thresholds – NZ subsidiaries	Parts 4 and 5 of the Regulations	The higher monetary thresholds (and other concessionary treatment) contained in Parts 4 and 5 of the Regulations do not permit eligible investors to rely on the relevant exemption if they wish to structure the transaction using a New Zealand subsidiary (whether existing or newly incorporated). We do not consider there to be any good policy reasons for this prohibition. An investor is able to transfer the sensitive assets to a New Zealand subsidiary under the corporate dealing exemption in regulation 37, so it seems absurd not to allow the initial acquisition to be made by that New Zealand subsidiary. The reality of many corporate transactions is that a purchaser wishes to use a tax efficient structure by utilising a local subsidiary to make an acquisition. The inability of a purchaser to do that and rely on the relevant higher thresholds (or other concessionary treatment) could also result in New Zealand vendors being paid less for assets, if a purchaser factors in the costs of an inefficient tax structure to the price it is willing to pay. ***Proposed change*:** provided that the subsidiary is incorporated in New Zealand and is wholly owned by eligible investors (including New Zealanders for these purposes), we suggest that the higher monetary thresholds (and other concessionary treatment) in Parts 4 and 5 of the Regulations ought to apply.
Top holding companies	r 37 of the Regulations	As currently drafted, it is not clear that regulation 37 permits a group of overseas persons to insert a new holding company between themselves and the current top holding company of a corporate group. Such structures are routinely (but not exclusively) used in connection with initial public offerings. The issue arises from the fact that regulation 37 only refers to acquisitions from "another member of the same group" or "another overseas person" – i.e. the wording is only expressed in a singular sense. Where a new top holding company is being inserted, the acquisition of securities in the current holding company is from a number of shareholders rather than from a single shareholder. There is no reason for such restructuring steps to be regulated by the Act. Accordingly, the drafting of the class exemption should be clarified such that it clearly applies to such structures.

Topic	Provision	Comments
		***Proposed change*:** there are various ways the outcome noted above could be achieved through the drafting of regulation 37. We have set out one such option in the Appendix, but would be happy to assist Treasury to consider alternative ways of achieving the same substantive outcome.
Shareholding creep – control limit	r 38 and 38A	The shareholding creep exemptions in the Regulations do not permit an investor to utilise that creep to reach a 100% interest in the relevant target entity. This is because, to rely on the exemption, the investor's level of control in the target following the relevant creep transaction is required to be "*less than the control limit*" (even where all other criteria are met). For example, if Investor A holds 92% of the ordinary shares in Target B (and assuming Investor A has not previously used the creep exemption), the relevant control limit is 100%. Investor A could acquire all remaining ordinary shares in Target B (as that does not exceed the 10 percentage point requirement in regulation 38(3)(c)(i) or 38A(3)(b)(i)) but for the fact its level of control in Target B must be "*less than*" 100%. The Regulations should be amended to permit use of the creep exemptions to acquire a 100% interest in a target entity (where the control limit is 100%). ***Proposed change*:** there are various ways the outcome noted above could be achieved. We suggest the simplest fix would be to amend the words "*less than the control limit*" in regulations 38(3)(c)(ii) and 38A(3)(b)(ii) to read "*no greater than the control limit*". This amendment is also consistent with the approach recently taken on the emergency notification regime in section 82(2)(a)(ii) of the Act, which triggers on acquisitions of "more than" certain thresholds rather than reaching that threshold.
Exemption for re-grants	r 51	The exemption for re-grants in the Regulations applies only to the re-grant of an interest to an overseas person that previously held that interest and that obtained consent for the acquisition of that interest. We consider that this regulation is too narrow in application and should allow for overseas persons to take a re-grant of the relevant interest in an entity either upstream or downstream of the overseas person that previously held the relevant interest (in the same way that regulation 38A now allows for shareholding creep by persons other than the consent holder). ***Proposed change*:** there are various ways the outcome noted above could be achieved through the drafting of new regulations. We would be happy to assist Treasury to consider the appropriate drafting.
Exemption for freeholder who acquires another interest in land included in a freehold	r 56	Regulation 56 currently only applies to the grant of a non-freehold interest where consent may be required because it relates to sensitive land. We can see no reason why this exemption should not also apply to the grant of a non-freehold interest where consent may be required under section 10(1)(b), which would be consistent with the intent of the intra-group exemptions contained in regulation 37. ***Proposed change:*** after the words "*section 10(1)(a)*" add the words "*and section 10(1)(b)*"

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Appendix: Proposed Drafting Changes

Reference	Provision	Proposed Drafting Change
Part A: Non-NZ Government Investors **Part C: Limited Partnerships**	s 6(1) of the Act – definition of *relevant government enterprise*	"***relevant government enterprise*** *means—* *(a) a body corporate (W) (other than a limited partnership), if a relevant government investor ~~or investors have~~(either alone or together with its associates) has, directly or indirectly, a more than 10% ownership or control interest in W; or* *(b) a partnership, an unincorporated joint venture, or any other unincorporated body of persons (Z) (other than a trust or unit trust or managed investment scheme) if—* *(i) more than ~~25%~~10% of Z's partners or members are relevant government investors; or* *(ii) ~~1 or more~~ a relevant government investor~~s have~~ (either alone or together with its associates) has a beneficial interest in or entitlement to more than ~~25%~~10% of Z's profits or assets (including on Z's winding up); or* *(iii) ~~1 or more~~ a relevant government investor~~s have~~ (either alone or together with its associates) has the right to exercise, or to control the exercise of, more than ~~25%~~10% of the voting power at a meeting of Z; or* *(c) a trust (X) (other than a managed investment scheme) if—* *(i) more than ~~25%~~10% of X's governing body are relevant government investors; or* *(ii) ~~1 or more~~ a relevant government investor~~s have~~ (either alone or together with its associates) has a beneficial interest in or entitlement to more than ~~25%~~10% of X's trust property; or* *(iii) more than ~~25%~~10% of the persons having the right to amend or control the amendment of X's trust deed are relevant government investors; or* *(iv) more than ~~25%~~10% of the persons having the right to control the composition of X's governing body are relevant government investors; or* *(d) a unit trust (Y) (other than a managed investment scheme) if—* *(i) the manager or trustee, or both, are relevant government investors; or* *(ii) ~~1 or more~~ a relevant government investor~~s have~~ (either alone or together with its associates) has a beneficial interest in or entitlement to more than ~~25%~~10% of Y's trust property; or* *(e) a managed investment scheme if—* *(i) the manager or the trustee (as the case may be) is a relevant government investor; or* *(ii) more than ~~25%~~10% of the value of the investment products in the managed investment scheme is invested on behalf of ~~1 or more~~ a relevant government investor~~s~~ (either alone or together with its associates),—* *where terms in this paragraph have the same meanings as in the Financial Markets Conduct Act 2013; or* *(f) a limited partnership (Z) if—* *(i) a general partner of Z is a relevant government investor; or* *(ii) a relevant government investor (together with its associates) has a beneficial interest in or entitlement to more than 10% of Z's profits or assets (including on its winding up); or* *(iii) a relevant government investor (together with its associates) has the right to exercise or control the exercise of more than 10% of the voting rights to amend or control the amendment of Z's limited partnership agreement; or* *(iv) a relevant government investor (together with its associates) has the right to exercise or control the exercise of more than 10% of the voting rights to appoint a general partner of Z*"

Reference	Provision	Proposed Drafting Change
Part C: Top holding companies	r 37(1)(b) of the Regulations	Replace regulation 37(1)(b) with: *"(b) the acquisition by an overseas person (A) of property from another overseas person or persons (B) where one of the following applies:* *(i) A owns 100% of the securities in B; or* *(ii) B owns 100% of the securities in A that are owned by overseas persons and, where B is more than one overseas person, B owns such securities in A in the same proportion as B's ownership interests in the relevant property; or* *(iii) another person (C)—* *(A) owns 100% of the securities in A and in B that are owned by overseas persons; and* *(B) owns a proportion of the total securities in A that is no greater than the proportion of the total securities that C owns in B; or* *(iv) 2 or more persons own in the same proportions 100% of the securities in A and in B that are owned by overseas persons,—* *where owns means directly or indirectly owns:"*

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