Reform of the Overseas Investment Act 2005: Facilitating productive investment that supports New Zealanders' wellbeing

Submission Form

Details of submitter

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Responses to consultation questions

1. Sensitive adjoining land (p. 20)

Do you agree that there is a problem, and

- if so, has this paper described it accurately? Can you tell us about your experience, including when it happened?
- if not, do you support the existing arrangements. If so, why?

Yes, we agree there is a problem. For background, the Australian Investment Council ("**AIC**") (previously known as the Australian Private Equity and Venture Capital Association Limited, or AVCAL) is the voice of private capital in Australia, and we represent the interests of the vast majority of the Australian-based private equity and venture capital funds, a significant number of whom have invested in New Zealand and as a result have played a central role in the growth and expansion of numerous businesses in New Zealand. For example, in the FY2017 period alone, Australian-based private capital funds invested close to A$135m across eight New Zealand-based companies, ranging from startups to more mature and established businesses. A number of AIC members ("**Members**") have, in the past, been required to obtain OIO consent in situations where the land interest they are acquiring is not in itself "sensitive" but happens to adjoin a stormwater reserve or sports field – this tends to occur primarily in respect of industrial sites, and leads to an odd outcome whereby consent is required for an investment in an asset which is, ostensibly, not special in any particular way (nor should it necessarily be a privilege to own or occupy, which we understand is the underlying premise of the Overseas Investment Act).

Do you have any comment on the potential effects of the options? Are you able to quantify potential effects on compliance costs?

We believe that removing the "Table 2" land would, in our view, have a significant positive effect on investment into New Zealand. Members are likely to be more receptive to investing in New Zealand assets and businesses and, importantly, removing the "Table 2" land would reduce the extent to which consent is required by Members when undertaking investments into New Zealand. We understand that at present, and as Treasury will be aware, the timeline to obtain consent for sensitive land is significant, in some cases taking upwards of 5 to 6 months or longer. This creates risk for purchasing entities as the target business is often in a state of "limbo" (effectively maintaining the status quo, pending the new owner taking control) which reduces the extent to which growth initiatives in the business can be implemented and increases the risk of a significant detrimental event occurring, which can impact the profitability of the business. Removing "Table 2" land would mean that a large number of transactions could be completed in an expedited manner, meaning that the purchaser will be able to begin to implement growth strategies sooner. This is relevant for Members, both when acquiring a business in New Zealand as well as exiting that business following the Member's hold period. Removing "Table 2" land would also mean that there would be no need to demonstrate benefits to New Zealand arising out of the transaction, which in turn would mean there would be no conditions (for example, in relation to the volume of exports, extent of capital expenditure, etc.) imposed on the acquirer. We believe that such conditions often distract acquirers from the operations of the

business, as they focus on ensuring compliance with conditions often to the detriment of the general operation and growth of the business. Therefore, the impact of removing "Table 2" land and any binding conditions relating to the operation of the business will likely result in greater focus and energy being able to be directed toward the operation of the business.

It is difficult for us to quantify the potential effects on compliance costs, but we would expect the savings would be significant (in the tens of thousands of dollars per transaction).

Do you think the right reform options (pp. 22 – 23) have been identified, and:

- if so, which of the options identified do you prefer and why?
- if not, what alternative option would you support and why?

We are supportive of Option 1.

In our view, including adjoining land within the scope of the overseas investment regime is unnecessary. Noting that the purpose of the Overseas Investment Act is to recognise that it is a privilege to own certain assets in New Zealand, we don't believe that there are any good policy reasons for including adjoining land in the class of land which is treated as deserving of such privileged status. Significantly, where the target land itself is not of environmental, cultural or historic significance but merely adjoins such land (or in some cases, only adjoins a road that adjoins such land), we see no reason why such target land, itself not being intrinsically special, should be subject to the screening regime. This has led to some perverse outcomes, fore example where consent has been required for investments in industrial / manufacturing businesses, or other assets which are not particular special or sensitive.

If the section 37 list were removed, should any of the types of land currently captured by it be retained in Table 2? (p. 23)

- If so, which types and why?

2. Leases of sensitive land that require screening (p. 25)

Do you agree that there is a problem, and

- if so, has this paper described it accurately? Can you tell us about your experience, including when it happened?
- if not, do you support the existing arrangements. If so, why?

We agree with the "problems with current law and practice" identified at paragraphs 83 to 85 of the Paper.

A key issue that arises in relation to short term leases being screened is that because a lessee does not own or control the underlying land, it is difficult or impossible, simply due to the rights afforded to a lessee under a typical lease agreement, for it to promise to deliver benefits that relate to rights over the land, such as access or substantial development of the land itself (as opposed to the buildings on it). This makes it significantly more difficult for investors to satisfy the benefits test. It is also difficult for a lessee to justify from an economic or return-on-investment perspective to commit to delivering significant developmental benefits when the lessee's tenure of the land is uncertain.

Do you have any comment on the potential effects of the options? Are you able to quantify potential effects on compliance costs?

Again, it is difficult for us to quantify the potential effects on compliance costs, but we would expect the savings would be significant.

Do you think the right reform options (pp. 25 – 26) have been identified, and:

- if so, which of the options identified do you prefer and why?
- if not, what alternative option would you support and why?

Yes, we consider the right reform options have been identified.

We support adoption of Option 2, as it represents a balanced approach to the matter. In our view, it is inconsistent that leases are treated the same as freehold land under the current regime. In all cases, either a New Zealander owner retains ownership and control of the underlying freehold land or an overseas person already owns and controls that freehold land, in which case, they will have been screened by the OIO and will be in a much better position than a leaseholder to provide long term and tangible benefits. Tenants have very limited ability to undertake meaningful capital works to the land as the ability to obtain a return on their investment is more constrained than compared to a freehold interest, where the increase in capital value is realised upon divestment of that land. We agree with the balanced approach presented by Option 2, where the more sensitive the underlying land is, the shorter the lease term which triggers the Act.

Do you consider that raising the threshold for exemption from screening to leases with terms of 10 years or more is appropriate, and:

- if so, why do you consider this the appropriate threshold?
- if not, what alternative threshold would you support, and why?

We agree with the proposed 10 year threshold for leases of non-urban land. We also agree with the proposed threshold of 35 years for all other classes of sensitive land.

As noted, it is inconsistent that leases are treated the same as freehold land under the current regime. Leaseholders have significantly less capacity to undertake meaningful and long-term development of the land, except where the tenure of the land is sufficiently long to ensure that the leaseholder obtains an appropriate return on their investment. Raising the threshold for all classes of land (excluding non-urban land) to 35 years means that only long term leases (which are akin to a freehold interest) are caught, and will result in lesser term leases (where the capacity of the leaseholder to undertake meaningful development on the land is constrained) are not caught, which we expect will have a significantly positive impact on Members' willingness to invest in New Zealand.

While we would prefer the term threshold for leases of non-urban land to be extended to 15 years, bearing in mind that the capacity for a leaseholder to deliver significant benefits in respect of leases of between 10 and 15 years are still constrained, we appreciate that agricultural land is viewed by the New Zealand Government as particularly sensitive, as is the case in Australia. If the "national interest" test (as discussed below) is adopted, and a more balanced approach is taken by the OIO to assessing applications for non-urban land, then we would support a threshold of 10 years for non-urban land.

3. Technical issue: periodic leases (p. 27)

Do you agree that there is a problem, and

- if so, has this paper described it accurately? Can you tell us about your experience, including when it happened?
- if not, do you support the existing arrangements. If so, why?

We agree that, based on the commentary in the Paper, there would appear to be a problem. But to our knowledge none of our members has experienced an issue with a periodic lease in transactions they have undertaken.

Do you have any comment on the potential effect of the option? Are you able to quantify potential effects on compliance costs?

Do you think the right reform option (p. 27) has been identified, and:

- if so, why?
- if not, what alternative option would you support and why?

Yes, we agree the right reform option has been identified.

4. Definition of overseas person as it applies to bodies corporates (p. 31)

Do you agree that there is a problem, and

- if so, has this paper described it accurately? Can you tell us about your experience, including when it happened?
- if not, do you support the existing arrangements. If so, why?

Yes, we believe that this is a problem. A number of our members have, to our knowledge, experienced issues with this definition when considering whether to invest in New Zealand entities, specifically when considering minority investments.

Do you have any comment on the potential effects of the options? Are you able to quantify potential effects on compliance costs?

In our experience, we expect this reform (taking account for the adjustments referred to below) would have a significantly positive impact on investment in New Zealand. In particular, we expect that this change would encourage more minority investments into growing New Zealand companies from sophisticated investors such as private equity funds, allowing those companies to access capital and expertise without the need and uncertainty of going through the OIO consenting process.

Do you think the right reform options (pp. 32 – 35) have been identified, and:

- if so, which of the options identified do you prefer and why?
- if not, what alternative option would you support and why?

We support Option 1, provided that the increased 49% threshold applies to all entities, and not just listed entities. There are relatively few listed companies in New Zealand and so limiting this threshold only to NZ listed companies would further complicate the regime and limit the practical impact of the proposed change. We understand that one of the assessment criteria is to "support overseas investment in productive assets." We believe that offshore investments (whether minority or otherwise) into growth companies in New Zealand should be encouraged as a way of providing growth capital, providing businesses with the capability and capital to expand into offshore markets, increase productive capacity or upskill their employees. Limiting this increased threshold only to listed companies would not achieve those benefits to the New Zealand economy. A number of our members actively consider minority investments in growth companies, and it is likely that such investments would be encouraged if there was a clear pathway to permit that investment without having to obtain OIO consent. We also consider that the appropriate threshold should be "50% or more" (not 49%) so that it is clear that an entity with 49.9% overseas ownership or control does not trigger the consent / screening requirements. We believe that setting the threshold at 49%, as proposed in the Paper, would further complicate the regime.

Have the right requirements (pp. 34 – 35) been identified for the exemption in Option 4?

- if not, what requirements, or additional requirements, do you think should be included?

In our view, if Option 1 were adopted on a modified basis consistent with our answers above, there would be no need to consider Option 4. That said, if Option 1 were not adopted, we would support the adoption of Option 4, permitting any body corporate (listed or not) to obtain an exemption from the definition of "overseas person".

5. Screening of portfolio investors (p. 38)

Do you agree that there is a problem, and

- if so, has this paper described it accurately? Can you tell us about your experience, including when it happened?
- if not, do you support the existing arrangements. If so, why?

This issue does not, to our knowledge, impact on any investments made by members of AIC, primarily due to the nature and scope of the investments made by those members.

Do you have any comment on the potential effects of the options? Are you able to quantify potential effects on compliance costs?

Do you think the right reform options (pp. 39 – 40) have been identified, and:

- if so, which of the options identified do you prefer and why?
- if not, what alternative option would you support and why?

6. Technical issue: Tipping point for requiring consent (p. 42)

Do you agree that there is a problem, and

- if so, has this paper described it accurately? Can you tell us about your experience, including when it happened?
- if not, do you support the existing arrangements. If so, why?

Yes, we agree that there is a problem.

In our view, it is unnecessary to regulate share acquisitions at any level lower than 25% for investors who are not associates. Additionally, as noted at paragraph 136 of the Paper, it is very difficult for an acquirer of a non-controlling stake to exercise sufficient control over the target to deliver benefits to New Zealand and meet the benefits test. The current provisions effectively act as a block on overseas investors acquiring small stakes in targets that hold interests in sensitive land or meet the significant business assets test. It also means that an overseas person who acquires, for example, a 2% stake in a New Zealand company with 24% existing overseas ownership would need to apply for consent to acquire sensitive assets. We believe such provisions are unnecessary and limit the flow of offshore capital into New Zealand businesses.

Do you have any comment on the potential effects of the options? Are you able to quantify potential effects on compliance costs?

Do you think the right reform options (p. 43) have been identified, and:

- if so, which of the options identified do you prefer and why?
- if not, what alternative option would you support and why?

We believe that other options than those proposed should be considered. One alternative option would be as follows:

- the tipping point should be 50% or more overseas ownership (consistent with our proposal in respect of item 4 on the definition of 'overseas persons' above); and
- a consent application should only be required from an investor that tips a target over this threshold if that investor itself, or together with its associates, acquires a meaningful ownership or control stake.

We believe that the options presented by Treasury are complex (thus not achieving one of the fundamental goals of the reform project) and do not address the underlying issue with the existing legislation. As noted, a party should only need to obtain consent if they meet the requisite control thresholds.

We believe that the requirement for a minority shareholder (e.g. a holder of a stake of 5% or less) to obtain OIO consent where they cause the target company to "tip" over a 25% foreign ownership threshold is unreasonable. The Act should be concerned with control being consolidated with one or a series of associated overseas persons, not with a series of minority but unrelated overseas investors. Further, in only very rare circumstances is there an ability for a minority shareholder to deliver (or to cause the target company to deliver) additional benefits to New Zealand, as required under the Act.

7. Technical issue: Incremental investments above a 25 per cent interest (p. 45)

Do you agree that there is a problem, and

- if so, has this paper described it accurately? Can you tell us about your experience, including when it happened?
- if not, do you support the existing arrangements. If so, why?

Yes, we agree there is a problem. A number of our members have voiced concerns with the current regime requiring overseas investors to obtain consent for incremental increases in shareholding. Our private equity members often structure investments so that they retain a majority stake, and issue management shares to senior management as part of a long term incentive scheme and/or have minority co-investors invest alongside the fund. As a result, the most common problems encountered by our members in abiding by the current Act include:

- where new equity is provided to a target company on a non-pro rata basis, which often occurs where the private equity sponsor has the funds available to provide growth equity, but the other shareholders, typically management, do not have the funds available to participate on a pro rata basis – this results in an increase in the percentage interest in the target company held by the offshore investor;
- where management shares need to be repurchased, which typically occurs where a manager leaves his or her employment with the target company; or
- in rare situations, if emergency funding needs to be provided to the target company to ensure that banking covenants continue to be complied with (and in such cases, there simply isn't enough time to seek or obtain OIO consent).

Do you have any comment on the potential effects of the options? Are you able to quantify potential effects on compliance costs?

If Option 1 is adopted, incorporating the modifications suggested below, we believe that this would have a significantly positive impact on investments in New Zealand. We are aware of numerous instances where separate consent has been required to permit minor share transactions (both buy-backs and issues of new equity) where control continues to reside entirely with the primary financial sponsor. Such requirements are both time consuming and costly, and can hinder the growth of businesses while consent is pending. As noted in the Paper, the compliance costs and administrative burden far outweigh the risk posed by such investments.

Do you think the right reform options (pp. 47 – 48) have been identified, and:

- if so, which of the options identified do you prefer and why?
- if not, what alternative option would you support and why?

On the whole, yes we agree that the right options have been identified. We support Option 1 and agree that, as a minimum, any incremental increase in shareholding should not be caught unless it crosses a "control threshold". This is particularly important where the target directly or indirectly holds an interests in sensitive land, due to the difficulties in satisfying the benefits test in these scenarios. We also support adopting Options 2, 3 and 4 (in addition to Option 1) in order to specifically address some of the technical issues identified in the Paper. We have set out our views on these below.

However, in our view, the reforms should extend to the following matters:

- All consents in respect of acquisitions of securities which expressly allow the applicant to acquire up to 100% of the target (i.e. where consent has been sought and granted for a 100% acquisition), should allow the applicant to directly or indirectly decrease its shareholding and subsequently increase it, both at the target level or at a holding company level. This would assist in a large number of practical scenarios, for example, share buy-backs, or non pro-rata share issues (this is common, as the financial sponsor will have the capacity to provide further growth equity, whereas management will not). It is very common for private equity-led acquisitions to initially acquire 100% of the target, and then subsequently issue shares to management as part of a long term incentive scheme. Often, either the company or the private equity fund are required to repurchase those shares (e.g. on default by a management shareholder, or because a manager ceases employment with the business). Even with the proposed flexibility to move within control thresholds, those buy-back transactions would require consent in circumstances where the underlying private equity investor had consent to acquire the asset in the first place (e.g. if consent was granted to acquire 100%, management were issued 12% of shares, and a buy-back subsequently occurred which resulted in the private equity sponsor moving from 88% to 91%).
- We believe that there should not be a 90% threshold as it is enough for an overseas person to obtain consent to increase its holding over 75%. Once at 75%, and absent any provisions in any shareholders agreement, that shareholder has enough control under the Companies Act and other law to fully control the target company. The 90% threshold does not grant a shareholder any special powers or control rights over and above what they would hold at 75%, and a controlling shareholder should not need to obtain OIO consent as well as proceed through the Takeovers Code requirements to obtain a 90% or more interest.
- For the reasons outlined in items 4 and 6, we believe that there should be no requirement for consent unless and until an overseas person, either alone or with its associates, holds 50% or more of the ownership or control rights of the relevant company (i.e. the 25% threshold is removed in its entirety). We believe that the 25% threshold for "control" under the current Act is not appropriate in the context of overseas investment. Real control resides in the board of directors of a company and consequently those shareholders who have the power outright to appoint and replace a majority of the board of directors. The ability to block special resolutions, or the ability to veto certain material proposals, in our view does not amount to control (in the case of veto rights, these are typical minority protection rights designed to protect a minority shareholder's investment and preserve the nature of what that shareholder fundamentally invested in – in no way do they amount to a

control right). As such, a holder of a 25% interest in a company does not have the ability to influence how sensitive assets are managed.

In respect of the technical issues identified:

- We agree with Option 2. We believe that there is no policy reason why the exemption should not apply to changes in shareholding by existing indirect shareholders. We consider that, for clarity, the control thresholds should apply to all changes in upstream shareholding, and we would prefer that this is expressly provided for in the revised regime.
- We agree with Option 3. We agree that there should be an express ability for a controlling shareholder to increase its shareholding in circumstances where the target business in question previously fell outside the scope of the Act – for example, if the controlling shareholder acquired its interest in the business when the business was worth less than $100 million but has grown the business to such a size that it falls within the "significant business asset" consent thresholds, or where the nature of the land has changed such that it is subsequently considered sensitive. In those situations, we believe it is unreasonable to require a controlling shareholder to obtain consent for incremental shareholding changes which fall outside of the control thresholds proposed. This is important to our members, as they are often acquiring companies in a growth stage, and play an extremely significant role in increasing the profitability and value of those companies. Accordingly, they should be free to increase their interests in the business which they have contributed to the growth of without having to go through the consenting process.
- We agree with Option 4. We cannot identify any justification for this restriction.

8. Assessing investors’ character and capacity (p. 51)

Do you agree that there is a problem, and

- if so, has this paper described it accurately? Can you tell us about your experience, including when it happened?
- if not, do you support the existing arrangements. If so, why?

We agree that there is a problem with the practical application of the investor test. While we appreciate that the OIO need to assess the character of the controlling individuals and determine whether they are suitable to control and manage a sensitive asset, in our members' experience the investigations extend to capture individuals in the chain of ownership who have very limited or no practical control or input over the operation of the asset in question. For our PE fund manager members, the control will rest in two places:

- primary day-to-day decision making will rest with the board of directors of the primary holding company or target company – these will often be the CEO and CFO of the business, along with investment professionals of the private equity fund; and
- key decision making (effectively, the decision of whether to exit the investment) will sit with the investment committee of the private equity fund, comprising investment professionals and often a number of independent advisors.

However, in our members’ experience, the OIO will look beyond this control construct and assign control to the general partners or even limited partners of the funds, when the reality is that the limited partners' investment in the private equity fund is passive and all control has been delegated to the fund manager (and ultimately the fund’s investment committee).

In relation to the "good character" test, in our members' experience the broad nature of this test has posed some significant problems for investors and their legal representatives, as well as the OIO itself. This particular process has often resulted in significant time delays to transaction approval during the course of dealing with immaterial and/or irrelevant claims which have no bearing on the "character" of the relevant individuals with control.

Do you have any comment on the potential effects of the options? Are you able to quantify potential effects on compliance costs?

Generally, we believe that the proposed changes to the character and capacity assessment will assist in streamlining the approval process, as well as assist with simplifying ongoing compliance by consent holders (given each new IWC/ROP needs to be assessed by the consent holder to ensure that they meet the "good character" requirements).

Do you think the right reform options (pp. 56 – 57) have been identified, and:

- if so, which of the options identified do you prefer and why?
- if not, what alternative option would you support and why?

We believe that the right reform options have been identified, and would support the adoption of any of the options. However, our preferred approach is Option 3, as it provides the greatest certainty to investors, with a defined set of criteria that can be considered by applicants before an investment is made. Option 3 also removes the risk that the OIO takes account of immaterial or irrelevant matters when assessing the "good character" of the ROP/IWC.

We strongly support the introduction of a standing consent for repeat investors. In our view, repeat overseas investors should be able to make an application for a standing consent, with an obligation to update that consent if one or more of the individuals with control changes. We believe that this should be a short form, low cost exercise. Holders of such exemptions, who then seek to undertake further transactions that would each require consent to be granted on a per transaction basis, would be exempt if the individuals with control for that transaction have not changed (in which case the investor would only be required to notify to the OIO, after the fact, of the basic details of the transaction undertaken, the fact that it had relied on its exemption in doing so and including a confirmation that the IWCs had not changed). For sensitive land transactions, the other criteria for consent would still need to be met and submissions made in respect of these for each new transaction, although the consent process should be streamlined as the OIO would not need to consider the good character and experience of the acquirer at the time. This would result in a significant time and cost saving for our members, a large number of whom are repeat investors in New Zealand and, if this one hurdle were removed, would likely encourage those investors to commit more time to investment opportunities, and eventually more capital to businesses, in New Zealand.

What types of allegation relating to potential criminal or civil offences do you think should be included in Option 2, if adopted, and why?

We would support a narrowing of the "good character" test to apply only to convictions for, or formal proceedings or investigations in respect of, civil or criminal offences. Ensuring that the test covers instances where proceedings have been formally commenced even though a conviction of adverse finding may not have resulted from those proceedings should capture scenarios where there has been wrong doing but an out-of-court settlement has been reached, which we think is justifiable (although we reiterate that our preferred option would be Option 3).

What factors do you think should be included in the bright-line test in Option 3, if adopted, and why?

We believe that the factors set out in paragraph 173 of the Paper are appropriate to be included in a bright line test. We also believe that the factors set out in section 15(1) of the Immigration Act 2009 (which apply in respect of the current regime) should be incorporated, as these set an appropriate threshold for the nature of, for example, criminal convictions.

9. Screening the impacts of investment (p. 60)

Do you agree that there is a problem, and

- if so, has this paper described it accurately? Can you tell us about your experience, including when it happened?
- if not, do you support the existing arrangements. If so, why?

Yes, we agree that there is a problem. Our members consider it one of the most significant problems with the current overseas investment regime. We believe that the requirement to demonstrate that the investment will benefit New Zealand is flawed and does not permit applicants to claim, or the OIO to account for, the holistic benefits that will arise from the transaction. Instead, due to the benefit factors, applicants are constrained as to what they can claim is a benefit to New Zealand, when in reality the investment will have broader benefits (which often don't fit neatly within the benefit factors that are set out under the current regime). The test is also not applied in a proportionate and risk-based manner, which results in the OIO requiring significant benefits, for a low risk or low value transaction.

The test also does not account for transfers from one overseas person to another. For a number of our members, the fact that they are a high quality financial investor with the skills and capacity to take a business to the next stage of its growth trajectory should be sufficient, and they should not be required to prove an additional benefit over and above those provided by a prior overseas owner. This is particularly relevant for those asset classes which have limited (or no) capacity left for incremental benefits which fit within the benefit factors to arise. For example, a vineyard may be fully planted, and so the capacity to plant more vines and increase exports is constrained, but the transfer to a new overseas investor with greater capital reserves and skills or contacts will enable the entity to reach the next stage of its growth. This is also a particular concern for investors who have grown a business and need to exit the investment, as imposing a requirement on a new overseas investor to deliver additional benefits can create liquidity issues and (in a worst case scenario) result in a stranded asset. Such an outcome would, in the long term, have a significant dampening effect on overseas investment into New Zealand as investors would be reluctant to invest if they cannot realise this investment. In this regard, we note the proposal to include a "no-detriment" test for transfers of interests in land between two overseas persons, and we would support this being included in the general assessment of the impact of the investment regardless of which option is ultimately adopted.

Do you have any comment on the potential effects of the options? Are you able to quantify potential effects on compliance costs?

The current "benefit to New Zealand" test has significant effects on overseas investors and levels of overseas investment into New Zealand. We believe that a material change to the regime is required to encourage and facilitate productive overseas investment into New Zealand because there are material issues with the benefits test and the way it is applied. In short, the existing regime:

- is not applied in a proportionate and risk-based manner, and requires overseas investors to make promises to spend capital, or deliver other benefits, in order to obtain consent even in situations where the nature of the asset does not warrant that expenditure or the commitment in respect of that benefit. This results in investors often having to commit to doing something that may not be in the best commercial interests of the underlying

business that they invest into, or may have significant (but inefficient) cost implications for the business;
- often requires investors to undertake lengthy and complicated (and therefore costly) assessments to provide that the benefits claimed will, or are likely, to arise; and
- the ongoing obligations to report against specific conditions imposed in response to specific benefits that will arise from the transaction can result in significant ongoing costs for investors.

Do you think the right reform options (pp. 67 – 76) have been identified, and:

- if so, which of the options identified do you prefer and why?
- if not, what alternative option would you support and why?

Yes, we generally think the right reform options have been identified.

We would strongly support the adoption of Option 4, particularly as this is the option which is most similar to the test applicable under Australia's Foreign Investment Review Board (FIRB) regime, and many of our members are familiar with that regime both through the sale of some of their investments to foreign owners in Australia and making investments in Australia (primarily due to the foreign component of the limited partner/investor bases of some of our members).

If Option 4 is adopted, a "not contrary to the national interest" test (similar to that under the FIRB regime) is significantly preferable to, and will create significantly more certainty for overseas investors than, an "in the national interest" test, which could be interpreted as not being materially different to the existing benefits test and at risk of being applied in the same way. We also believe that sufficient parameters would need to be placed around the application of the test so as to provide investors with as much certainty as possible as to how the test is applied and what sort of investments are likely to be approved.

Do you think the Act should expressly enable decision makers to consider any negative effects of a proposed investment, as described in Option 1? Why/Why not?

If Option 4 is adopted and framed as a "not contrary to the national interest" test, then material negative effects of the transaction which can be shown to likely arise could be taken into account by relevant decision makers. While not ideal from an investment standpoint (as it would create a degree of uncertainty for investors), we consider this approach to provide an appropriate balance to community concerns about overseas investment and its impact. We believe that this option would provide for a regime which is more transparent, flexible, efficient and timely.

Do you think the right risks have been identified in the definition of substantial harm in Option 2, and:

- if so, why do you think this?
- if not, which other risks do you suggest and why?

Do you think the right factors have been identified in the simplified benefit to New Zealand test in Options 2 and 3, and:

- if so, why do you think this?
- if not, which other factors do you suggest and why?

We do not think Option 2 or Option 3 are preferable, as adding a "substantial harm" or "national interest" overlay to the existing benefit test (or even a simplified version of that test) will create additional complexity and uncertainly and further deter foreign investment.

That said, if Option 2 or 3 is adopted, we believe that:

- The "exports" benefit should be retained. Given New Zealand is largely an export-focused nation, it is in our view important that this benefit factor be retained, as investments which result in an increase in exports should clearly be of benefit to New Zealand.
- The "additional investment for development purposes" factor should also expressly be retained. From a private capital industry perspective, this is a clear benefit which can typically be relied on by businesses that are backed by a private capital investment (as well as their employees or other stakeholders), and removing this may indicate that growth capital is not encouraged in New Zealand. Retaining this as a factor would be beneficial to the ongoing economic prosperity of New Zealand.
- The enhancement of prior investments benefit should also be retained, as should the benefit relating to prior investments undertaken by the overseas person. Both of these are important as they permit an applicant to demonstrate broader benefits which have arisen based on their track record of past investments in New Zealand or allow a benefit to be claimed where the acquisition may be a bolt-on investment or complimentary to an existing asset (which may or may not have been screened by the OIO).

Do you agree that the ‘substantial and identifiable benefit’ threshold for non-urban land over five hectares should be removed from the simplified benefit to New Zealand test in Options 2 and 3? Why/Why not:

Yes, we agree this should be removed. If the OIO assesses investments in a proportionate and risk-based manner, then this threshold becomes redundant, as the OIO would be able to assess the benefits arising from an investment in, for example, farmland, on a proportionate basis.

Do you think the right industries have been identified as industries of strategic importance in Option 3, and:

- if so, why do you think this?
- if not, which other industries do you suggest and why?

We disagree with the inclusion of media, transport and finance as sectors which are strategically important enough to require the application of a national interest test. In our view, each of these categories are so broad and could (even unintentionally) capture a significant number of businesses or assets which are of negligible strategic importance to New Zealand.

If a national security and public order call-in power were adopted (as proposed under Option 5), do you have a view on:

- which agency or agencies should be responsible for assessing prospective transactions (for example, the OIO, security agencies or an alternative) and, if so, why do you think this?
- how the government could become aware of transactions that could be called in for screening (that is, a compulsory, voluntary or combined approach, or another option entirely) and, if so, why do you think this?
- which Minister should be responsible for making decisions under this test and, if so, why do you think this?
- whether the responsible Minister (whoever that should be) should have to consult other Ministers before denying consent to a transaction using this power and, if so, which Ministers and why do you think this?

We do not have any specific views on this, noting our preference would be a modified Option 4.

10. Water extraction and the Act (p. 82)

Do you agree that there is a problem, and

- if so, has this paper described it accurately? Can you tell us about your experience, including when it happened?
- if not, do you support the existing arrangements. If so, why?

No, we do not believe that there is a problem. We are only aware of one transaction involving water bottling, and do not think this is a sufficiently material sector to warrant inclusion of a specific legislative provision.

Do you think the right reform options (p. 83) have been identified, and:

- if so, which of the options identified do you prefer and why?
- if not, what alternative option would you support and why?

If the "national interest" test were adopted, then there would be no need to provide specific provisions in the regime to address water bottling or extraction as specific sectors. If the "national interest" test were not adopted, then we would prefer Option 1 as this is a more targeted approach and deals with specific and discrete transactions. We would oppose Option 2 as it would have the unintended consequence of capturing a significant array of other businesses which rely on water extraction to operate (e.g. vineyards, some food processing plants), and we believe that such provisions are unnecessary.

Do you have any comment on the potential effects of the options? Are you able to quantify potential effects on compliance costs?

11. Tax and the Act (p. 85)

Do you agree that there is a problem, and

- if so, has this paper described it accurately? Can you tell us about your experience, including when it happened?
- if not, do you support the existing arrangements. If so, why?

No, we do not consider there is a problem. To our knowledge, all our members and their portfolio entities comply with relevant tax laws. The Australian Investment Council's Code of Conduct requires that PE fund manager members comply with all laws and regulations relevant to the conduct of our business, including tax law. We believe that expanding the regime to specifically cover tax matters would be unnecessary and create a more complex and costly overseas investment regime.

Do you have any comment on the potential effects of the options? Are you able to quantify potential effects on compliance costs?

Each of the options presented would have significant compliance costs. For example, they would require the consent holder to undertake significant ongoing monitoring of the tax affairs of its ROP/IWC. We believe that Option 3 would in particular be burdensome and unworkable if every transaction (even above a certain threshold) would require a binding tax ruling, as such a process would result in a significant delay (our understanding is that tax rulings can take up to 3 months to obtain) as well as a material additional cost (estimated to be up to $40,000).

Do you think the right reform options (pp. 85 – 86) have been identified, and:

- if so, which of the options identified do you prefer and why?
- if not, what alternative option would you support and why?

We do not support any of the reform options presented. We believe that applying additional regulations to the overseas investment screening process, particularly in a complex area such as tax law/regulation, creates unnecessary hurdles for foreign investors. We also believe that the options presented do not meet the three criteria set out in the consultation paper that are used to assess the extent to which options for change are likely to meet the Government's objectives for reform.

Firstly, we believe that none of these reform options meets the last two criteria. Creating additional rules, compliance checks or requirements for self-assessment which specifically deal with tax considerations would discourage, rather than support, overseas investment in productive assets in New Zealand. Having to conduct additional checks and clearances, or receive assurances from applicants regarding tax matters (e.g. structuring of deals), would also lead to a less predictable and timely outcome for those applicants.

Secondly, with regard to Criterion 1 (regarding managing the risks of overseas investment to New Zealanders' wellbeing), we believe that New Zealand's existing tax rules and legislation are well-functioning and provide the necessary framework to manage any concerns about tax compliance risk.

12. Māori cultural values and the Act (p. 88)

Do you agree that there is a problem, and

- if so, has this paper described it accurately? Can you tell us about your experience, including when it happened?
- if not, do you support the existing arrangements. If so, why?

No, we do not consider there is a problem. To our knowledge, very few (if any) investments by our members in New Zealand have impacted on Maori cultural values.

Do you have any comment on the potential effects of the options? Are you able to quantify potential effects on compliance costs?

Do you think the right reform options (p. 89) have been identified, and:

- if so, which of the options identified do you prefer and why?
- if not, what alternative option would you support and why?

What types of activity do you think should be defined as relevant arrangements under Option 1, and why do you think this

13. Special land provisions (p. 91)

Do you agree that there is a problem, and

- if so, has this paper described it accurately? Can you tell us about your experience, including when it happened?
- if not, do you support the existing arrangements. If so, why?

We are not aware of any of our members encountering any specific problems with the special land provisions.

Do you have any comment on the potential effects of the options? Are you able to quantify potential effects on compliance costs?

Do you think the right reform options (p. 93) have been identified, and:

- if so, which of the options identified do you prefer and why?
- if not, what alternative option would you support and why?

14. Farmland advertising (p. 95)

Do you agree that there is a problem, and

- if so, has this paper described it accurately? Can you tell us about your experience, including when it happened?
- if not, do you support the existing arrangements. If so, why?

We are not aware of any of our members encountering any specific problems with the farm land advertising requirements.

Do you have any comment on the potential effects of the options? Are you able to quantify potential effects on compliance costs?

Do you think the right reform options (p. 96) have been identified, and:

- if so, which of the options identified do you prefer and why?
- if not, what alternative option would you support and why?

We agree with Option 2. As far as we are aware, on the occasions when our members have sold interests in farmland, they have complied with the farmland advertising requirements but have not subsequently agreed to sell the land to an alternative buyer following the farmland advertising process. Further, the farmland advertising requirement also applies in respect of share sales where the sale entity holds "farmland". When those companies are sold by our members, they are typically of such a size or scale to warrant the sale being managed by an investment bank or financial advisor, who will typically have undertaken an extensive marketing campaign for those businesses. Thus it is unnecessary for those types of assets to then be advertised for sale through outdated mechanisms such as classified sections of papers, as the logical buyers for those assets, and the buyers with the financial capacity to acquire those assets, will have been identified and approached through the marketing campaign conducted by the investment banks and/or financial advisors. On that basis, we see very little practical utility in the farmland advertising requirements.

15. Timeframes for decisions (p. 98)

Do you agree that there is a problem, and

- if so, has this paper described it accurately? Can you tell us about your experience, including when it happened?
- if not, do you support the existing arrangements. If so, why?

Yes, we believe the paper has described the problems accurately. As noted previously, our members regularly apply for OIO consent and much of feedback we receive from them relates to the OIO process often being too slow. This has significant implications for transactions being undertaken by our members, including but not limited to:

- increased economic and business risk for purchasers – as the target business is often in a state of "limbo" (effectively maintaining the status quo, pending the new owner taking control), this reduces the extent to which growth initiatives for the business can be implemented and increases the risk of a significant detrimental event occurring, which can impact on the profitability of the business;
- increased funding costs for purchasers – as most private equity-funded acquisitions include some element of debt financing, there is a "ticking fee" which is payable from the period the funding commitments are extended by the banks or other debt providers to the date that completion occurs, so the longer the timeframe, the higher the ticking fee and thus a higher financing cost to the target business; and
- risks around gaps in warranty coverage – a large number of private equity acquisitions are backed by warranty insurance, which doesn't cover warranty breaches which arise and are discovered in the period between signing and completion of the transaction (with limited to no recourse to the seller for such loss), and so a longer period between signing and completion increases the risk that such a breach can occur.

Difficulties in making investments and deploying capital can also have an effect at the fund level, as fund commitments made by underlying fund investors (limited partners) will remain dormant and miss out on generating investment returns for a longer period while fund managers deal with issues such as those outlined above.

Do you have any comment on the potential effects of the options and sub-options? Are you able to quantify potential effects on compliance costs?

We believe that imposing a statutory timeframe on consents will increase investor certainty in the process, and allow a purchaser to appropriately plan for transition of ownership and growth initiatives post-completion. Each of the issues noted directly above will be reduced by a statutory timeframe, and thus reduce risks and certain funding costs for the businesses involved.

Do you think the right reform options and sub-options (pp. 99 – 100) have been identified, and:

- if so, which of the options and sub-options identified do you prefer and why?
- if not, what alternative option and/or sub-option would you support and why?

We would prefer Option 1, as this provides certainty to all applicants regardless of the nature of the investment being made. If decision makers had the ability to unilaterally extend the deadline, then the OIO would need to provide legitimate reasons for extending the deadline and, ideally, provide a specific updated timeframe for consent.

What do you consider to be the appropriate timeframes and why?

We consider the appropriate timeframes to 45 working days (as proposed under Option 1). This allows for two and a half months of active consideration, and moves the regime closer to the timing experienced in other jurisdictions (for example, under the FIRB regime), which should be achievable if the "national interest" test is adopted.

Do you agree that consent should be deemed granted if no decision is made within the prescribed time period and, if so, why do you think that?

Yes, we agree with that approach. We believe that if no adverse findings are made by the OIO during the approval process, then approval should be deemed granted by the applicant. A level of certainty would thus be assured for overseas investors and appropriate commercial considerations and decisions can be planned for or initiated. We believe that this condition will also help the OIO in focussing resources to achieve the set timeframe.

Experience with the Overseas Investment Office

If you have any feedback on your operational experience with the Overseas Investment Office, please share it with us below so they can use it in their continuous improvement programme:

Other comments on the regime?

If you have any other comments on New Zealand's overseas investment regime, please share them with us below:

We have the following additional comments on the regime:

- The OIO should be expressly required to assess investments in a proportionate and risk-based manner. This would ensure that the OIO assesses transactions in an appropriate manner, and according to the relative risk to New Zealand (including where the investors are of a low risk/high quality such as Australian-based fund managers that have a track record of investing in New Zealand), the value of the transaction, and the nature and extent of the land if it is part of the investment/target business, and would ensure that the consent outcome, including any conditions, reflects the risk and nature of the transaction.
- As noted, transfers from one overseas person to another overseas person should be assessed in a proportionate way. This is critical for our members as it potentially impacts on the liquidity of their investments. We would ideally like to see the regime work in such a way that if there is no detriment to New Zealand as a result of the transfer of ownership from one overseas person to another overseas person, then the transaction would be approved (i.e. there would be no need to demonstrate additional benefits).
- An additional problem that we understand some of our members often encounter is a lack of commerciality from decision makers. While difficult to legislate for, we and our members would like to see the OIO adopting a more commercial approach to its assessment of applications, and thus we think setting certain time frames for decisions to be handed down is appropriate.
- With respect to the Australian non-Government investor exemption, this currently only applies where an Australian entity that undertakes substantial business operations (or is owned 75% or more by Australians and New Zealanders) actually acquires the relevant asset. This means that subsidiary special purpose vehicles (SPVs) cannot be incorporated to undertake the transaction and rely on this exemption, which is a common structure implemented by our members and is common standard practice across the world for leveraged buyouts and other types of private equity transactions. It also means that Australian private equity funds cannot rely on this exemption unless the acquisition is undertaken through an existing portfolio business. We believe that this is an unfortunate or unintended outcome, and we would like to see an amendment made to this exemption which permits the Australian non-Government investor exemption to be relied on:
    - where the acquisition is effected through an SPV, provided that it is a subsidiary of an Australian entity that undertakes substantial business operations; and
    - by SPVs and portfolio entities that are owned by Australian-domiciled private equity funds or are managed by Australian-based private equity fund managers.