

24 May 2019

Overseas Investment Act Reform
The Treasury
Wellington

By email: OverseasInvestment@treasury.govt.nz

Re: Overseas Investment Act reform, phase 2 – consultation

The New Zealand Law Society welcomes the opportunity to comment on the discussion paper, *Reform of the Overseas Investment Act 2005, April 2019* (discussion paper).

The discussion paper has been considered by property law practitioners on the New Zealand Law Society Property Law Section's Law Reform Panel (Panel). The Panel has not responded to questions in the discussion document that are outside its remit and expertise. (For instance, we have not commented on the large portfolio investor questions, which are best left to stakeholders and large law firms who have most experience in this area.) Responses to the remaining questions are set out below, along with some general comments on the Overseas Investment Act 2005 (the Act).

General comments on the Act

The Panel agrees with the suggestion in the discussion paper that the Act does not appear to be operating efficiently or effectively, and that its perceived complexity may be discouraging overseas investment.¹ The Panel's experience reflects the concerns listed in the discussion paper, regarding:

- the inordinate delay in processing applications; and
- the high cost involved in making an application.²

As noted in the paper, there are also difficulties with using the counterfactual test to determine if a proposed investment is likely to benefit New Zealand, following the High Court decision in the *Tiroa* case.³ The Panel agrees that the test is somewhat arbitrary and artificial, and is not a useful comparison tool.⁴

New Zealand's national interest

The current review also seeks to ensure that the screening regime for overseas investment provides appropriate protection against risks to New Zealand associated with the overseas ownership of sensitive assets, with particular consideration of whether New Zealand's national interest is

¹ *Reform of the Overseas Investment Act 2005, April 2019* discussion paper, at [30] ff.

² Note 1, at [30].

³ *Tiroa E and Te Hape B Trusts v Chief Executive of Land Information New Zealand* [2012] NZHC 147.

⁴ Note 1, at [182] – [183]: "Parts of the benefit to New Zealand test are unclear and unnecessarily complex. This can create uncertainty, impose unnecessary costs and result in time-consuming processes, all of which can deter overseas investment. In addition, the test's design and gaps in coverage may undermine decision makers' ability to deny consent to investments that are not in New Zealand's national interest."

sufficiently protected.⁵ In the Panel's view, it does seem appropriate to consider an 'exception' discretion being granted to Ministers, where the national interest is at real risk. The Panel would endorse either of Options 3 or 4 from Table 15, subject to there being clear criteria for the exercise of the discretion and the availability of judicial review. Presumably, only a few large transactions would fall into the category of requiring Ministerial exceptional discretion.

Consultation questions

Sensitive adjoining land (p. 20)

Q1: Do you agree that there is a problem, and if so, has this paper described it accurately?

There is a problem in relation to sensitive adjoining land, given that a number of reserves already provide for public access (which renders the Overseas Investment Office's (OIO) ability to impose conditions on access redundant). There are also a number of reserve lands which, in reality, fall out of the category of being designated reserve lands. (These may be created by necessary earth works for stormwater and artificial bank creation but are designated reserves even though they are not primarily aimed at environmental protection or public enjoyment.)

There are also examples where overseas owners of large enterprises (such as warehouse owners) have been required to apply for consents where their warehouses are situated adjoining an artificial stream or embankment area, which is categorised as reserve land. Another example involved a case where a reasonable portion of adjoining reserve land was actually a carpark for the Department of Conservation and tourists. The need to go through the Overseas Investment Act process in such cases is clearly unnecessary and imposes unjustifiable costs on overseas investors.

A practical solution would be to send photos or a video of the site to the OIO so that the type and use of the land can be properly understood, since a designation does not always truly indicate the actual character and use of the land.

Making an application can incur a reasonably significant cost: in addition to the application fees, costs can escalate when interested parties make Official Information Act requests for information from the OIO. That requires the OIO and applicants to produce detailed reports, even where requests may be frivolous or vexatious, which adds to cost and delays.

Do you think the right reform options (pp22 – 23) have been identified, and if so, which of the options identified do you prefer and why?

Option 1 is preferred as it would simplify the screening requirements, while retaining the foreshore and seabed and significant areas to Māori, such as wāhi tapu areas noted on the New Zealand Heritage list. In this regard, we agree with the observation that excluded recreation reserves are generally of the least environmental concern and can usually be accessed via existing public roads or tracks. Further, the Resource Management Act 1991 (RMA) process is available to contest any adverse environmental effects, so that process remains available to objectors. It should not be the task of the OIO to adopt a role that is more appropriately a matter for experts engaged in resource management.

⁵ Refer Terms of Reference: Note 1, at p105; discussed at pp15, 17, and tables 14 and 15 at pp67, 77.

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

Q2: Do you agree that there is a problem, and if so, has this paper described it accurately?

The paper notes anecdotal evidence that the screening process in relation to leases involves disproportionate cost and delay, particularly for short-term leases. The Panel has no direct experience and therefore cannot comment but it is evident the cost may not be warranted for very short term (e.g. 3-year) leases.

The observation that it is problematic if the lease provisions lead to people choosing to buy the fee simple rather than a lease and that this is “seemingly contrary to the Act’s purpose”⁶ is questioned. The Act appears to be neutral on whether overseas persons can own land once they have complied with the criteria and conditions that the Act puts in place. Leases may be problematic for other reasons, but an incentive to buy rather than lease land is not a problem in itself.

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

Care should be taken in use of the word “short term lease”; in property law terms this is defined (see Property Law Act 2007, section 207) as an unregistered lease for a period of one year or less. Reference to leases of up to 10 years as “short term”⁷ would probably be better described as “medium term”.

The articulation of a difference between “a series of short-term leases” and options to renew is not well made. Presumably if an applicant wanted to defeat the purpose of option 1 by entering into a series of ‘short term’ leases they would need to make sure there was no explicit intention to do precisely that, otherwise they would fall foul of the rule. If parties choose in any particular case to enter into a new lease at the end of the 10-year period, but are free to do so or not, then we cannot see that there is any problem.

One option (albeit complicated and expensive) could be that whenever an overseas person enters into a lease the OIO is informed, and informed again when a new lease is entered, with the option that at some point a threshold is crossed that triggers the Act’s mechanisms. However, it would be odd that a lease for 10 years is acceptable, but a second lease for 10 years is not.

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?

The Panel would support Option 2 but suggests removing the 10-year term for non-urban land of 5 hectares or more (so that this category is treated the same as “all other classes of land”, i.e. consent required for 35-year leases).

⁶ Note 1, at [85].

⁷ Note 1, at [87].

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?

The paper describes the screening of leases of sensitive land as a disincentive for applicants to consider short-term leases. The current threshold of 3 years is plainly at odds with market forces, since it would not be economic to look at any short-term leases of 3 years or even longer than such period. Indeed, even the suggested 10-year period will still act as something of a disincentive. Possibly the benchmark should be the deemed subdivision provision in section 218 of the RMA, which has a 35-year period for deemed subdivisions, so the suggested 10 years (in both Options 1 and 2) could be extended to no more than 35 years.

Technical issue: periodic leases (p. 27)

Q3: Do you agree that there is a problem, and if so, has this paper described it accurately?

The Panel agrees with the concerns expressed, and they have been accurately described. The interpretation point is well made.⁸

Do you think the right reform option (p. 27) has been identified, and if so, why?

Yes, the right reform option has been identified. It seems to be a straightforward solution that maintains what is perceived to be the status quo.

Assessing investors' character and capacity (p. 51)

Q8: 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?

The Panel supports narrowing the “good character” tests which are arbitrary and not helpful, in the absence of any firm criteria. We would support Option 2, retaining some control over the need for applicants to disclose issues of materiality.

Water extraction and the Act (p. 82)

Q10: Do you agree that there is a problem, and if so, has this paper described it accurately?

This issue should be dealt with under the RMA and not the Overseas Investment Act: it is a consenting rather than an investment issue. It would confuse matters if the Overseas Investment Act were to encroach into this area. (And logically, if the OIO were to start dealing with water, it should also deal with all other exploitative natural resource use, since there is no material distinction between water and (for example) coal or gravel in this context).

Māori cultural values and the Act (p. 88)

Q12. Do you agree that there is a problem, and if so, has this paper described it accurately?

The significance of land to Māori is acknowledged, and that more transparency is needed in relation to protecting cultural values. It is important however that the meaning of “cultural values” is clearly and carefully defined, since there are differing interpretations and introducing further uncertainty would not be helpful.

⁸ Note 1, at [94].

Special land provisions (p. 91)

Q13: Do you agree that there is a problem, and if so, has this paper described it accurately? If not, do you support the existing arrangements – and why?

The special land provisions where such land as foreshore and riverbed is to be offered to the Crown before consent is granted can lead to inordinate delays. Also, there are cases where it is unclear whether some riverbeds and lake beds genuinely constitute special land. There are many riverbeds which do not have any flow of water for many months in a year, perhaps only at spring. Such riverbeds are marginal at best to be considered as special land and should be excluded from consideration.

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?

The Panel supports option 4 (improving the offer process so there is more transparency and understanding of the impact of what constitutes special land), on the basis that this should increase certainty and reduce timeframes and compliance costs.

Farmland advertising (p. 95)

Q14: 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?

Option 2 is supported. The current requirement to advertise is onerous and as the discussion paper notes, some advertising methods are outdated and ineffective. Furthermore, most if not all vendors will typically go to the wider market to entertain a competitive process. There is no compelling rationale for retaining the requirement to advertise.

Timeframes for decisions (p. 98)

Q15: Do you agree that there is a problem, and if so, has this paper described it accurately?

The discussion paper identifies the problems accurately. As noted earlier, this appears to be the biggest problem that overseas persons have in engaging with the OIO process.

Do you have any comment on the potential effects of the options and sub-options?

Deadlines are typically not adhered to. The Panel does see some merit in Sub-Option B where information would need to be delivered within 15 days.

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?

Option 2 (tailored deadlines with an ability to extend) appears to be sensible.

Sub-Option C (the timeframe commences when an application is received but is paused if additional information is required) is not supported. The OIO should not be able to simply 'stop the clock', as this may result in long delays.

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?

This has some attraction, as it would provide an excellent incentive for the OIO to deal with applications in a timely way. The OIO would of course need to be appropriately resourced.

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.

The Panel's experience is that the OIO is under-resourced. The staff have been under immense pressure and yet have been responsive and very helpful.

We hope you find these comments helpful. If you have any questions, the convenor of the Property Law Section's Law Reform Panel, John Greenwood, can be contacted via the Section Manager Katrina Thomas (katrina.thomas@lawsociety.org.nz / 04 463 2963).

Yours faithfully

A handwritten signature in black ink, appearing to read 'Tiana Epati', with a stylized flourish at the end.

Tiana Epati
President