Overseas Investment Act Reform
The Treasury
PO Box 3724
Wellington 6140
By email: OverseasInvestment@treasury.govt.nz

24 May 2019

Dear Sir / Madam

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

At PwC, our purpose is to build trust in society and solve important problems. We recognise that protecting sensitive New Zealand assets, while ensuring that New Zealand remains an appealing destination for high-quality overseas investment, is an important, complex and multidimensional challenge.

PwC values the opportunity to contribute to Treasury's consideration of the proposed reform of the Overseas Investment Act 2005 (the **Act**).

About us

As a leading professional services business in New Zealand, PwC employs over 1,600 people. Our clients include multinationals, public and privately held companies, charities, and individuals with aspirations to succeed. We offer market-leading services across a range of disciplines, which means that we are uniquely positioned to comment on, and bring a multidisciplinary lens to, the proposed reform of the Act. In preparing our **enclosed** submission, we have drawn on the expertise and experience of industry experts within our corporate finance, tax, infrastructure and development, Māori business, real estate advisory and private business teams, as well as the specialist transactional lawyers at PwC Legal.

Our submission

PwC New Zealand and PwC Legal regularly act for a variety of domestic and offshore investors, vendors, and purchasers, and are very familiar with the issues covered by the proposed reform. The proposed reform is of direct interest to us as leading financial, legal and transactional professionals who regularly advise our clients in relation to the application of the Act. Fundamentally, we support a reform that is aligned with the "ownership and control" purpose and intention of the Act and is consistent with other legislation applicable to investments in New Zealand assets – this has served as our guiding principle in preparing the enclosed submission.

We would welcome the opportunity to further discuss our recommendations with Treasury, and to bring the holistic expertise of the PwC Network to the proposed reform. Please contact us if you have any questions regarding our submission.

Yours sincerely

Mark Averill
CEO & Senior Partner

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Consultation Document Reference	Treasury's proposed reforms	Recommendation
What assets do overseas persons need consent to invest in (i.e., what should the Overseas Investment Office screen)?		
Sensitive adjoining land Pg 20-24	**Option 1** Remove Table 2 land from the definition of sensitive land, with the exception of the following categories, which would continue to trigger screening requirements: ● foreshore or lakebeds. This would be consistent with provisions in the Resource Management Act for the maintenance and enhancement of public access to coastal marine areas and lakes; and ● some land that is significant to Māori. This would comprise Māori reservations, and land that includes a wāhi tapu or wāhi tapu area that is entered on the New Zealand Heritage List/Rārangi Kōrero or for which there is an application that has been notified. *The Resource Management Act would continue to govern the use of the land subject to a transaction (including the environmental effects on the types of land currently included in Table 2).* **Option 2** Narrow the definition of Table 2 land by removing the section 37 list, but continue screening adjoining land of environmental, cultural or historic significance and/or where public access is important (the following box provides	***Existing Table 2 land framework creates uncertainty and inefficiencies*** The Consultation Document notes that the existing screening framework seeks to ensure that overseas investments "*are beneficial to the conservation of, or public access to, Table 2 land (for example, the foreshore where access may be through land subject to an overseas investment transaction)*", and that by classifying land adjoining Table 2 land as "sensitive", the Act recognises that "the development and use of sensitive adjoining land could have environmental effects on, or affect access to, Table 2 land". We do not consider that the screening of overseas investments addresses the identified concerns. Minimising the environmental impacts of land development, preserving access rights to Table 2 land, and addressing possible adverse impacts to Table 2 land as it relates to Te Ao Māori are factors that are relevant to all land transactions - not only to land transactions involving overseas persons. In our view, with the exception of land adjoining sensitive Māori land (for the reasons noted below), the current overseas investment framework, as it relates to sensitive adjoining land: ● fails to address the harm of adversely impacting access to Table 2 land, environmental protection of Table 2 land, and preservation of historic and cultural values associated with Table 2 land - all of which are unrelated to whether an overseas buyer is the buyer, or not; ● creates investor and vendor uncertainty (as to whether or not land is sensitive by reference to its proximity to land that may, itself, have

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	examples of the types of land currently captured by section 37 that could be retained in the Act). *This option would exclude most recreation reserves from screening requirements (except those adjoining the foreshore or lakebeds, and those managed by the Department of Conservation, if retained). These excluded recreation reserves are generally of the least environmental concern and can usually be accessed via public roads or tracks.*	sensitive characteristics); ● creates barriers to investment (relating to the time to obtain consent and the requirement for an overseas person to commit to deliver benefits that a theoretical counterfactual (often, rational) buyer would not deliver); and ● results in inefficient allocation of overseas capital (costs of application and associated advisor fees, and costs of creating benefits that a counterfactual buyer would not create). ***Land adjoining sensitive Māori land*** The principles of Te Tiriti o Waitangi, in particular kaitiakitanga, provide that land that adjoins land of special significance to Māori (i.e., land that adjoins Māori reservations, land that includes a wāhi tapu or wāhi tapu area that is entered on the New Zealand Heritage List/Rārangi Kōrero) is given special importance as Ngā Taonga Tuku Iho (cultural property). Land adjoining sensitive Māori land is currently considered to be "sensitive land" under the Act, and in our view, should continue to be considered to be "sensitive land", in recognition of the special relationship of this land to Māori. ***Existing development considerations*** As noted above, minimising the environmental impacts of land development and addressing possible adverse land impacts as it relates to Te Ao Māori, are factors that are relevant to all land transactions. In our view, where an overseas person, or a New Zealander, wishes to acquire land, or a lease of land that adjoins Table 2 land (i.e., a reserve, land held for conservation purposes or land adjoining foreshore or

Consultation Document Reference	Treasury's proposed reforms	Recommendation
		lakebed) *for development purposes*, New Zealand's planning, environmental, access, historical and cultural interests should be capable of protection through existing zoning restrictions and, if outside of the permitted land use, through the application of the *Resource Management Act 1991* to the proposed development. Development considerations are not, in our view, considerations that require assessment at the time of investment by overseas persons - moreover we do not consider that the nature and type of considerations or protections differ between a non-overseas person and an overseas person. ***Preferred Option*** We believe Treasury's proposed Option 1 provides market participants with more clarity and certainty than the alternative option proposed in the Consultation Document. In our view, the reforms proposed by Option 1 will facilitate further investment in New Zealand, and simplify the overseas investment regime in a manner that is consistent with the purpose and intention of the Act, while ensuring that the rights of New Zealanders to access, enjoy and protect land that is of community, cultural and national importance, is retained. We acknowledge that by adopting Option 1, neither the OIO, nor the relevant local authority would have decision-making powers in relation to the acquisition and use by an overseas person of land adjoining Table 2 land if: ● that land is not within the identified Option 1 exclusions; and ● is being used consistently with its permitted land use; or

Consultation Document Reference	Treasury's proposed reforms	Recommendation
		• is not being developed, or is being developed in accordance with existing zoning requirements. In our view, requiring an overseas person who wishes to acquire an interest in land adjoining Table 2 land, and use and develop that land consistently with its zoning and permitted use, to apply for consent to the acquisition, and to cite the benefits that their acquisition will bring to New Zealand, does not address the identified use and development concerns, and creates unnecessary compliance costs for both investors and government. If Treasury wishes to retain land adjoining Table 2 land as "sensitive land", we consider that providing further certainty to investors as to the land referenced in Table 2 (e.g., creating a publicly accessible register of all Table 2 land) is appropriate. This would create greater efficiencies in the assessment of whether land is sensitive and reduce the compliance costs of seeking sensitive land certificates from LINZ accredited agents.
Leases of sensitive land Pg 25-26	**Option 1** Exclude all short-term leases (for example, leases of 10 years or less) from the screening requirements to better recognise their relatively low-risk nature. However, there is a risk that this could encourage investors to enter a series of short-term leases rather than enter a long-term lease. This is distinct from leases that contain options to renew, where the tenure is calculated to include rights of renewal, which are generally captured by the Act's screening requirements. *If Option 1 were adopted, the criteria for the re-grant exemption would need to be reconsidered.*	***Overseas persons acquiring interests in businesses*** A significant majority of businesses, and their investors, have a commercial requirement to ensure that their businesses have reasonable security of tenure of business premises. In our experience, offshore investors acquiring interests in New Zealand businesses neither seek, nor place increased commercial value in acquiring a leasehold interest in sensitive land. Rather, any acquisition of a leasehold interest in sensitive land is typically a consequence of an overseas person's investment in the business itself. Current terms of commercial leases vary, but most commercial leases have terms (including rights of renewal) exceeding 10 years; this means that most commercial leases would give rise to an "interest in land" under the Act and would require an application for consent to be made if the

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<tr><th>Consultation Document Reference</th><th>Treasury's proposed reforms</th><th>Recommendation</th></tr>
<tr><td></td><td>Option 2

Create a split category of screening, under which the threshold for consent would be:

• for non-urban land of five hectares or more and residential land, leases that have tenures of 10 years or longer; and

• for all other classes of land, leases that have tenures of 35 years or longer. This is consistent with requirements under the Resource Management Act for a subdivision of land by a lease of part of the allotment.

Option 2 would remove screening requirements for some leases of less sensitive areas of land. The Act currently recognises this difference in sensitivity. For example, to obtain consent to acquire non-urban land of more than five hectares, an investment must be likely to have 'substantial and identifiable' benefits (rather than just benefits).

Under both options, consideration could be given to extending the relevant time period for screening profits à prendre over all or certain types of sensitive land.</td><td>underlying land is sensitive and the business acquirer is an overseas person. In our view, requiring an overseas person to apply for consent under the Act in order to acquire a business that has a lease over sensitive land for a reasonable term (i.e., a term that is sufficient to provide security of tenure) results in outcomes that are inconsistent with the purpose and intention of the Act, and creates barriers to investment.

We support a significantly longer leasehold period, before a lease is considered to be an "interest" in land for the purposes of the Act, and consider that the proposed 35 year term (whether or not urban or non-urban) is appropriate.

Land development and conversion

We consider that an extension to the proposed 10 year term for non-urban land is warranted in relation to agricultural and horticultural land to:

• incentivise overseas investors to invest in agricultural / horticultural land for a longer term, without having the disincentive of additional consent and compliance costs; and

• facilitate the inflow of capital into New Zealand's agricultural and horticultural industry. In the case of land use conversion, significant capital investment is required in order to achieve the desired returns for a financial investor (for example, conversion from bare land to a break-even Kiwifruit orchard takes a minimum of 11 years, based on recent modelling undertaken by PwC).

Where a New Zealand person holds the reversionary interest in the sensitive land in question, we do not consider that undertaking a full consent application is appropriate, or proportionate to the benefits that will arise to New Zealand on reversion.</td></tr>
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Consultation Document Reference	Treasury's proposed reforms	Recommendation
		In our opinion, Treasury should, as part of its consideration of reforms to the Act: ● consider whether a broad 35 year term of leasehold land is appropriate; or ● if a 35 year lease term is not considered appropriate, consider whether a streamlined exemption process for an extension of term is appropriate, where an overseas person requires a longer lease term in order to achieve a reasonable return on their investment (noting that the OIO can bind overseas persons to their cited capital investment commitment through the conditions of such exemptions). ***Profits à prendre*** We agree that a corresponding amendment should be made to the threshold for consent for acquiring profits à prendre, particularly given that a profit à prendre gives the owner of the profit a lesser property interest in land (being a non-possessory interest in land) as compared to a lease (which, typically, grants a tenant a right to exclusive possession of land for the term of the lease).
Periodic leases Pg 27-28		We do not comment on this, but would welcome the opportunity to discuss this, and our submission, with Treasury.

Who needs consent, and when, to invest in sensitive assets (i.e., who should the Overseas Investment Office screen)?		
Definition of overseas person as it applies to bodies corporate, including exemptions Pg 31-37	**Option 1** Increase the percentage of overseas ownership required for a domestically incorporated and listed body corporate to qualify as an overseas person, from 25% to 49%. *This is designed to better target the regime at entities where the majority of economic returns associated with sensitive assets would flow offshore. It is similar to the approach used in Canada under the Investment Canada Act.* **Option 2** Target the screening regime at entities where overseas persons have material degrees of control over sensitive assets. *Under this approach, a domestically incorporated and listed body corporate would be an overseas person only if 'substantial holdings' by overseas persons in classes of securities that confer control rights cumulatively totalled 25%. This is similar to the approach used in Australia under the Foreign Acquisitions and Takeovers Act 1975 and would effectively remove widely held companies (that is, listed companies with diverse shareholder bases) from the regime.* **Option 3** Impose screening requirements on domestically incorporated and listed bodies corporate when:	***Listed companies*** In our view, the current definition of an "overseas person" as it applies to bodies corporate, does not align with the stated purpose of the Act, which is that it is a privilege for overseas persons to "own or control" sensitive New Zealand assets. The cumulative 25% threshold is, in our opinion, an incorrect threshold that: ● if seeking to achieve the "control" purpose of the Act: ○ assumes that a group of shareholders who are overseas persons will control a body corporate as a bloc; ○ applies the ownership level of 25% to reflect the ability to have control rights, but typically these are only negative (i.e., veto) control rights, not the right to control the positive actions of a company; and ● if seeking to address the "ownership" purpose of the Act, in the case of a domestically incorporated and listed body corporate: ○ is very low, when taken as an aggregated amount, and consequently fetters the ability of New Zealand listed companies to gain access to international capital; and ○ creates compliance difficulties given the liquidity of listed shares and the challenges in tracking ownership in real time. ***Preferred Options*** We consider that the reforms proposed by Treasury in Options 1, 2 and 3 are all more aligned with the stated ownership and control purposes of the Act. While we support the implementation of any of these three Options over the status quo, our preferred Options are as follows (in descending order of priority):

	• more than 49% of the economic returns flow to overseas persons (that is, the entity is majority, or close to majority, foreign owned); and/or
	
	• overseas persons collectively hold substantial holdings in a securities class that confers control rights at a level of 25% or more (that is, the entity is subject to foreign control).
	
	Option 4
	
	No change to the definition of an overseas person. Instead, all domestically incorporated bodies corporate could apply for an exemption from the Act if they have a strong connection to New Zealand and a strong record of compliance. For example, an entity could qualify if:
	
	• it is incorporated in New Zealand;
	
	• it is headquartered in New Zealand;
	
	• it is at least 51% owned by New Zealanders;
	
	• New Zealanders control the board (that is, New Zealanders constitute at least half of the board of directors);
	
	• it is listed on a securities exchange, is listed on a New Zealand securities exchange and has dispersed overseas shareholdings. That is, 'substantial holders' do not comprise 25% or more of a class of securities with control rights;
	
	• no 'foreign government' or its associate(s) owns equity in the entity;
		• ***Option 2 (varied)*** - in our view, the test for determining when a listed body corporate is considered to be an "overseas person" should be a variation of the test proposed by Treasury's Option 2. Specifically, Treasury should consider that a domestically incorporated and listed body corporate should only be considered to be an "overseas person" where *one* overseas person (together with that person's associates) holds more than 20% of the voting shares on issue in the body corporate. This test is consistent with the Takeovers Code and, in our view, is more closely aligned with the ownership and control focus of the Act. While the test proposed by Option 2 acknowledges that only the interests of overseas persons with "substantial holdings", in a class of securities that confers control rights, should be taken into account in determining ownership or control, aside from the ease of monitoring compliance against a cumulative 25% shareholding threshold, in a listed context, we do not view that the "substantial holdings" qualification is necessary.
		
		• ***Option 1*** - our second preferred option would be for the test proposed by Option 1 to be adopted - i.e., that the threshold for determining control in the context of a listed body corporate should be increased from 25% to 49%. While still being an arbitrary bright-line, this change would:
		
		  ○ facilitate further investment in New Zealand's capital markets; and
		
		  ○ reduce compliance costs and increase investor certainty for some bodies corporate (albeit the increase in threshold does not, unfortunately, solve the challenges of tracking ownership in the case of widely-held, non majority-government owned, listed bodies corporate).
		
		We consider that any relaxation to the current definition of "overseas person" in the context of listed bodies corporate should only be available to bodies corporate that are incorporated in New Zealand ***and are listed on the NZX*** (i.e., companies that have been incorporated in New Zealand but have decided to list offshore or to de-list from the NZX, should be bound

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it has received consent for at least two investments under the Act in the previous five years; and
it has a strong record of compliance with the requirements of the Act and New Zealand law more broadly. For example, no enforcement action under the Act has been validly taken against the entity.

To support compliance, exempted entities would be required to notify the OIO whenever there was a material change in their ownership or control (for example, the appointment of a new director to the board). Option 4 could operate as an alternative to, or complement, any of Options 1-3.

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by the “overseas person” definition as it applies to privately owned companies). In our view, imposing this qualification would signal Treasury’s support for New Zealand’s capital markets and would assist the NZX and the New Zealand Government to attract further foreign investment in NZX listed companies.

25% threshold discussion in Consultation Document

We recommend that Treasury re-examine whether the application of the current 25% threshold is consistent with the purposes of the Act, as, among other things, it fails to address the control purposes of the Act. We note for completeness that the reasons for not re-examining this threshold, as noted on pg 33 of the Consultation Document are not warranted as:

Major transaction/ amendments to constitution: Both the major transaction and constitutional amendment requirements of the Companies Act 1993 are entity specific and such decisions are infrequently decisions of all ultimate shareholders, as the entities holding the relevant assets are typically structurally subordinated, such that the board of the holding company has ultimate decision making powers, not the ultimate indirect shareholders;
Managing sensitive assets: In our view, negative control does not have implications for the management of sensitive assets - it only has an impact on the ability for the status quo to change (i.e. if a company wanted to do something with sensitive land, that is different from the current land usage, and that land is the company’s principal asset, a person with negative control rights could prohibit the action being taken); and
Collusion concern: While this may be a valid concern, it is a matter that is already considered and catered for under the Takeovers Act 1993. It is not a concern that is attributable only to overseas persons, and based on historical compliance with the Takeovers Act, not one that needs to be dealt with by reference to an arbitrary “bright-line” approach to aggregate all offshore parties.

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		Closely-held private companies We do not consider that the rationale for assessing whether a privately-owned body corporate is an "overseas person" should significantly differ to the rationale that is applied to an assessment of a listed body corporate. However, we appreciate that there are fewer statutory controls that apply to closely-held bodies corporate (e.g., private companies that are not "Code Companies" under the Takeovers Code) and that applying the same narrower "overseas person" definition to closely-held private bodies corporate has the potential to give rise to abuse by overseas shareholders who can engineer negative control rights in private shareholders' agreements etc. We do, however, consider that privately-owned companies should be entitled to apply for an exemption from the consent requirements of the Act if they have a strong connection to New Zealand and meet certain prescribed parameters (e.g., if they are at least 51% owned by New Zealanders, they have no foreign government shareholders and their board is controlled by New Zealanders). In our view, the proposed Option 4 exemption should be made available to privately-owned companies, as this would facilitate further investment in the growth of New Zealand businesses.
Screening of portfolio investors Pg 38-41	**Option 1** Establish a class exemption for a portfolio investor where the entity's policy is to: ● limit its interest in New Zealand companies to portfolio minority investments. It does not seek to control these companies, and ● not seek representation on the boards of companies in which it holds securities. *This option is modelled on OIO guidance to access the existing Schedule 3 exemption. However, unlike the*	The growth of superannuation schemes and investment funds (including private equity, hedge, and sovereign wealth funds) has led to the growth of specialist managers, with investors typically having little, and in most cases, no control over the way in which the managers deploy their investment capital. We agree with Treasury that it could be seen as inappropriate that portfolio investors are required to obtain consent to invest in sensitive New Zealand assets in situations where the portfolio investors do not have majority ownership or exert control.

	Schedule 3 exemption, investors would self-assess their compliance with the requirements. That is, Cabinet would not determine whether any entity qualified for the exemption in advance of that entity acquiring sensitive assets. **Option 2** Establish a class exemption for entities beneficially owned or controlled by New Zealanders. That is where: • at least 51% of the entities' funds are invested on behalf of non-overseas persons (that is, New Zealanders); and • any control rights associated with the entities' holdings are at least 76% beneficially held by New Zealanders (that is, overseas persons cannot have negative control over any entity in which the entities invest). **Option 3** Adopt a narrower class exemption, aimed at entities that are beneficially owned or controlled by New Zealanders but limited to domestically regulated superannuation funds, such as KiwiSaver schemes. **Option 4** Amend the Act to allow individual exemptions for portfolio investors and entities beneficially owned or controlled by New Zealanders. Entities could apply for an exemption if they met the criteria specified in Options 1 and 2 for portfolio investors and entities beneficially owned or controlled by New Zealanders. Ministers would make the decisions and conditions could be applied (consistent with other exemptions under the Act).	***Portfolio investors*** In our view, an investment by a portfolio investor is akin to an ordinary course lender providing funding in return for an investment return. A portfolio investor with little or no control should not, in our view, trigger the requirements for consent. Moreover, we consider that Treasury should consider undertaking a broader review of the application of the Act in the light of the changing nature, and the increase in number of, investment funds, and how the control and ownership tests should apply to non-controlling parties. ***Preferred Option*** We consider that providing a class exemption, as noted in Treasury's proposed Option 1, would facilitate further capital inflows into New Zealand and is consistent with the purpose of the Act. However, we do consider Treasury should more broadly consider the application of the Act to investment funds.

Tipping point for requiring consent Pg 42-44	**Option 1** Replace section 12(b)(iii) with a general anti-avoidance provision that prohibits a person delaying a transaction that would result in an entity becoming an overseas person, in order to allow the entity to buy sensitive land without obtaining consent. This would simplify the regime by targeting the Act at deliberate attempts to undermine its intent. **Option 2** Require consent for a transaction in an entity that owns or controls an interest in sensitive land where an overseas person acquires a class of securities in that entity, if: ● when the transaction is complete, the acquirer will hold at least 5% of the total number of securities in that class; and ● as a result of the transaction, the entity invested in will be an overseas person (or the acquisition is the first such transaction after the entity becomes an overseas person). **Option 3** Establish the same control thresholds for consent as Option 2, but limit their application to publicly listed entities (the provision for other entity types would stay the same). This is designed to target the arguably more significant problems that section 12(b)(iii) presents for listed entities. Under this option, the rules could be closely aligned with the substantial product holder regime under the Financial Markets Conduct Act 2013. For example, there could also be a 1% threshold for transaction size.	As noted above, in our view, Treasury should consider, as part of its review of the Act, whether the application of an aggregated shareholding threshold is consistent with the purposes and intent of the Act. If an aggregated threshold continues to be applied, we support the material tipping shareholder concept as outlined in Option 2, which will provide further clarity and ease the compliance burden for both investors and decision-makers.

| **Incremental investment above a 25% interest**

Pg 45-49 | **Option 1**

Allow an overseas person to increase its control interest by any amount below the relevant key control threshold. This could be done by amending the trigger sections in the Act rather than expanding the exemption in the Regulations.

Any increases in ownership interest would also be restricted within those thresholds. However, this may depend on any changes in the definition of 'overseas person' as it relates to bodies corporate, as discussed in the previous section.

Option 2

Allow any upstream or downstream shareholder in the consent holder (direct or indirect) to qualify for the exemption. This would ensure that small upstream transactions (such as capital raisings) that will not result in any material changes to the ultimate ownership or control of the sensitive asset do not require consent.

Option 3

Allow a shareholder to qualify for an exemption if:

● consent was not required at the time of the original transaction, and was not in fact obtained; and

● the underlying asset has become sensitive since the original transaction.

Option 4

Remove the five-year limit from the exemption.

These options could be adopted in isolation or as a package. | We agree with Treasury that an incremental investment, that does not cross key control thresholds, should not be subject to screening under the Act. We consider this rationale applies irrespective of whether the increase in shareholding:

● occurs "downstream" or "upstream" of the consent holder;

● is for less than 5% of the total number of shares for which the overseas person was initially granted consent or less than 10% of all shares in the same class; or

● occurs within 5 years of the date of the original consent.

Often, increases in control or ownership interests between generally banded thresholds (e.g., from 25.1% to 49.9%) do not materially alter the ability of a shareholder to influence control over the sensitive asset, and screening such transactions, in our view, creates unnecessary compliance and monitoring costs for both investors and central government, and is of little benefit to the furtherance of the purpose and intent of the Act.

We agree with Treasury that the dis-alignment between the relevant shareholding interests and the ability to influence control, does not promote or encourage offshore investment.

In our view, the Act and/or Regulations should be amended to incorporate the exemptions proposed by Treasury in both Options 1 and 3.

Option 1

We support the implementation of Treasury's proposed Option 1 - which would permit an overseas person to increase their control interest by any amount below a specified key control threshold, without the requirement to obtain consent under the Act. We also agree that the control thresholds set out in Regulation 38 are an appropriate measure of a substantial change in ownership and control, and support the alignment of the Act with (a) commonly accepted thresholds for control in a body corporate context, and (b) the Takeovers Code (albeit the shareholder "creep" rule at |

		Rule 7(e) of the Takeovers Code only applies to increases in shareholdings of Code Companies above 50%). In our view, Option 1 would be most appropriately implemented by amending the trigger sections in sections 12(b)(ii) and 13(1)(a)(i) of the Act and section 57D(b)(ii) of the Fisheries Act 1996, rather than expanding on the existing exemption in Regulation 38. ***Option 2*** While the implementation of Treasury's proposed Option 2 would address the technical restraints of the current Regulation 38 exemption, by allowing "upstream" or "downstream" shareholders to qualify for the exemption; it would not provide investors with the same degree of flexibility as the exemption proposed by Option 1, since investors would still need to satisfy the other conditions of the existing Regulation 38 exemption (e.g., their investment would need to be for less than 5% of the total number of shares for which the overseas person was initially granted consent and must occur within 5 years of the date of the original consent etc.). In our view, key control thresholds should be the only measure of a substantial change in ownership or control of sensitive New Zealand assets. Imposing additional conditions relating to the period in which the further investments occur, as well as absolute caps on the total number of shares or shares in a particular class to be acquired as part of any further investment, does not, in our opinion, align with the purpose and intent of the Act and is unnecessarily restrictive. ***Option 3*** We agree that an overseas person who holds shares in a company with an interest in assets that have become sensitive post the overseas person's investment (either due to a legal or regulatory change, or a change to the assets' nature) should be exempt from screening under the Act.

		Option 4 While we support Treasury's proposed Option 4, and agree that the five-year time limit imposed by the existing Regulation 38 exemption is not an appropriate measure of a material change in ownership or control, we consider that the technical issue that this Option seeks to address would be more appropriately dealt with through the implementation of the broader exemption proposed by Option 1. In our view, it should make no difference when a transaction resulting in an increased shareholding actually occurs, provided the increase in shareholding does not cross a key control threshold. ***Benefit to New Zealand test*** Under the current regime, an overseas person who wishes to increase their shareholding in a company that has an interest in "sensitive land" (and who does not qualify for an exemption under Regulation 38) is required to cite the benefits that their increased investment will bring to New Zealand in their application for consent (notwithstanding that either they, or their parent or subsidiary, will have already been required to cite benefits in the original application for consent). We consider that Treasury should consider adopting a similar "no detriment test" as proposed on page 76 of the Consultation Document, which would require the relevant shareholder to demonstrate that their increased investment would, at least, maintain the benefits cited in the original consent holder's application for consent (noting that the OIO will have the ability to continue to monitor the delivery of such benefits via the conditions that it imposes on consents granted). The OIO could also use this opportunity, as a condition to granting consent to an increased investment above a key control threshold, to require that the relevant overseas applicant demonstrates that the "likely" benefits cited by the applicant (or their parent or subsidiary) in the original consent application have, in fact, been achieved, or other benefits have been achieved.

How does the Act screen transactions in sensitive assets (i.e., how can we improve the screening process)?		
Assessing investors' character and capacity Pg 51-59		We do not comment on this, but would welcome the opportunity to discuss this, and our submission, with Treasury.
Screening the impacts of investment (the "National Interest Test") Pg 60-81	**Option 1** Retain much of the design of the existing benefit to New Zealand test, while broadening its coverage to address perceived gaps. Decision makers would be able to consider: ● any negative effects of a proposed investment to the extent that those effects relate to factors in the test (such as job losses); and ● the effects that the investment will or is likely to have on New Zealand's national security. The ability to add factors to the benefit to New Zealand test by regulation would be removed. **Option 2** Introduce a substantial harm test that would operate in conjunction with a simplified benefit to New Zealand test. That is: ● all investments would have to satisfy the investor test; ● investments in sensitive land would also have to satisfy the simplified benefit to New Zealand test; and	We support legislative reform that empowers decision makers to screen transactions that pose risks of substantial harm to New Zealand's key national security and other national risks. We do not consider that there should be a difference in the application of the substantial harm test between applications involving sensitive land and applications for significant business assets. We do not support a broad "national interest test", in any form, and consider that the application of such a test would create uncertainty for investors and would reduce much needed foreign investment. ***Substantial harm test (Option 2)*** As noted above, we support Treasury further exploring the application of a "substantial harm" test; on the basis that if this test is implemented, it is implemented in a way that does not create uncertainty, and appropriate guidance is provided in relation to when "substantial harm" is likely to arise, and when a proposed transaction is likely to be identified for further "substantial harm test" screening. The Consultation Document identifies broad threats to New Zealand's national interests (i.e., threats to public order, public health and safety and essential security interests), however more comprehensive guidelines should be referenced in each of these categories to provide overseas investors with certainty and confidence in the applicability of the test - this is particularly important if Ministers are to be given a general right to "call in" any investments that haven't been identified by the security services as

	• certain transactions to acquire sensitive land or significant business assets would also be subject to the substantial harm test. *The substantial harm test would provide decision makers with broader grounds to decline prospective investments. It would be based on OECD guidance on managing risks associated with investments, and be similar to the test that underpins Japan's foreign investment screening regime. In particular, decision makers would have the power to deny consent to investments that pose risks of substantial harm to New Zealand. These could broadly include:* • ***threats to public order:*** *Investments that would damage the functioning of New Zealand's society or threaten New Zealand's political or economic survival;* • ***threats to public health and safety:*** *Investments that would severely damage the health and safety of the New Zealand public or a section of the public; and/or* • ***threats to essential security interests:*** *Investments that would threaten New Zealand's economic wellbeing and/or national security. Ministers would be able to decline transactions proposed for completion during a time of war or armed conflict, or any other emergency in international relations.* *The high threshold for activating the substantial harm test means it could only be exercised by Ministers (that is, it could not be delegated). Ministers would be accountable for its use and for determining what constitutes 'substantial harm' (rather than, for example, assessing a prospective investment against legislated criteria that attempt to define substantial harm). This would ensure that the test is responsive to a dynamic global environment. The threshold*	presenting potential national security risks, as proposed in the Consultation Document. ***Simplified benefit to New Zealand test*** We agree that parts of the current benefit to New Zealand test are unclear, unnecessarily complex and have the potential to deter or restrain foreign investment. The government's ability to add factors to the benefit to New Zealand test by regulation (in addition to the 21 prescribed economic, environmental and cultural factors) creates further uncertainty. We support Treasury's proposal to replace the existing benefit to New Zealand test with a simplified test that: • reduces the number and specificity of the existing economic, environmental and cultural factors, and categorises these based on their underlying objectives; • removes the requirement for benefits associated with non-urban land exceeding 5 hectares to be 'substantial and identifiable'; and • removes the government's ability to add factors to the test by regulation. ***Simplified counterfactual test*** The issues and concerns associated with the current counterfactual test, as identified in the Consultation Document, are, in our experience, well founded issues and concerns. The complexity associated with the "with and without" test results in theoretical analysis of who likely counterfactual acquirers would be, what they would do, and how they would do it. We support reform of the counterfactual test to remove uncertainty and associated costs for both investors and decision-makers.

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	for substantial harm would be a policy decision for each government. *Operationally, the test would be used for any transaction identified by the security services as presenting potential national security risks. The Minister would also be able to call in any other prospective investment (generally screened under the Act) for consideration against the substantial harm test.* *To balance the additional flexibility that the substantial harm test provides for decision makers in assessing applications for consent, all applications involving sensitive land would be assessed against a simplified benefit to New Zealand test. The existing test would be reformed to:* ● *combine factors with similar objectives to reduce their number and specificity;* ● *remove the requirement for benefits associated with non-urban land of more than five hectares to be 'substantial and identifiable'. This is because any investment that has a risk of causing substantial harm to New Zealand could be denied consent under the substantial harm test. This would also reduce the framework's complexity; and* ● *remove the ability to add factors to the test by regulation.* *[See further commentary at paras 202-205 of the Consultation Document]* **Option 3** Similar to Option 2, but the primary difference is that the national interest test would allow decision makers to	We also agree with the proposal to adopt a "no detriment test" for transactions that involve the transfer between two overseas persons of sensitive land (or a lease over sensitive land). Treasury's proposed "Sub-Option B" (comparing what an overseas person would do with what would happen if the vendor continued to own the land) is the most appropriate solution, of the Options proposed, to the issues currently facing investors and advisors in applying the current counterfactual test and will, in our view, result in significantly reduced compliance costs for investors and decision-makers alike. However, we acknowledge that adopting a "status quo" counterfactual may not be appropriate in certain circumstances (e.g., where the vendor is insolvent or is not operating the sensitive land to its full potential). As such, we consider that the "status quo" should be introduced as a rebuttable presumption, rather than hard-wiring this into the Act as the only counterfactual scenario. ***Transactions under NZ$100 million*** In our view, Treasury should also consider imposing a notification obligation on overseas investors who acquire or invest in business assets below the NZ$100 million threshold in certain defined industries – this would give Ministers a prescribed period (e.g., 30 working days) following receipt of the notification in which to "call in" the transaction if they consider that the transaction is likely to cause "substantial harm" to New Zealand, by reference to the clearly defined parameters set out in the comprehensive guidelines issued in relation to the applicability of the "substantial harm" test (as per our recommendation above).

	consider whatever features of a prospective investment – both positive and negative – they consider relevant when determining whether to grant consent. This is in contrast to the prescribed factors in the existing benefit to New Zealand test and those proposed in the substantial harm test. *As with the proposed substantial harm test, only Ministers would be able to use the test and they would determine what is, or is not, in New Zealand's national interest. However, unlike the substantial harm test, a national interest test would allow Ministers to consent to transactions that they determine to be in New Zealand's national interest rather than only deny consent to those that pose substantial harm.* *To support investor confidence, if a national interest test were adopted it is proposed that:* ● *the government would provide guidance on the factors likely to be considered, and their relative importance, in determining what constitutes New Zealand's national interest;* ● *before an application could be declined, the relevant Minister would consult security Ministers and other Ministers as relevant (for example the Minister of Foreign Affairs or the Minister for Economic Development). This is similar to the requirements under the Outer Space and High-altitude Activities Act 2017;* ● *Ministers could be required to publish the reasons for declining prospective investments unless it risked the release of sensitive national security information; and* ● *decisions could be reviewable (either on the merits or judicially).*	

	As in Option 2, all applications involving sensitive land would continue to be assessed against a simplified benefit to New Zealand test, even if they were also expected to be subject to the national interest test. *[See further commentary at paras 211-214 of the Consultation Document]* **Option 4** Replace the benefit to New Zealand test with a national interest test (that is, all transactions would be subject to the national interest test). The test itself would be designed in the same way as in Option 3 and would apply to all investments screened under the Act, excluding those in residential land and forestry assets on sensitive land (unless the acquisitions would be subject to satisfying the current benefit to New Zealand test). *This is the simplest approach to addressing the identified problems, and most similar to Australia's foreign investment screening regime. Under this option, consideration would be given to whether to retain the existing requirement to offer special land back to the Crown. It is necessary because this requirement is currently triggered under the benefit to New Zealand test for certain transactions.* **Option 5** Grant Ministers the power to call in for screening certain transactions involving an overseas person (or their associates) if they raised national security and/or public order risks, even if they would not ordinarily require screening under the Act (that is, if they were below the current screening threshold of $100 million).	

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	Transactions that could be called in on national security grounds could include, for example, investments in dual-use technology firms and critical direct suppliers to the government's defence, security and/or intelligence functions. The public order grounds are intended to be used to call in investments in the media sector (although it is possible that the media sector may be called in on national security grounds). *[See further commentary at paras 221-228 of the Consultation Document]*	
Water extraction and the Act Pg 82-4	**Option 1** Amend the benefit to New Zealand test to include a factor such as, 'whether, for transactions involving an existing or proposed resource consent for water bottling or bulk water export, there are or will be adequate mechanisms in place to protect or enhance the environment or cultural or economic wellbeing'. **Option 2** Amend the benefit to New Zealand test to include a factor such as, 'whether, for transactions involving an existing or proposed resource consent for water extraction, there are or will be adequate mechanisms in place to protect or enhance the environment or cultural or economic wellbeing'.	We do not consider it necessary to amend the benefit to New Zealand test to include a specific factor addressing environmental, cultural or economic protection mechanisms in relation to water bottling or extraction activities. As noted in the Consultation Document, the *Resource Management Act 1991* regulates water extraction activities on both sensitive and non-sensitive land and, in our view, local authorities are better equipped to assess the environmental and cultural impacts of water extraction as part of the resource consent process. As for assessing the economic effects of water extraction or water bottling activities – this already falls within the OIO's remit, in the case of overseas investments involving water extraction or water bottling activities that take place on sensitive land, through the benefit to New Zealand test. Additionally, we note that the two proposed Options would only apply to overseas investments in water extraction activities or water-bottling operations on "sensitive land" (which require the benefit to New Zealand test to be met) - they would not apply to overseas investments in large water-bottling companies that trigger the "significant business asset" threshold.

Tax and the Act **Pg 85-87**	**Option 1** Expressly include tax compliance history as part of the investor test. While tax compliance history can already be considered under the good character test, this option is designed to *ensure* that the decision maker considers tax arrangements (for example, residency in low-tax jurisdictions, tax disputes and shortfall penalties) when determining an overseas person's character. *This option is primarily for bodies corporate rather than individuals with control. If the investor test is not extended to bodies corporate, this option could still be imposed on them, but only if the Act is amended to include a standalone requirement. If the investor test is extended to bodies corporate, this option could be implemented using the Ministerial Directive Letter. If information provided by an overseas person were found to be inaccurate, the government could take enforcement action.* **Option 2** Require, as part of the investor test, each ROP/IWC to certify that, in any jurisdiction, it (or any entity under its control): ● is not involved in any tax avoidance scheme; ● has not breached any tax legislation (including whether it has been subject to shortfall penalties, or an equivalent, for non-compliance); or ● is not currently involved in a dispute with any tax authority. *If an investor were unable to certify, they would be required to explain any contraventions (and certify subject to those contraventions). The decision maker could exercise*	We do not consider that additional, tax specific, considerations are beneficial when assessing the "Investor test"; nor do we consider that an overseas corporate structure is relevant to the assessment of a ROP/IWC's good character. In our view, the OIO's focus should remain on "prosecutions" of the ROP/IWC for tax offences (which, in New Zealand terms, would be criminal prosecutions), as we believe that this is a measurable and objective consideration in assessing a person's good character. We consider this also provides more certainty and clarity than some of the alternative Options proposed by Treasury, for the reasons discussed below. Treasury's proposed Options 1 and 2 are not, in our view, an appropriate measure of a ROP/IWC's good character. For example: ● a group's corporate structure is often influenced by non-tax specific considerations (including enforceability of proceedings, political risk, availability of resources etc). We consider that permitting consideration of international tax arrangements will create more uncertainty than benefits; ● the reference to "involvement in any tax avoidance scheme" is, in our view, too difficult to define or identify, given that different countries have different tax avoidance rules, all of which would need to be respected. As noted in Table 18 of the Consultation Document, the OIO will likely need to engage tax experts to advise it on such matters which, in our view, would be an unnecessary use of time and resources; ● the bar set by a certification that a ROP/IWC "has not breached any tax legislation" is, in our opinion, too low. Bodies corporate and individuals make errors in relation to tax compliance matters, however those mistakes are usually able to be corrected without penalty. In addition, the reference to "shortfall" penalties is a reference to a New Zealand concept (being non-criminal penalties). If penalties are to be a focus for the OIO in assessing a ROP/IWC's good character, then the

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	discretion as to whether the explanation is adequate (for example, the breach could be historical and the investor may have since made material changes), and consent could still be granted. *The decision maker could also consider the severity of the breach and whether denying consent is appropriate; for example, shortfall penalties can be imposed for fairly minor, administrative breaches as well as more serious non-compliance. As with Option 1, this option is designed to apply to corporates, and a director of each relevant overseas person would be required to certify.* **Option 3** Require investors to obtain binding rulings from Inland Revenue on the treatment of transactions under New Zealand's tax rules – for example, the structure and funding arrangements used to acquire land. This would ensure that the tax arrangements were not in breach of domestic tax law. Given the time and costs involved in obtaining binding rulings, this option could be limited to acquisitions over a certain threshold.	focus should be on criminal penalties (i.e., prosecution) and not "shortfall" penalties; ● the reference to "is not currently involved in a dispute with any tax authority" is an inappropriate measure of a person's good character - tax, like any other commercial matter, is uncertain and disputes are a legitimate way of finding the right answer. A ROP/IWC should not be penalised for, or disincentivised from, pursuing a dispute with a tax authority; and ● the reference to a decision maker's ability to consider the severity of an investor's breach raises practical issues - in our view, it would be more appropriate for the certification in Option 2 to be limited to prosecutions, and for the decision-maker's discretion to be limited to determining the severity of the relevant prosecution. We consider that Table 18 accurately addresses the negative aspects of Treasury's proposed Option 3, however we would also question whether it is an appropriate use of Inland Revenue Rulings' resources to be dealing with all OIO matters (many of which will be non-contentious), or whether those resources are better spent on genuinely contentious matters in the wider economy, as they are now.
Māori cultural values and the Act Pg 88-90	**Option 1** Broaden the benefit to New Zealand test to allow decision makers to take account of an overseas person's plans to allow lawful 'existing arrangements' in respect of the land to continue, where those arrangements are recorded in writing. Relevant existing arrangements could be defined. This could be similar to regulation 29, which provides for some recognition of existing arrangements, such as an agreement to provide access for a section of the public where an application involves forestry activities.	We support Treasury seeking to further align the Act with the cultural significance and connection between Māori and Te Whenua (the land). ***Broader Treasury consideration*** Given the significance of the connection between Māori and Te Whenua, and our experience that financial investors often acquire freehold title as a consequence of a business acquisition, we support Treasury considering whether, when there is a sale of sensitive land: ● that the land is required to be advertised on the open-market (in a similar way that farmland is currently advertised), to ensure that all

	Option 2 Clarify and broaden the benefit to New Zealand test to enable decision makers to take account of overseas persons' intentions to protect or enhance wāhi tūpuna that are listed under the Heritage New Zealand Pouhere Taonga Act 2014, and/or promote or enhance a Māori reservation established under section 338 of Te Ture Whenua Maori Act. This would enable decision makers to take into account a range of sites of ancestral, historical, spiritual or emotional significance to Māori when they are considering the benefits of applications. **Option 3** Expand the benefit to New Zealand test to allow decision makers to consider 'Māori cultural values as they relate to the physical and historical characteristics of the relevant sensitive land'.	New Zealanders have the opportunity to acquire the sensitive land; and/or ● Māori be given a first right of refusal over the land in question, or the portion of land that is of special cultural importance (in the same way that "special land" is currently dealt with under the Act, but subject to a lease-back on market terms), in each case in a manner that continues to be timely and promote investor and vendor certainty of process and outcome. ***Preferred Options*** In our view, a mix of Option 2 and Option 3 is appropriate, such that benefits to New Zealand could include: ● an overseas persons' intentions to protect or enhance wāhi tūpuna that are listed under the Heritage New Zealand Pouhere Taonga Act 2014, and/or promote or enhance a Māori reservation established under section 338 of Te Ture Whenua Maori Act; and ● an overseas persons' intentions to protect or enhance Māori cultural values as they relate to the physical and historical characteristics of the relevant sensitive land. We note that Treasury has indicated that Option 3 could have moderately negative impacts in relation to the support of overseas investment and delivering more predictable, transparent and timely outcomes. We do not agree with this. In our experience, local authorities throughout New Zealand already have, or should have, mechanisms in place that enable them to identify and assess Māori cultural values and the OIO has, or should have, access to relevant experts through being able to work with other government departments. While we agree with Treasury that Option 3 results in additional factors that need to be considered as part of the benefit to New Zealand test, our view is that such considerations are consistent with Te Tiriti o Waitangi

		principles contained within existing NZ legislation, should not be onerous and could be run in conjunction with the consent process as it currently stands.
Special land provisions Pg 91-94		We do not comment on this, but would welcome the opportunity to discuss this, and our submission, with Treasury.
Farmland advertising Pg 95-97		We do not comment on this, but would welcome the opportunity to discuss this, and our submission, with Treasury.
Timeframes for decisions Pg 98-103		We do not comment on this, but would welcome the opportunity to discuss this, and our submission, with Treasury.