Submission on Land Information New Zealand Consultation Document:

Review of Third-Party Funding for the Overseas Investment Office

Bell Gully

22 March 2021

1. Introduction

1.1 Land Information New Zealand (**LINZ**) has asked for submissions on its Review of Third-Party Funding for the Overseas Investment Office (**OIO**) (the **Review Paper**).

1.1 This submission is Bell Gully's response to the submission questions raised in the Review Paper.

2. Executive Summary

2.1 Bell Gully advises many major New Zealand and overseas businesses on applications under the Overseas Investment Act 2005 (the **Act**) and Overseas Investment Regulations 2005 (details of some of Bell Gully's experience can be found here).

1.2 In summary, Bell Gully's position on the proposals in the Review Paper is as follows.

(a) Overseas investment brings substantial benefits to New Zealand and is critical to a healthy, growing economy. This has been recognised repeatedly by the Government. Accordingly, we strongly disagree with the characterisation of an OIO consent conferring a purely private benefit on an overseas investor. The Act, as a regulatory regime to address potential risks from overseas investment (which occur very infrequently with the applicants who go through the consent process) has a broad public good element. In particular, it deters potentially risky investors from seeking to invest here. Accordingly, we disagree with the notion that all costs should be borne by applicants as they would be bearing costs that are better attributed to risky investors who the Act appropriately deters from investing in New Zealand.

(b) We appreciate that the application process has become more complex for the OIO in recent years which has had an impact on the OIO's costs and resources. However, the Government's recent focus has been on reforming the Act to reduce unnecessary complexity and ensure compliance costs are proportionate to the risks associated with the investment. Accordingly, we consider that assessing potential fee increases by reference to historic figures may be inappropriate.

(c) Additionally, the OIO is currently streamlining its processes, including shifting some administrative tasks to applicants. For example, it is moving applications for consent for overseas investments in significant business assets and sensitive land (benefit to New Zealand, forestry and residential development one-off and standing consents pathways) to online website forms, which are expected to materially decrease the administrative burden for the OIO in processing applications.

(d) Accordingly, we consider that LINZ should further consider the *status quo* Option 1 and not look to change the OIO's fees and fee structure until after the impact of changes to the overseas investment regime and assessment process has been realised.

(e) Of the Options within Option 2, Option B is our preferred option. However,

(i) lodgement fees appear high and do not reflect application complexity;

(ii) monitoring compliance should not have its own fee; and

(iii) certain proposed fees appear not to follow the expected, historical or, in our view, logical pattern for OIO application fees, with proposed fees:

(A) in many circumstances decreasing with application complexity (across both complex and simple applications); and

(B) for decisions delegated to the OIO more often than not being less than those requiring Ministerial consideration;

(f) Accordingly, if Option B is to be implemented, we strongly request that the OIO reviews its proposed fees in detail to ensure they match actual costs as best as possible and follow logical increases.

(g) We note that these issues are also present in Options A and C, which we have not assessed in detail.

2.2 Bell Gully's detailed responses to each of the submission questions raised in the Review Paper are set out below.

2. **What is your view on the preferred proposal for third-party funding of the overseas investment regime (i.e. updated fees charged to overseas persons)?**

Fees should recognise public benefit from overseas investment

2.1 Overseas investment into New Zealand is a critical part of our economy. This has been recognised repeatedly by the Government including in every stage of the reform of the Act. For example. LINZ has previously recognised:

> *Overseas investment is a big contributor to New Zealand's economy. It improves productivity and employment, it enhances export opportunities, and it brings new ideas, innovations and relationships.*[1]

And further:

> *Overseas investment will support New Zealand's economic recovery post COVID-19, so businesses can continue to grow and evolve, and keep more New Zealanders in jobs. Like all countries, New Zealand relies on overseas investment as a vital contributor to economic growth.*[2]

While the Prime Minister Ardern has stated:

> *Overseas investment is important because New Zealand relies on it to provide businesses with capital to grow, create jobs and bring new technology and skills from overseas. We are competing more than ever for overseas capital. So it's particularly important that our investment screening regime does not deter valuable overseas investment.*[3]

2.2 Accordingly, we strongly disagree with the assessment on page 12 of the Review Paper that an application by an overseas person to acquire New Zealand assets confers a private benefit on that person. Rather, the Act serves the public good by managing risk associated with overseas investments. In reality, very few applications that go through the OIO present any material risks to New Zealand at all, yet the Act may serve to deter (appropriately) investors who could create a risk. Accordingly, by placing the full costs of the regime on those applicants who do use the regime, the Government is privatising, amongst responsible, low-risk investors, the costs of a regime that protects New Zealand's interests against potential high-risk investors.

2.3 This is view is consistent with the operation of the Commerce Act regime for example, where the public good nature of an effective competition enforcement regime is reflected in the comparatively low fees charged to applicants for merger clearance. As noted in the Review Paper, a merger clearance application fee is only $3,680, while it is likely to be a more complex assessment in most instances than an OIO application (in general, a Commerce Commission merger assessment requires several rounds of RFIs and consultation with a broad set of market participants).

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[1] Changes to the Overseas Investment Act | Land Information New Zealand (LINZ)

[2] Overseas Investment in New Zealand: Urgent Measures Explainer

[3] Speech to Trans-Tasman Business Circle | Beehive.govt.nz

2.4 In light of the above, we consider that applicants should not pay the full cost of the application regime. It is right that the Crown pays for a portion of this regime given that it confers a public good.

Option 1 should be further considered

2.5 Subject to the point above, Bell Gully generally agrees with the importance of setting a fair and appropriate fee to meet the costs of the OIO. We understand that the consent application and assessment process has become much more complex for the OIO in recent years, with:

(a) substantial amendments to the Act in 2018 (including the roll out of alternative consent pathways and the inclusion of residential land and forestry rights as sensitive land);

(b) the recent amendments introducing the national interest test and the emergency notification regime;

(c) the increased scrutiny the OIO is placing on entities high up in the relevant corporate structure, including broad good character search requirements; and

(d) the prioritisation of enforcement and monitoring resulting in increased workload in both areas,

which have had an impact on the OIO's costs and resources. As a result LINZ has undertaken the Review and proposed fee reforms as set out in the Review Paper.

2.6 However, we note that, putting reforms due to Covid-19 aside, the Government has focused recently on reforming the Act to ensure that New Zealand remains an attractive destination for high-quality productive overseas investment by reducing unnecessary complexity. The Government has also sought to ensure compliance costs are proportionate to the risks associated with the investment. For example:

(a) the investor test has been made substantially more simple – we understand that the investigation OIO case assessors undertook in relation to the IWCs and ROPs took up a high proportion of the OIO's assessment time;

(b) certain types of sensitive adjoining land have been removed from the scope of the Act;

(c) certain NZX listed issuers have been removed from the scope of 'overseas person'; and

(d) the sensitive land criteria and counterfactual test are set to be greatly simplified.

2.7 Additionally, the OIO is currently undertaking a process to shift administration tasks to applicants. For example, it is moving applications for consent for overseas investments in significant business assets and sensitive land (benefit to New Zealand, forestry and residential development one-off and standing consents pathways) to online website forms. The OIO itself has identified that this:

(a) move is "only one of the ways [it is] reducing application assessment times"; and

(b) means the OIO will spend less time dedicated to administrative tasks.

2.8 As a result, while LINZ has identified the need to increase fees based on previous years' deficits, we consider that the assessment process will become much more streamlined, efficient and cost effective in the next few years.

2.9 Accordingly, we consider that LINZ should further consider the *status quo* Option 1 and not look to change the OIO's fees and fee structure until after the impact of changes to the overseas investment regime and assessment process has been realised.

Better alternate options could have been better identified

2.10 We further note that the Review Paper offered no intermediate step between *Option 2 – update fees* and *Option 3 – fully Crown funded*. This choice ignored various options such as partial Crown funding.

2.11 Partial Crown funding is already in place in relation to enforcement. For the reasons set out at paragraph 2.1-2.3 above, we consider that partial Crown funding would be an appropriate method for funding applications and monitoring.

Option 2 is a good option

2.12 In the event that LINZ does proceed to amend the fees (irrespective of whether that includes partial Crown funding), we agree that Option 2 is the best alternative to the status quo (i.e., we consider that Options 3 and 4 would be not be appropriate).

3. **Which option do you prefer for the fee structure proposed to be applied to recover the costs of the Overseas Investment Office?**

3.1 As set out above, we consider that the OIO should be partially Crown funded. Nevertheless, *Option B*, provided fees are set at an appropriate level, has some merit. In particular, we consider it is appropriate to implement a lodgement fee to better reflect costs incurred by the OIO in the quality assurance (**QA**) stage.

3.2 However, we consider that the following issues arise with Option B.

(a) **Lodgement fees appear high and do not reflect application complexity:** We address this in further detail at paragraph 4 below.

(b) **Monitoring should not have its own fee:** We address this in further detail at paragraph 5 below.

(c) **Certain proposed fees appear illogical:** Some of the proposed fees do not follow the expected, historical or, in our view, logical pattern for OIO applications. For example, the proposed assessment fee for the:

(i) complex benefit to New Zealand test - delegated to the OIO is $114,600; and

(ii) complex benefit to New Zealand test – Ministerial consideration is $157,600.

This does not make sense to us as, as set out on page 29 of the Review Paper, "Ministerial engagement, can add up to 5 percent of average assessment and decision-making time", whereas this Ministerial consideration fee is ~38% higher than the OIO delegation fee. The benefit to New Zealand test fees were previously $35,500 to $41,500 and $37,500 to $43,500 respectively, making the Ministerial consideration fee a consistent ~4.8% to 5.3% higher than the OIO delegation fee. We note that this inappropriate Ministerial consideration / OIO delegation fees difference is present in other proposed fees also.

Additionally, in some circumstances, the proposed assessment fees appear to:

(i) decrease with application complexity (across both complex and simple applications); and

(ii) be less for those requiring Ministerial consideration.

For example:

(i) the proposed fees for the benefits to New Zealand test are more than the proposed fees for the:

(A) substantial and identifiable benefits to New Zealand test; and

(B) the combined significant business assets and substantial and identifiable benefits to New Zealand and test,

despite the latter two being more complex; and

(ii) despite the proposed fees for the complex benefit to New Zealand test being cheaper for OIO delegation than Ministerial consideration (as set out above), the proposed fees for the remaining tests are cheaper for Ministerial consideration than OIO delegation. For example, the complex substantial and identifiable benefit to New Zealand test is $113,200 for Ministerial consideration but is $122,400 for OIO delegation.

We request that the OIO reviews these fees in detail to ensure they match actual costs as best as possible and follow logical increases. We request a further opportunity to submit once these issues have been addressed.

We note that these issues are also present in Option A and Option C which we have not assessed in detail.

3.3 We consider *Option A: Higher single fees structure* to be the next best option. Although, we note that the issues set out at paragraph 3.2(c) above are equally applicable to Option A and Option C.

4. **What is your view on the proposal to introduce a lodgement fee for the quality assurance of applications for residential land, sensitive land, significant business assets, forestry and fishing quota?**

4.1 We agree that a lodgement fee for the quality assurance of applications for residential land, sensitive land, significant business assets, forestry and fishing quota has merit. The OIO's quality assurance work should have a fee attached, regardless of whether or not the application is accepted for assessment.

4.2 However, the proposed lodgement fee appears too high and does not reflect application complexity. We set out further details below.

Lodgement fee appears too high

4.3 Based on our experience with consent applications, a lodgement fee of $13,300 appears excessively high. Based on the OIO's proposed hourly rate of $337 this fee equates to approximately 40 hours of assessment.

4.4 We frequently review other parties' applications to advise our clients on whether they are complete and accurate (e.g. checking sensitive land assessments and character claims). We would not expect a 40 hour process, even in the most complex of cases (e.g., an overseas investment in significant business assets (**SBA**) and sensitive land by a limited partnership with a complex multi-fund and non-NZ government ownership structure and requiring the demonstration of substantial and identifiable benefits to New Zealand).

4.5 While we recognise that OIO processes will be different, we consider a reasonable amount of time for such an assessment would be, at most, two and a half full days (~approximately 20 hours) rather than a full week suggested by the proposed fee. Additionally, we note that the majority of applications are much more straightforward than the example we have suggested – we would expect most applications to be assessed well within two and a half days of staff time. We consider that the lodgement fee should therefore be substantially lower (no more than half the proposed amount given our comments on partial Crown funding set out above).

Lodgement fees do not reflect application complexity

4.6 There is also no variation in lodgement fee amount for the various types of consent applications (aside from the OHTLI and certain standing consent applications). We would expect substantially different amounts of time and resource would be required for the QA process for these different applications.

4.7 For example, we expect an application for an overseas investment in SBA only would require less time and resource in QA than one requiring the applicant to demonstrate benefits to New Zealand, as there are fewer and less substantial documents the completeness of which the OIO must assess (namely the 'Investment plan' and sensitive land certificate, tables and maps).

5. **What is your view on the proposal to introduce a monitoring compliance fee for new approved applications for residential land, sensitive land, significant business assets, forestry and fishing quota transactions?**

5.1 We consider that it is not appropriate to implement a fee for monitoring compliance with consent conditions.

5.2 Applicants would query why their application fees should cover the OIO's monitoring and compliance function. Costs associated with monitoring compliance should be borne by the New Zealand Government. Overseas persons accept conditions in consents and commit to meeting their requirements. They should not also be charged for the OIO to check that they are doing so.

5.3 If it were to be charged for (noting our comments above about partial Crown funding), we consider that the cost of monitoring compliance should be included in the assessment fee in order to reduce administrative costs to both the OIO and applicants.

5.4 While addressing monitoring costs in the assessment fee might at first appear unfair to those applicants whose applications do not receive consent, we do not consider this to be the case. Applications that do not result in a consent being issued do not result in the OIO incurring monitoring costs. However, such applications will invariably require more engagement from the OIO in the assessment stage (such as additional RFIs, letters, calls, etc.) regarding the application's issues. Accordingly, the increased assessment fee would fund this work.

6. **What is your view on the proposal to maintain the fees for One Home to Live In individual consents?**

6.1 We have no concerns with this approach.

7. **What is your view on the proposal to adjust the relevant application fees for residential and otherwise sensitive land consents. to introduce standard and complex fees for applications?**

7.1 There is some merit in differentiating between complex and standard applications, provided that criteria are very clear. It would be an adverse result if applicants were incentivised to spend substantial time and resource making submissions on why their applications should be treated as "standard".

8. **What is your view on the proposal to increase the fees for non-residential sensitive land applications, to introduce standard and complex fees for applications?**

8.1 See above.

9. **What is your view on the proposal to increase the fees for significant business asset. forestry, and fishing quota applications, to introduce standard and complex fees for applications?**

9.1 As above, we generally agree with the proposal to introduce separate fees for standard and complex OIO applications. However, if there are to be two fees, we consider that the standard fees should be the same as the existing fees.

9.2 We also emphasise the importance of the guidelines the OIO will publish regarding the 5 complexity factors:

(a) investor risk profile;

(b) corporate structure;

(c) degree of consultation;

(d) nature of benefit arguments; and

(e) sensitivity of the assets.

9.3 The current fee regime is already very complicated because of the number of application and fee types. Introducing standard and complex fees will further decrease investor certainty and transparency. Therefore, sufficient guidance must be published for investors to determine in advance of submission, which type of fee will be required.

10. **Do you have a view on the impact the proposed new and increased fees could have on you, or your business?**

10.1 Please refer to our responses to the submission questions at paragraphs 12 below.

11. **Can you please describe any impacts and quantify these if possible (for example, in respect of cost)?**

11.1 Please refer to our responses to the submission questions at paragraphs 12 below.

12. **Do you have evidence that the proposed new and increased fees may have a deterrent effect on prospective overseas investors?**

12.1 In Bell Gully's experience application fees can have a deterrent effect on transactions, particularly lower valued transactions (including taking leases over sensitive land). Applications by large corporates or overseas institutions / funds are unlikely to be deterred by the higher fees, as they will still be relatively minor in the overall cost of a transaction. However, we expect some private overseas investors who are undertaking smaller transactions will find the fees unacceptable as a proportion of the overall transaction value. For example, we have previously advised on a transaction where the purchase price for the acquisition was $44,000, so the proposed application fee would have almost exceeded the purchase price. We acknowledge that this example was an exceptional situation.

12.2 Furthermore, if fees become too high, vendors will recognise that this could have an impact on how much a purchaser is willing to pay for the asset. In extreme cases (and more likely in scenarios where the only trigger is sensitive land), a multinational vendor may simply close its New Zealand operations and relinquish any land assets, with adverse effects on employment and investment in New Zealand, rather than see its transaction subject to an OIO consent requirement.

12.3 Finally, we consider that it is inappropriate to make direct comparisons to fees charged in large, overseas jurisdictions like the USA and UK. In general, investments in these countries are worth many multiples of the value of investment in New Zealand. Accordingly, higher fees will be a much lesser deterrent in those jurisdictions than they are in New Zealand.