SUBMISSION

STRATERRA™
NATURAL RESOURCES OF NEW ZEALAND

Submission from Straterra
To The Treasury
Reform of the Overseas Investment Act
Consultation Document
May 2019

Introduction

1. Straterra is the industry association representing the New Zealand minerals and mining sector. Our membership is comprised of mining companies, explorers, researchers, service providers, and support companies.

2. We welcome the opportunity to make this submission on the on the Reform of the Overseas Investment Act (OIA) 2005 Consultation Document ("the discussion document").

Background

3. As a general statement we welcome overseas investment, which is important for our sector and for the New Zealand economy as a whole. Notwithstanding the view that overseas ownership of 'sensitive New Zealand assets' is a privilege, we support a relatively open overseas investment regime.

4. Mining in New Zealand has a large degree of overseas investment with demonstrated economic benefits for both New Zealand and the local communities where it occurs. At the local level overseas investment in the industry is particularly valued for the community benefits it provides. A 2006 independent report by KPMG for OceanaGold (one of the largest overseas-owned company operating in the sector) found $330 million, or 88% of expenditure on its domestic operations, reached people and businesses in New Zealand through wages and procurement.

5. The government also recognises the value that overseas investment plays in mining as evidenced by the funding it provides the investment promotion team in New Zealand Petroleum and Minerals focused on promoting New Zealand industry and its opportunities and potential to prospective overseas investors.

Submission

6. The Discussion Document has identified a number of issues in the overseas investment regime, many of which we comment on in this submission, under the following headings:

   - What we screen
   - Who we screen and when
   - How we screen

7. First, we make some general comments on the Discussion Document.

Submission - Part 1

Undesirable assets such as undesirable sectors

8. In para 24 under the heading '*However, overseas investment can also have risks'*, the document refers to investments in undesirable assets such as assets in 'unsustainable sectors'. We are concerned about the use of the term 'unsustainable sector' which can mean different things to different people and in its broadest definition, could be applied to just about all New Zealand industry. The Minister of Land Information referred to mining as an 'unsustainable sector when ruling on the OceanaGold decision (see below). This clearly illustrates how the term can be misused.

9. This illustrates a major flaw of the Act (and indeed the 2017 Ministerial Letter) in that there are too many sweeping terms that are too vague and require tighter definitions to be meaningful or helpful.

Ministerial discretion

10. We are pleased the review will consider whether the existing levels of ministerial discretion are appropriate. While some degree of discretion has merit, we think there is too much in the case of the overseas investment regime due to the vagueness of some of the terms.

11. We are concerned that the document proposes even greater discretion in places with the use of terms such as 'national interest', 'public health and safety', 'national security', 'public order', and 'cultural values' which are not clearly defined and open to interpretation.

12. While the November 2017 Ministerial Directive letter is outside the scope of this review, we note that this, perhaps inadvertently, has further increased the scope for bad decision making arising from too much discretion.

13. An example of the problems too much discretion can cause was provided in the recent decision against OceanaGold's application to purchase land at Waihi to continue its

operations. Here two different Ministers presented with the same set of facts were able to come up with diametrically opposed conclusions - with the Overseas Investment Office itself recommending the application proceed.

14. The increased uncertainty which this inconsistent decision making has caused makes New Zealand a less attractive place to invest and is partly due to the levels of discretion provided.

15. This was compounded by the fact that in 2015 as a condition of OceanaGold's purchase of the Waihi gold mine, the Overseas Investment Office had stipulated the company must commit to extending the life of the mine.

Introducing environmental issues

16. The OceanaGold decision referred above also set a new precedent in that it brought environmental issues into consideration for applications for the overseas purchase of land. OCG's application to the OIO was a necessary step to enable the continuation of their business. A subsequent step would have been applying for resource consents under the RMA. The Minister of Land Information's decision cited environmental concerns as part of her justification. It is important that the integrity of specialist environmental regulatory processes is not compromised by ad hoc decision making. This is again one of the consequences of the combination of vague definitions and too much discretion.

17. Reform of the OIA must not introduce environmental barriers to overseas investment given there are other mechanisms for screening the environmental and sustainability impacts of all investments (whether foreign or domestically owned), including the RMA.

Submission - Part 2

18. We now turn to specific proposals in the document.

What We Screen

19. We agree that the Act defines sensitive land and sensitive assets too widely, meaning too many investment applications are captured imposing unnecessary compliance costs and putting at risk proposed investments which have the potential to provide benefits to New Zealand. Almost all mines will be in rural areas on land over 5 hectares, and so will be covered by the definition.

20. This section looks at to what extent the Government should screen:

- Investment in land that is considered 'sensitive' only because it is next to particular types of land which have sensitive characteristics ('sensitive adjoining land'); and
- Short-term lease of sensitive land.

Sensitive adjoining land – page 20

21. As we understand it, the original intent of this provision in the Act was to guard against wealthy overseas people buying large areas of iconic New Zealand land. One of the unintended consequences is sales of often small parcels of land for industrial purposes, which happens to be adjacent to land falling under the definition of sensitive, are hindered.

22. We support reform to remedy this. Of the options provided, both are an improvement, but we prefer Option 1 which gives a prominent role to the RMA in governing the use of the land.

23. While the development and use of sensitive adjoining land could have environmental effects on, or affect access to, Table 2 land, this isn't always the case. This emphasises the case for consideration of what the land will be used for as part of the decision. As the document says, the Resource Management Act guides most decisions about the environmental effects of land development and use, and this should continue.

24. Not only is Table 2 land badly defined, as admitted by the document, the degree of sensitive characteristics of the land in Table 2 will vary and so it makes sense to consider on a case by case basis. In the case of conservation land, for example, there are a range conservation values – not all of it is high value National Parks. Such areas need less protection.

Short-term lease of sensitive land – page 80

25. The fact that short term leases of three years and more are captured by the OIA is particularly problematic for the mining sector because the nature of mining is that the land is often not held long term. Modern mining practice in New Zealand dictates that as mining progresses, and/or is completed, the land is rehabilitated as required by the conditions of the relevant resource consents and returned as appropriate.

26. We believe the overseas investment regime needs to provide sufficient flexibility for temporary change of title into overseas ownership for when its known that the land will return to New Zealand ownership.

27. We strongly support excluding leases of sensitive non-urban land from the ambit of the OIA. Rather than such leases of 10 years or under being exempted, a more realistic term for our sector would be 20 years. 20 years is less than the 35 years that is used in the Resource Management Act (as referred to in paragraph 89).

Who We Screen And When

28. The document identifies a number of issues that need to be dealt with around the definition of an overseas person. This definition is complicated when that 'person' is a business or entity with multiple owners.

29. In today's environment many New Zealand incorporated and headquartered companies have more than 25% overseas shareholding and so are considered an 'overseas person' for the purposes of the Act.

30. We agree this is an area which needs reform. The compliance costs are substantial with such a large number of entities captured by the definition, and so having to obtain consent. Similarly, the number of transactions that have to go through the process is too great.

31. We support Option 1 (page 32) i.e. raising the limit of overseas ownership before triggering the Act from 25% to 49%.

32. We also support Option 4 (page 34) which would widen the pool of entities which could apply for an exemption by widening the applicable criteria.

33. This listed criterion are all factors which help define a New Zealand business in most peoples' eyes. In the mining industry ownership regularly changes, but operations in particular locations throughout the country have been in place for many decades and to all intense and purposes can be considered New Zealand enterprises.

34. Rather than requiring all of the criteria to be met, we think a subset of them, say 8 out of the 10, should be deemed sufficient. Option 4 should complement Option 1. That is, companies with more than 49% shareholding should still be able to apply for an exemption under Option 4.

How We Screen

35. We agree there is an opportunity to improve how we screen overseas investments. Existing requirements are complex and costly for investors and limit decision makers' ability to consider the full effects of investments.

36. As stated earlier, there have been cases where the regime has been used as a vehicle to block mining proposals for reasons beyond the purpose of the Act their overseas ownership.

37. We comment here on a number of proposals in the document which impact on the minerals sector.

Good character - Page 51

38. There are a number of problems with the Investor Test (good character) which imposes compliance costs disproportionate to the risk posed by most overseas investors. One particular anomaly that stands out is when New Zealand directors become subject to the good character assessment when their businesses form joint ventures with overseas owned companies

39. We support introducing a "standing consent" (para 175, page 57). This would exempt overseas persons who have previously received consent via the investor test if there have been no changes in ROPs/IWCs nature and suitability.

Screening the impacts of investments – Page 60

40. The counter-factual test, which is used when assessing benefits to New Zealand, creates much difficulty for applicants. Allowing the applicant to choose alternative comparators where it can better provide evidence on is a practical alternative to the existing theoretical counterfactual test and so we support Sub-Options A – C.

Timeframes for decisions - Page 99

41. Investors have long expressed frustration at the time taken for applications to be processed. An average of 100 days is too long especially when other countries are able to process applications between 30-60 days. Such timeframes have a negative impact on investor impressions of New Zealand and the delays can cause considerable costs

42. Recent increases in resources for the OIO should help and so should changes proposed in this review that will simplify and streamline application processes and tests.

43. To further address this issue, we support both options but prefer Option 2, which would impose a decision deadline for processing applications. Having clarity on how long it should take for a decision to be made for each type of pathway should also provide more certainty to investors.