The Treasury

Overseas Investment Act Submissions Information Release

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

Submission Form

Details of submitter

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Contact person:	Sara Wheeler
Contact person's position in organisation:	General Counsel – Corporate
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Part of submission confidential[1]	X confidential information highlighted in yellow
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Responses to consultation questions

1. Sensitive adjoining land (p. 20)

[1] The text that you do not want published must be clearly marked in the submission.

Do you agree that there is a problem, and

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

We do agree that there is a problem. We consider that the consultation paper discusses and identifies well the issues we have regularly faced in our business in relation to sensitive adjoining land.

A number of Fletcher Building business units and legal entities have been required to seek consent where they have sought to acquire a freehold or leasehold interest in land which adjoins "sensitive" land. This has particularly arisen in the case of acquisition of leasehold interests, including the renewal or grant of new leases of properties already in our portfolio.

For example:

1. Fletcher Distribution Limited (trading as PlaceMakers) has recently obtained consent to enter into a new lease arrangement for its existing premises at PlaceMakers Pakuranga (Case Number 201810330) which it has occupied since the 1970s. As the leasehold premises adjoins land held by Auckland Council that is classified as recreational reserve and zoned open space (so captured by the section 37 list), the new lease triggered the requirement for a consent. The sensitive adjoining land in this instance is the Howick Pakuranga Netball Centre and to the further west of that the Lloyd Elsmore Park Pool and Leisure Centre, the Pakuranga Bowling Club and the Pakuranga Croquet Club. All such "sensitive" land is well accessed directly from Pakuranga Road (and accordingly there is no requirement at all for any access via the PlaceMakers site and indeed for there to be such access would be a significant health and safety risk). Also, with the "sensitive" land immediately adjacent to the PlaceMakers site being fully sealed netball courts there is no known environmental effects arising from PlaceMakers' business activities continuing to operate from the neighbouring property.

2. Another example is Fletcher Distribution Limited's new lease for its existing premises at McLaughlins Road in Wiri (Case Number 201720117). This is a site where we trade as Frame & Truss. As the adjoining land has been rezoned (since we first took occupation) as an Open Space - Informal Recreation Zone, a consent is now required as it exceeds 0.4 hectares and is a local purpose (esplanade) reserve on the section 37 list. Since Fletcher Distribution Limited first took occupation of the property the adjacent land had been subdivided and through that subdivision process an esplanade reserve had been established, the esplanade reserve being captured by the section 37 list. Existing access to this recreational zone was not provided via this property.

3. Fletcher Steel Limited was required to seek consent to enter into a new lease of premises it had occupied for some years at 968 Great South Rd (Case Number 201620038) but purchased, sold and then leased back through a back-to-back transaction. This consent was required as the site adjoins a reserve captured by the section 37 list (being Hamlins Hill Mutukaroa Regional Park) even though the regional park cannot be physically accessed from this property (and as such access to the regional park is not affected).

In all cases obtaining consent took 4-5 months. Yet all these properties were already in our portfolio (i.e. they were new leases for existing leasehold properties) and involved sites that are

adjacent to section 37 reserve land. The commercial activities undertaken by Fletcher Building on the leased sites were being managed in accordance with all applicable environmental and other laws and regulations and there was no known risk to the adjacent sensitive land by those activities continuing in the same manner pursuant to a new lease with the existing landlord.

We can see no justification at all for any screening of these lease renewals.

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

If option 1 was adopted, we consider that this will reduce the number of consents we seek by approximately 3 or 4 consents per year. If option 2 was adopted, this may potentially reduce the number of consents we were required to seek, but we consider the reduction would likely be minimal.

It is important to note that when we are looking at potential sites to lease or acquire, we undertake a sensitive land assessment. If there is any site that will not require consent (across the various sites we are contemplating) then in many instances, we will favour the land that does not require consent (even if that site may or may not be preferred for the relevant business's needs). Option 1 will therefore allow us to select sites that are more suitable for our business and operational needs as well as reduce costs of seeking consents for properties that pose no known risk to nor affect access to the adjacent sensitive land.

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

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

Fletcher Building prefers that option 1 be adopted, whereby all categories of land are removed from Table 2 in Schedule 1 of the Overseas Investment Act 2005 (the Act) with the exception of high-risk sensitive assets (as described at paragraph 75 of the consultation paper). We think however that the requirement to obtain consent for even the high-risk sensitive assets (as described in paragraph 75 of the constitution paper) should only apply if there is no existing public access to the adjacent area (and as such the screening is required to protect public access to these areas).

We have had to seek consent on many occasions for properties that adjoin sensitive land when there is already sufficient protection of, or access to, the sensitive adjoining land and the land in question (and our proposed activities on that land) poses no risk to the "sensitive" land. We are also strongly of the view that other legislation, namely the Resource Management Act 1991, and planning regulations adequately safeguards against any environmental, conservation or cultural effects on the neighbouring sensitive land.

As the section 37 rules have proved difficult to interpret and have resulted in differing opinions over interpretation amongst applicants and their advisers, any high-risk sensitive assets that remain subject to investment screening need to be clearly defined in order to avoid future confusion.

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

- If so, which types and why?

If the section 37 list was removed, we consider that the only additional type of land to be retained should be National Parks if there is no existing public access to the National Park in place.

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

Do you agree that there is a problem, and

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

We agree that there is a problem with the current screening regime in relation to leases. We consider that this has been accurately described in the consultation paper.

The current screening regime for leases is unduly restrictive, particularly for Fletcher Building which across New Zealand occupies approximately 400 leased properties. The current screening regime captures low risk, short term arrangements that pose no risk to "sensitive" land nor New Zealand's interests generally (noting our comments above regarding sensitive adjoining land). The regime also captures properties that we have been in occupation of for many years either prior to the Act (or its prior legislation) coming into force and/or where a subsequent change to zoning or an adjacent subdivision has resulted in the land being deemed "sensitive" under the Act. Examples are set out above of circumstances where a new lease or renewal of a lease of property we have been occupying for many years has triggered the need for consent. The current screening regime has a significant impact on our ability to be competitive with other tenants in the market (who do not require consent) and has caused significant delays to both investments in projects and new job opportunities.

It is not reasonable for lease transactions described above to have the same level of scrutiny as freehold or longer term leasehold acquisitions where the underlying freehold land will remain in New Zealand ownership and there is no permanent disposition. The current regime does not recognise that when acquiring a leasehold interest, any tenant is bound by rigorous compliance covenants under the lease as well as having liability as an occupier under the Resource Management Act 1991. Any potential risk to the "sensitive" land is managed and regulated through such other contractual and statutory requirements.

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

There would be a significant positive effect of these options on Fletcher Building as a large tenant entity in New Zealand. Often Fletcher Building occupies land over the 0.4ha threshold due to the nature of its commercial and industrial activities. Having to obtain consent for leases of sites adjacent to sensitive land can increase our lease transaction costs by sometimes up [25] [26] depending on the complexity of the land, the transaction and the consent application itself. Reforming this area of the law would enable us to more quickly and efficiently acquire leasehold interests in properties that best suit our business needs (as opposed to having to eliminate sites based on their sensitivity) and to contract in a market standard and timely manner. We currently seek 3 to 5 consents each year. We anticipate this number will increase due to the recent changes to the treatment of profits a prendre under the Act which will increase applications required for consented quarry operations.

We also highlight the difficulty of completing the benefits and counterfactual analysis when seeking consent for a new lease of property we already occupy. In such cases we are simply carrying on existing business operations which makes preparation of the benefits analysis more challenging

(compared with an applicant seeking consent to acquire an interest in land it does not already occupy).

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

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

For the most part we consider that the reform options proposed will be a significant improvement on the current regime.

Fletcher Building prefers Option 2 as we consider that the 10 year time frame proposed as Option 1 is too short, having regard to common market terms of commercial and industrial leases where significant capital is being invested in the business (which will almost always include a number of renewal terms which must be included in the calculation of the lease term for consent purposes).

We would prefer that there is a different treatment of land which is considered to be of greater sensitivity (i.e., non-urban land of 5 hectares or more) as proposed by Option 2 but note that if non-urban land has been identified as a future commercial or industrial use (in a unitary or district plan) then this should not be deemed sensitive. We also consider that the alignment with the 35-year rule under the Resource Management Act 1991 is also a logical approach for other classes of land (noting that the Te Ture Whenua Maori Land Act 1993 does not consider land to be “alienated” unless the total lease term (including renewals) exceeds 52 years).

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

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

Yes, we do consider that raising the threshold for exemption from screening to leases with terms greater than 10 years or more is appropriate and strongly support this change.

As noted above, our preference is for Option 2. Option 2 still allows investment in New Zealand for a relatively short period of time without the land being owned indefinitely by overseas persons. This would increase the viability of many commercial investments in New Zealand, which would bring revenue and business to New Zealand without divesting ownership. Option 2 also has a shorter lease term for leases of land of greater sensitivity to New Zealand, although we note future consideration needs to be given to the land which is considered to have greater sensitivity.

Option 2 will also likely have the effect of a greater number of overseas persons seeking to acquire leasehold interests in land in lieu of acquiring a freehold interest. Under the current regime, as the same consenting cost and process applies both to acquisition of a lease term greater than 3 years as a freehold acquisition, unsurprisingly a number of overseas persons have taken the view that a freehold acquisition better justifies the delay and cost of seeking overseas investment consent.

We consider that the potential negative impact of excluding leases of less than 35 years is small as a 35-year term does not permanently remove land from New Zealand ownership. This change would allow the benefits of foreign capital (including new employment, increased export receipts and technology) to flow into New Zealand without the complication of having to complete a benefits analysis and experience the associated delay and cost of completing an application (especially where it is a site the overseas person already occupies and seeks consent to enter into a new lease of such premises). In addition, it allows an overseas person to compete for strategic sites where landlords will not consider offers conditional on obtaining overseas investment consent.

Fletcher Building frequently invests substantial capital into the development of our leasehold portfolio (in distribution, manufacturing and quarry assets) and accordingly being able to take on longer term leases without the complexity and cost of needing overseas investment consent will enable us to acquire such leases without delay and undertake the necessary investment (often resulting in better and safer facilities and creating new jobs and technologies).

We note the concern in the commentary on Option 2 that investors may be encouraged to enter into short-term leases for smaller parcels of land instead of freehold transfers, in order to avoid screening. Our view is that encouraging investors to enter into short-term leases (as opposed to purchasing the land) is positive as it means that the land itself remains in New Zealand ownership while allowing investors to have greater flexibility over their business operations so that they can relocate their business premises in response to the relevant market's requirements without undue restriction – as is frequently the case for Fletcher Building. We also consider that the same exclusion proposed to leases under Option 2 should apply to profits a prendre of less than 35 years (which we commonly use for our quarry operations – noting here that the Fletcher Building group's quarry business has been operating in New Zealand since the 1860s.).

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

Do you agree that there is a problem, and

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

Yes, we agree there is a problem and that periodic leases should not be caught by the screening regime (in fact we understood they were never caught, or intended to be caught). Such arrangements are terminable by both the landlord and the tenant on a period of notice (usually one month) so by their nature are temporary and short term.

We agree that the requirement for consent is disproportionate to the potential risks associated with such tenancies. We have a number of periodic tenancies in our portfolio for business units who hold premises on a temporary basis while either permanent premises are sourced or as part of its site requirement to complete projects.

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

The removal of periodic leases from the screening regime will ensure that we can continue to enter into such flexible, short term arrangements to respond to our business's needs quickly and without undue cost or delay.

The costs of a sensitive land application for us are usually in the region of [25] [26] (including the application fee and the associated legal fees) which are entirely disproportionate to the rental or term of the periodic tenancy (and the risk of early termination).

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

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

As noted above we agree that the right reform is to exclude periodic leases from the need to obtain consent.

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

Do you agree that there is a problem, and

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

We strongly agree that there is a problem with the definition of “overseas person” as it applies to bodies corporate, and that the problems are particularly acute in relation to NZX-listed entities. In particular:

- Underlying beneficial and legal ownership of the shares in listed entities changes from day to day in the ordinary course of share trading activity on listed capital markets. Moreover, underlying ownership changes entirely independently of the listed entity. When considered overall, only on very rare occasions is share trading activity motivated by an effort to gain control over the activities of the entity.

- The standard and widespread use of nominee companies to hold legal title to shares means it is practically impossible for a listed entity to accurately identify who are the underlying beneficial owners of shares, and what is the accurate level of underlying economic benefit ownership that is held by non-New Zealand persons.

- The definition of overseas person does not effectively focus on the source of capital, resulting in the perverse outcome that Kiwisaver funds can often be counted as “overseas” because they are managed by “overseas” fund managers (in many cases the Australian domiciled fund management arms of the “Big 4” NZ banks).

- The 25% threshold in the definition of “overseas person” seems to presume that overseas persons can together exercise control over a listed entity if they own shares in excess of this threshold. This is a false presumption. Share ownership of listed entities is quite separate to an ability to exercise control over the management and operations of the listed company. Only when a single shareholder (or their associates) holds or controls a large cornerstone shareholding or agrees to co-ordinate their exercise of votes with other substantial holders of shares can they exercise any real practical control over management of the entity. The Takeovers Code itself effectively sets this threshold at 20% of the listed entity’s voting securities (though note that once the 20% threshold is reached, the security holder is required to make an offer for at least 50% of the voting securities of the company, which arguably sets the threshold at 50% of the entity’s voting securities).

- Many long-standing NZX-listed entities have board and management, and most or all of their business operations, entirely based in New Zealand and have conducted business activities in New Zealand for years or decades.

During the 1980s and 1990s, Fletcher Challenge Limited (the predecessor organisation to Fletcher Building and a similarly widely-held NZX listed company) was exempted from the consent requirement under the Overseas Investment Act 1973 (legislation substantially similar to the current Overseas Investment Act 2005). This exemption fell away following restructuring of Fletcher Challenge in 2001. Since then, Fletcher Building has been subject to the consent requirements of the Overseas Investment Act, despite:

- Fletcher Building’s ownership structure as a widely-held listed company remaining the same, and with no single shareholder (whether New Zealand or overseas person) having an ability to exercise any control over the management and affairs of the company;

- its business operations continuing to be substantially based in New Zealand (as they have been for more than 100 years);

- the company remaining headquartered in New Zealand, with board and management control sitting unquestionably in New Zealand, despite the acquisition of significant offshore assets in Australia, the US, Asia and Europe. The strategy, management and investment decisions of Fletcher Building are made entirely by the board and management of Fletcher Building, not overseas shareholders.

Compliance with the Overseas Investment Act now directly costs the Fletcher Building group in the order of [25] [26] per year (including direct application and legal fees, management time for applications and on-going reporting) depending on the number of consent applications per year, which has the potential to substantially increase for residential land which is not covered by our standing consent. In our view, this is a substantial cost to long-standing New Zealand businesses for very little (if any) appreciable regulatory or policy benefit. It simply increases the cost of doing in New Zealand the same business we have done for over 100 years. Furthermore, it slows down (and in many cases inhibits completely) the efficient implementation of our substantial capital investment programme in residential, distribution and manufacturing assets each year. We regularly lose investment opportunities due to the cost and time of the Overseas Investment Act consent requirements and the regime therefore makes Fletcher Building less nimble than its competitors. In fact, we note that Fletcher Building is subject to more onerous screening requirements when buying or leasing property and businesses located in New Zealand than it is when buying or leasing property or businesses that are located in Australia (where Fletcher Building is considered to be an overseas person for the purposes of the equivalent Australian regime).

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

As noted above, compliance with the Overseas Investment Act now directly costs the Fletcher Building group in the order of [25] [26] per year (depending on the number of consent applications per year). Changing the definition of “overseas person” in a way that would exclude Fletcher Building (and other long-standing New Zealand listed companies) from the consent requirement would avoid those (we think unnecessary) compliance costs and enable the Fletcher Building group to more quickly take advantage of opportunities to invest in productive manufacturing, distribution and housing and construction development assets – all of which are activities inherently beneficial to the New Zealand economy.

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

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

We do not think the correct reform options have been identified that appropriately deal with the key problems relating to listed companies. In particular, all of the options fail to adequately deal with the fundamental reality that the underlying ownership of listed entities changes on a daily basis (without any motivation to exercise control over strategy and management of the listed company and its assets) and accurately identifying underlying beneficial ownership is virtually impossible for listed companies. This means that ordinary share trading activity could unwittingly transform the listed entity from a non-overseas person to an overseas person (or vice versa).

We think the better approach is for a listed entity to be considered an overseas person only where 25% or more of the shares are beneficially owned by a single overseas person (either alone or together with their associates). One or more shareholders operating together in a co-ordinated manner can exercise influence over a listed company through voting activity (or the threat thereof), something that the Takeovers Code itself recognises. The substantial product holder (SPH) regime in the Financial Markets Conduct Act (FMCA) requires disclosure of interests above 5%, but the potential for practical control does not meaningfully arise until the 20% threshold is crossed.

The SPH regime can be readily utilised to assist identifying when the 25% ownership or control threshold is crossed, as SPH notices must be filed with NZX. The FMCA could be easily modified to require SPH notices to include a declaration of whether a person disclosing an interest is an overseas entity.

Under this approach, any acquisition of shares by an overseas person or their associates over 20% would require a takeover (either partial or full) and therefore would be caught by the screening regime under the Overseas Investment Act. It means that only share trading activity by an overseas person that is motivated by a desire to obtain control of a listed entity would trigger a consent requirement and (i.e. if the partial or full takeover was completed, or approval under the Takeovers Code to move to between 25-50% ownership is obtained) ultimately deem that entity to be an overseas person. As such, we do not see this option as being susceptible to abuse or creation of a loophole that could be used by overseas persons as a way to avoid investments being screened where there is a justification to do so. Nevertheless, as a reserve protection against abuse or outcomes inconsistent with the policy intent we would support powers for the Minister (on advice from the OIO) to declare that a listed entity more than 25% owned or controlled by unrelated overseas person be treated as an overseas person.

This approach could operate either as an entirely new option (potentially a class exemption) or be applied as a modification to the option 4 criteria (as discussed more fully below).

We do not think that overseas ownership of shares above 25% is itself sufficient justification for treating a New Zealand-managed listed entity as an overseas person, on the basis that substantial economic benefits flow out of New Zealand (in the form of dividend or other distributions). This ignores the accumulated benefits of inflows of investment capital (including by purchase of shares on-market from New Zealand shareholders), taxation payments, employment and other economic contributions to New Zealand. In our view, it is only where control is exercised by a single overseas person or their associates that a justifiable policy case can be made to screen investments to ensure that control of the entity is exercised such that the investment decision benefits New Zealand and is not contrary to New Zealand's national interest.

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

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

As a general principle, we strongly support the idea of a regime that enables listed entities with a strong New Zealand connection to be exempted from the Act. We would support this option being applied either as an "opt in" regime, whereby a listed entity could apply for an exemption, or a class exemption which listed entities can rely on but with reserve powers for the Minister (on advice from the OIO) to declare that an entity can no longer rely on the class exemption. This provides a protection against structuring or activities that could be seen as an abuse of the exemption regime and inconsistent with the policy underlying the class exemption.

We do not however think the proposed criteria for option 4 are correct. Three of the criteria for an exemption are particularly problematic and should be removed or amended:

- The requirement that the entity be at least 51% owned by New Zealanders implies there is something inherently meritorious in the majority of shares being owned by New Zealanders, presumably on the basis that the majority of the economic benefits (in the form of dividends and other distributions) do not flow offshore but stay in New Zealand. This ignores the accumulated and substantial benefits of inflow of investment capital (including by purchase of shares on market from New Zealand shareholders), taxation payments, employment and other economic contributions to New Zealand, and thus artificially increases the relevance of this criterion. It fails to recognise that significant Kiwisaver and other funds are invested in listed New Zealand companies (with dividend entitlements staying in New Zealand) but are often treated as overseas capital because the funds are managed by an overseas fund manager. In addition, many substantial "overseas" investors are nominees who are passive investors and who do not exercise "control" in any real sense. Ultimately, this requirement also ignores the reality that New Zealand is reliant on overseas sources of capital to fund economic growth,

- The requirements that the entity be at least 51% owned by New Zealanders and that substantial holders do not comprise 25% or more of the shares both suffer from the fundamental problem that shareholdings will change on a daily basis. So, an entity might satisfy these criteria one day, only to find that overnight share trading activity has unwittingly tripped a threshold and the entity has ceased to satisfy these criteria. This makes the overseas person concept inherently unstable and extremely difficult to monitor and comply with.

- The requirement that no foreign government or its associates owns equity in the entity is problematic, given the challenges of identifying underlying beneficial ownership and the proliferation and scale of sovereign wealth funds. At a minimum, this criteria (if it is maintained) should be set at a level that both easily enables identification and is material. A 5% holding by a foreign government or its associates, which would need to be disclosed under the Substantial Product Holder regime, should be the minimum.

We think a better way to ensure this exemption option is limited to listed New Zealand entities with a strong New Zealand connection and control, is to increase the stringency of the New Zealand management and New Zealand business history criteria, for example:

- Require at least 50% of the board and senior management be New Zealanders and be persons with no association with any overseas shareholder who has disclosed a substantial holding of 5% or more.

- Limit the exemption to listed New Zealand companies that have operated a business in New Zealand for no less than 10 years. This avoids the risk of the exemption option being exploited by overseas persons with a more tenuous and shorter-term connection with New Zealand.

- The entity must be domiciled in NZ.

We would also support a regular (e.g. annual) self-certification regime that could require the regular lodgement of information confirming the requirements continue to be met. This would enable the OIO to "call in" and recommend that the entity can no longer rely on the exemption where it had concerns about activities that could be seen as an abuse of the exemptions regime.

5. Screening of portfolio investors (p. 38)

Do you agree that there is a problem, and

- if so, has this paper described it accurately? Can you tell us about your experience, including when it happened?

- if not, do you support the existing arrangements. If so, why?

We agree that the paper has correctly identified the problem with the treatment of portfolio investment. However, we would be concerned if the problem was addressed as a solution to the more fundamental problem of the definition of overseas person in the context of a listed entity. Indeed, if our preferred approach (as set out in our response to section 4) is adopted, this problem with portfolio investors falls away (as any investor or their associates acquiring 25% or more of a listed company would not by its nature be a portfolio investor, but would be investing for control).

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

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

- if so, which of the options identified do you prefer and why?

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

When considered as a standalone issue, we would support option 2.

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

Do you agree that there is a problem, and

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

We agree there is a problem, and the problem is particularly acute in the case of a listed entity, where even small ordinary share trading activities can transform a listed entity into an overseas person (or they cease being an overseas person). Again, we would be concerned if the problem was addressed as a solution to the more fundamental problem of the definition of overseas person in the context of a listed entity. Indeed, if our preferred approach is adopted, this problem with trading around the 25% tipping point falls away.

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

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

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

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

Do you agree that there is a problem, and

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

We agree there is a problem, and again the problem is particularly acute in the case of listed entities, where normal trading activities can move a shareholding up or down. And again, we would be concerned if the problem was addressed as a solution to the more fundamental problem of the definition of overseas person in the context of a listed entity. Indeed, if our preferred approach is adopted, this problem with incremental creep investments above a 25% interest falls away, unless the overseas person has obtained approval under the Takeovers Code to hold voting securities

between 25-50% (which is rare). Accordingly, we would support an amendment to align the creep regime under the OIA for listed entities with the creep regime under the Takeovers Code.

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

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

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

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

Do you agree that there is a problem, and

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

We agree that there is a problem.

Fletcher Building is a repeat applicant, yet has to comply with the investor test each time we submit an application. This is cumbersome and repetitive. In most instances the OIO will receive the same information over and over again.

We also consider that having to provide extensive information regarding IWCs who are New Zealand citizens (being the majority of our directors and executives) to be contrary to the policy and principle of this legislation. These individuals have no association with the source of capital that results in Fletcher Building being deemed to be an overseas person, and could as individuals invest in land and assets in New Zealand without any screening

At paragraph 164 of the consultation paper there is a comment that the OIO is streamlining its processes for repeat investors, including building investor profiles that can be used to speed up assessments. We are yet to see such improvements as a repeat investor and would like to know what is planned in this regard.

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

The cost of compliance with the investor test in general is not as significant as compliance with the requirement to provide an investment plan and complete the benefits test and counterfactual analysis. However, any steps towards simplifying the process for repeat investors would be materially beneficial, as would recognition of the significant number of New Zealanders who are IWCs in our organisation, to the consent regime as a whole. In our view, having to undertake good character assessments in respect of New Zealanders with no association with the overseas source of capital does not align with the policy objectives of the Act – in short, it results in screening of New Zealanders, not screening of overseas individuals.

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

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

We consider that Option 2 to be a reasonable proposal. However, we would also strongly support excluding New Zealanders from the investor test, and for a standing consent arrangement to be implemented for directors or shareholders who have already satisfied the good character requirements on previous applications/consents (i.e. such individuals would only have to disclose that there has been no change to their previous disclosures).

The majority of IWCs in our business are New Zealanders or New Zealand residents who live and work here in New Zealand.

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

We consider that allegations in relation to environmental matters, dishonesty and fraud should be considered as these could have the ability to influence the manner in which an ROP/IWC may seek to develop, manage or trade from the land.

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

We would be happy for the factors listed at paragraph 173 of the consultation paper to be included in the bright-line test, although consider that “adverse findings from a security agency” requires more certainty. We are not clear on the meaning of this and any law reform needs to provide as much certainty and clarity as possible.

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

Do you agree that there is a problem, and

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

We strongly agree that there is a problem with the benefits test, and it is critical that changes are made to the substantive tests for screening the impact of investments. Key problems are:

- The hypothetical counterfactual benefits test is unreasonably complex and artificial, requiring identification of potential benefits under future hypothetical scenarios that is often extremely difficult to do with any meaningful accuracy.
- The complexity of the test adds considerable time to the application process, and in many circumstances, this is not justified by the degree of actual sensitivity of the investment.
- The application of the test is now straying into areas which are already regulated under other legislation – in particular environmental impacts (which are regulated under the Resource Management Act). This means that long-established and fundamentally New Zealand companies who have been operating in New Zealand for decades (and in Fletcher Building's case, over a century) find themselves having to demonstrate standards of environmental benefit and sensitivity materially higher that what is required of "New Zealand" entities.

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

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

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

Of the five options outlined in the paper, we consider option 3 (a simplified benefit to New Zealand test with a "national interest test" for higher risk applications) and option 2 (a simplified benefit to New Zealand test with a substantial harm test) to be by far the preferred options.

Overall, we think the screening test should be re-balanced to focus more on investments of a type that can reasonably be considered justifying closer scrutiny. We support a dual track test as follows:

- all investments in sensitive land should be required to demonstrate benefits to New Zealand (with the express proviso that these benefits should be subject to a reformed counterfactual analysis – sub-option A as set out in the paper);

- investments in certain “sensitive assets or sectors” (whether involving sensitive land or otherwise) should be subject to a national interest test or substantial harm test, with either test in practice applying only to a narrow range of sectors and critical infrastructure and based on criteria (whether they be harm factors or national interest factors) that are clearly defined. This clarity would be important for both applicants and their advisers;
- investments that do not involve sensitive land or sensitive assets or sectors should not be subject to any screening tests other than the investor test.

We would only support option 4 if it was combined with a commitment to faster decision-making. We are concerned that a vague national benefits test applied broadly to all investment applications across all sectors could introduce even greater delay and uncertainty to the application process.

In any case there must be a commitment to faster decision-making as the current regime often takes 5-6 months to decide an application, with more complex applications taking up to 1 year. We think that the OIO should be required to indicates its view within 30-40 working days of receipt of a completed application.

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

Yes, but only in relation to investments in those important assets or sectors that are subject to a wider national interest test. The potential harm that can be caused by any investment activity in New Zealand is already regulated by existing statutes, such as the Resource Management Act, Commerce Act, Financial Markets Conduct Act, Health and Safety at Work Act and other laws specifically enacted to address a particular harm or other issue.

We do not support option 1 in any form. We think option 1 would further exacerbate the current problems with the Overseas Investment Act, rather than solve them.

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

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

We do not support option 2 in any form. Much like option 1, we think option 2 would further exacerbate the current problems with the Overseas Investment Act, rather than solve them. Potential for substantial harm can be best addressed through the range of existing statutes and laws. For matters of national security or other concerns that may not be adequately covered by existing laws, the risk of harm could be taken into consideration as part of a national interest test (i.e. options 3 or 4).

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

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

We support in principle a simplification of the benefits test. Two aspects are relevant here:

- The range of benefit factors should be simplified, to both reduce the size and complexity of applications and the speed of assessment. However, we caution against over-simplification of the benefits factors, as benefits can take many different forms, and the Act should be careful to not unreasonably exclude factors that could be assessed as delivering a benefit to New Zealand.

- The most important and impactful change would be reform of the counterfactual test. We strongly support adoption of sub-option A as the appropriate alternative form of counterfactual analysis. We think comparing the applicant's investment plans to those of the vendor risks reintroducing a hypothetical aspect to the analysis, which is important to avoid in any reformed counterfactual test. If sub-option B were to be adopted, guidance should make clear that a vendor is not required to have future investment plans (i.e. the status quo is an acceptable counterfactual) and a vendor's future investment plan should be considered only where the plan is developed to an extent that it can be meaningfully compared with the applicant's plan.

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

Yes, we agree this should be removed. It is not immediately obvious why any higher threshold should apply to non-urban land in excess of 5ha. Furthermore, it has always been unclear what exactly constitutes "substantial and identifiable", as any benefit claimed in an application which is accepted by the regulator must inherently be identifiable, and the concept of substance adds very little to the analysis and is often impossible to meaningfully quantify. Clearly any benefits test should require demonstration of benefits that are more than simply trivial.

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

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

The case for inclusion of finance sector businesses is not at all clear, as the finance sector is already dominated by overseas persons and New Zealand is generally reliant on overseas sources of capital coming into the finance sector. In addition, the finance sector is heavily regulated, meaning the interests of New Zealand and the wider economy are already protected.

The case for inclusion of transport is also not clear. The transport sector is diverse and generally highly competitive. It is harder to see a strategic national interest issue arising in the transport sector, other than transport infrastructure assets that can be classified as "critical infrastructure".

The list of strategically important assets or sectors should:

- be clearly defined in regulation, and could be subject to amendment without changes to primary legislation;
- not include investments that do not result in control of the assets or businesses in those sectors, but are merely ancillary investments. For example, acquisition of land/buildings that are leased by the owner of a business in a sensitive sector should not trigger the need for a national interest test screening (unless that investment gives the overseas person control over the sensitive assets themselves).

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

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

We have no objection to option 5, although think it should operate as complementary option, rather than an alternative. We accept that for matters of national security, reserve call-in powers are justified and agree this should be for only a very narrow category of investments.

We think an adequately resourced OIO (operating with a more narrowly focussed screening regime) should continue to be the frontline regulator responsible for assessment of investments generally. However, where matters of national security arise (i.e. as proposed under Option 5), determinations of specific issues of national security should be made by an appropriate senior agency such as the Department of Prime Minister and Cabinet, who could be supported in its assessment by information provided by the OIO, MFAT, SIS, GCSB and other appropriate agencies. The ultimate decision should be made by the Prime Minister. This is commensurate with the significance of matters raising issues of national security.

We would support an obligation to give notice of an investment in a sector that gives rise to national security questions, provided it was clearly defined, combined with a call-in power.

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

Do you agree that there is a problem, and

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

We do not agree that the problem identified by the consultation paper is a matter that is best managed through the overseas investment regime. We consider that such matters are best dealt with by the Resource Management Act (or appropriate reforms to such legislation as may be as necessary) and planning regulations (which deal with the relevant quantities of water which can be extracted) which have a clear role in regulating water extraction by anyone (whether New Zealanders or overseas persons). We agree that there would be a risk of conflicting decisions between the Resource Management Act/territorial authorities and the Act if the Act addressed water extraction more extensively (which in turn will increase investor uncertainty).

We also believe that any additional regime for managing water could also create uncertainty and complexity, if water extraction needs change following acquisition (for example, a manufacturing plant where it is discovered that a water take consent is required following detailed design of the plant).

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

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

We do not consider that reforms to the Act as proposed are required for the reasons noted above.

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

Please refer our comments above.

11. Tax and the Act (p. 85)

Do you agree that there is a problem, and

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

We do not have any comment on this aspect of the proposed reforms. Any Fletcher Building legal entity that would require consent under the Act is registered here in New Zealand and accordingly

has significant tax history in this country. We would be concerned about the adverse impact on application timeframes of additional investigation into tax matters when seeking OIO consent as it will further increase the complexity and time spent on the investor test. We also consider that the Inland Revenue and the Police are the organisations best suited and placed to manage tax compliance and tax avoidance matters.

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

Please refer our comments above.

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

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

Please refer our comments above.

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

Do you agree that there is a problem, and

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

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

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

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

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

13. Special land provisions (p. 91)

Do you agree that there is a problem, and

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

Fletcher Building has not had a lot of recent experience in managing special land as part of an OIO application but does agree some reform is required here. The OIO application process is already time consuming and costly and even more so, when special land is involved. We prefer Option 1, although aspects of Option 3 and 4 are also appealing. However, the difficulty of Option 3 will be to what extent access could be established to the special land. Much will depend upon the land in question and the location of the special land in relation to the remainder of the property and its use etc. A combination of Options 1 and 4 might be the best solution at improving certainty, time and cost.

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

Please refer our comments above.

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

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

Please refer our comments above.

14. Farmland advertising (p. 95)

Do you agree that there is a problem, and

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

We agree that there is a problem and that the consultation paper captures the concerns that we have. In addition, the advertising requirement can result in Fletcher Building losing the opportunity to purchase land that is critical to Fletcher Building business and/or development operations that have been conducted for decades. For example, if there are several landholdings that we are acquiring for a residential development, the removal of one of these landholdings as a result of a third party purchase via the advertising process (which can be by a competitor), frustrates the whole development.

Fletcher Building supports Option 2 and the removal of the requirement to advertise farmland. We consider that the current requirement to advertise does not meet the Act's policy objectives (as discussed at paragraph 245 of the consultation paper).

We have also noted at the end of this submission that there is a considerable amount of uncertainty over the concept of "non-urban land" under the Act. In particular, a number of Fletcher Building business units are frequently faced with assessing whether land they are considering acquiring falls into the category of non-urban land of over 5 hectares. This is particularly problematic for Fletcher Residential Limited (which trades as Fletcher Living) where it is frequently looking to acquire land for residential housing development that is zoned by the local authority as Future Urban. We consider that the Act needs to be reformed so that land which has or will be re-zoned for residential, commercial or industrial use (on the basis that the territorial authority has included such zoning in its unitary or district plan) be excluded from the sensitive land category for non-urban land greater than 5 hectares. Having to work through the farmland advertising requirements under the Act for land that is zoned as Future Urban and which the relevant territorial authority has ear marked for residential, industrial or commercial development is contrary to the long-term intent of local council in zoning the land as future urban. Furthermore, it is particularly frustrating in cases where we would contemplate a residential development and are unable to rely on our standing consent for meeting the increased housing test in relation to residential land.

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

Option 2 would significantly reduce risk, cost and delay to the preparation and management of an application for consent. As a purchaser we will usually take on the cost of the advertising process. The additional costs of advertising can range from $5,000 to $10,000 or more depending on the land in question and the method of advertising adopted. This includes legal fees for advising us on the correct process and compliance with the Act's requirements.

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

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

Yes, we agree that Option 2 is the right reform.

15. Timeframes for decisions (p. 98)

Do you agree that there is a problem, and

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

We agree there is a longstanding and major problem. Any improvement to the current decision timeframes would be welcome. Consent applications can usually take in the region of 4 to 6 months (depending on the nature of the application and the further information that the OIO may request) which is a significant delay to any commercial transaction, particularly in the context of lease transactions and transactions where there is strong market interest in the property.

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

We consider that Option 1 provides simplicity, but Option 2 gives greater flexibility and addresses the fact that some applications are more complex and will by their nature require greater time for the OIO to assess.

Sub options A and B are preferred, but we would suggest reducing the 15 working days to 10 working days.

With respect to sub option C, this should only apply if the OIO identifies the further information as being critical to their assessment.

Any improvements to the time taken for the OIO to assess an application will reduce cost but more importantly it would improve the speed with which transactions that require consent reaching a conclusion for both the vendor and the purchaser. On most occasions it is a New Zealand vendor who is also adversely affected by the delay caused by the need for the purchaser to seek consent.

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

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

Yes, we consider that the right reform options have been identified but these must be viewed in conjunction with the other reforms in the consultation paper which will also significantly improve the timing of transactions subject to OIO consent.

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

Please refer to our comments above.

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

Yes, we support this approach, as it gives certainty of timetable for an applicant. We also note that this is the approach taken in other regulatory approval regimes. However, we note that this would require significant additional resourcing for the OIO. Any ability for the OIO to extend timeframes must be commensurate with the complexity of the relevant application.

Experience with the Overseas Investment Office

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

Other comments on the regime?

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

We consider that there is a considerable amount of uncertainty over the concept of "non-urban land" under the Act. In particular, a number of Fletcher Building business units are frequently faced with assessing whether land falls into the category of non-urban land of over 5 hectares. This is particularly problematic for Fletcher Residential Limited (which trades as Fletcher Living) where it is frequently looking to acquire land for residential housing development that is zoned by the local authority as Future Urban. We consider that the Act needs to be reformed so that land which has or will be re-zoned for residential, commercial or industrial use (on the basis that the territorial authority has included such zoning in its unitary or district plan) be excluded from the sensitive land category for non-urban land greater than 5 hectares. This would enable Fletcher Residential, who

has obtained a standing consent for the acquisition of residential land, to more quickly acquire the land and proceed with a residential development.