Submission

By

THE NEW ZEALAND INITIATIVE

to the Finance and Expenditure Committee

on the

Submission on Overseas Investment (Urgent Measures) Amendment Bill

18 May 2020

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INTRODUCTION

1.1. This submission on the Overseas Investment (Urgent Measures) Amendment Bill (the Bill) is made by The New Zealand Initiative (the Initiative), a think tank supported primarily by chief executives of major New Zealand businesses. In combination, our members employ more than 150,000 people. The Initiative undertakes research that contributes to the development of sound public policies in New Zealand and the creation of a competitive, open and dynamic economy and a free, prosperous, fair and cohesive society.

1.2. Openness to international trade, capital and know-how is important for New Zealand's ongoing prosperity. New Zealand has a small population by world standards. Its ability to tap into international expertise and technology depends on this access.[1]

1.3. The Initiative has published many research reports and articles assessing New Zealand's degree of openness to overseas investment and the weaknesses in its regulation of that investment.[2] New Zealand's screening regime is extraordinarily restrictive compared with other countries[3] and it has been less successful than other small, advanced economies, including Australia, in attracting overseas investment.[4] The United Kingdom's regime is one of the least restrictive globally. A particularly egregious feature of New Zealand's regime is its refusal to recognise the prime benefit of overseas investment to Kiwis – the consideration paid.

1.4. In a February 2018 submission to this committee on the then Overseas Investment Amendment Bill[5] the Initiative summarised its broad recommendations as follows:

- Abolish the Overseas Investment Act. There should be no FDI regime;
- Subject all investors, domestic and foreign, to the same rules, and;
- Protect New Zealanders' property rights, including the freedom to sell to whomever they wish. In cases of public interest, appropriate compensation must be paid.

1.5. Activities that are potentially subversive of public order, public health and/or essential security interests must be addressed whether or not the threat arises from FDI or non-FDI sources. These issues do not justify the existing consent provisions in the OIA.[6]

[1] The Treasury's "Reform of the Overseas Investment Act 2005 – Phase 2 Regulatory Impact Assessment+, March 2020, makes the same point on page 12. On page 16, it reports indicative costs of obtaining consent at more than $100,000, excluding application fees, along with longer delays. Opportunities are being missed.

[2] See, for example, "*New Zealand's Global Links: Foreign Ownership and the Status of New Zealand's Net International Investment,*" 2013, *Capital Doldrums: How globalisation is bypassing New Zealand,* February, 2014, "*Open for Business: Removing the barriers to foreign investment,* April, 2014, "*Capital Markets: Five Myths about foreign Investment,*" *New Zealand Herald*, 8 May, 2014 "*Cease this foreign investor farce*", Insights, 23 November, 2018, Chapter 4 Foreign Direct Investment in "*Open to the World, in Manifesto 2017: What the next New Zealand Government should do.*"

[3] The Treasury's March 2020 regulatory impact assessment on the earlier Bill makes the same point on page 10. It also comments on page 3 that "[t]here is significant evidence that relaxing restrictions on foreign direct investment (FDI) increases the flow of overseas investment."

[4] The Treasury's March 2020 regulatory impact assessment documents this on page 13.

[5] That legislation encouraged investment in forestry assets and certain other profits-a-prendre and sought to reduce overseas investment in residential land.

[6] The Treasury's March 2020 regulatory impact assessment documents favoured a backstop 'substantial harm' test based on "a relatively narrow set of harms (to public order, public health and essential security interests" (see page 43).

1.6. The Bill was tabled in Parliament and received its first reading on 14 May. The deadline for submissions is 18 May. Given this extraordinarily compressed time frame, this submission limits itself to commenting on the proposed temporary emergency notification measures.

1.7. The emergency measures greatly expand the scope of the screening regime and give broad powers to the responsible Minister to prohibit or dispose of investments deemed to be 'contrary to the national interest.' The provisions must be reviewed every 90 days and will be removed when the Government determines the Covid-19 pandemic and associated economic effects no longer have a significant impact.

2 The Bill's Emergency Notification Provisions

2.1 The temporary emergency notification regime "broadly allows the Government to review transactions not ordinarily screened if they would result in more than a 25% interest in a business or its assets, or increases an existing interest to, or beyond, 50%, 75% or 100%." The proposed measure has a zero-dollar threshold. This means a $100 investment in a business worth $400 would be subject to the full regime.

2.2 The Government hopes the measure will come into force by mid-June of this year. The responsible Minister will have 10 working days to determine if a national interest test should be applied to a proposed transaction. If it is so determined, the Minister has a further 30 working days to make a decision, extendable for a further 30 days.

3 Inadequate Problem Definition

3.1 The Minister of Trade and Development, Hon David Parker, said the emergency measure is necessary to prevent overseas investors from acquiring equity stakes in New Zealand business at fire-sale low prices:

> We need to minimise the possibility that cornerstone businesses in our productive economy are sold in a way contrary to our national interest while the pandemic is causing the value of many businesses to fall, Parker said in a statement. [7]

3.2 Parker was further quoted as asserting that where the value of a significant tourism company might now be "low or near zero," that "value would not reflect the importance of the business, so interim controls are needed to protect our national interest." It does not make any commercial sense for a business to have two values: the market value and David Parker's value.[8] When prices are low, business owners require no protection – and no law is needed to stop people selling shares, houses, cars or any other asset – competing buyers do that job. The principle of mutual benefit between willing buyer and willing seller applies.

3.3 Moreover, politicians have neither the incentive nor the knowledge to assess whether an asset's market price is too high or too low. The only meaningful yardstick is the price struck between a willing buyer and willing seller, which is the one Minister's are presumably seeking the power to disregard with this Bill.

[7] As cited in the New Zealand Herald, "Government tweaking Overseas Investment Act to prevent fire sales to foreigners during Covid-19 crisis," 13 May, 2020. https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=12331682

[8] The New Zealand Initiative's 14 May, 2020 "Media Release: 'Farcical' OIA change won't help Kiwi companies," made this point.

4 No recognisable public interest justification

4.1 The national interest should be thought of as the overall wellbeing of the New Zealand public. The fact that the Minister and unidentified like-minded others want to stop transactions between a willing buyer and a willing seller does not constitute a public interest case for the proposed policy. The national interest does not depend on whom owns the local corner dairy, or most businesses.

4.2 Recourse to the royal "we," as in the "we need to minimise …," is not a public interest justification. It does not confer any prerogative of the promoting Minister and unidentified like-minded persons to prohibit mutually beneficial transactions between consenting parties.

4.3 In the rare situations of a general public benefit from preventing such transactions (for example, national security or public health) the cost of achieving that benefit should be borne by the general public. That is the benefit principle of taxation. To impose that cost instead on the thwarted seller is manifestly unfair and opens the way to majoritarian exploitation.

5 Conclusions

5.1 The reasons for the Bill's timetable are unconscionable and entirely fallacious. Kiwis should be free to sell assets to whomever they please, unless doing so is contrary to the public interest, in which case the issue of compensation should be addressed. Moreover, the Government encourage similar freedoms for New Zealanders hoping to buy overseas assets.

5.2 The Government has made no public interest case for adopting these measures, let alone the urgency. The unnecessary business failures and job losses that can be expected are contrary to the Government's objectives for Budget 2020.

5.3 The commercial incoherence of stopping business owners from getting the best price for a share of their business will diminish overseas investors' attitudes to investing in New Zealand. In the Initiative's earlier research, it criticised the arrogance and insularity of New Zealand Governments privilege overseas investors here. In reality, the country needs the technology, expertise and access to overseas markets this investment brings.

5.4 Without a recognisable public interest case for such urgency, the Select Committee should recommend that Parliament does not permit this Bill to pass without normal due process and time for consultation and deliberation.[9]

[9] The disclosure statement accompanying the Bill notes that its emergency powers were incorporated subsequent to the Treasury's Regulatory Impact Statement, so the case for them was not addressed (page 6).