# Have your say on the Overseas Investment Act 2005

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

## Submission Form

### Details of submitter

#### For organisations

| **Name of organisation:** | Listed Companies Association Inc. |
|---|---|
| **Contact person:** | John Blair |
| **Contact person's position in organisation:** | Chairman |
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### Confidentiality request

If you want all or part of your submission to be kept confidential and not uploaded onto the Treasury's website, please mark the applicable box below:

| **Entire submission confidential** | NO |
|---|---|

| **Part of submission confidential**[1] | NO |
|---|---|

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

| Name only confidential | NO |
|---|---|

## Introduction to submitter

The Listed Companies Association Inc. (**LCA**) is an independent, non-profit organisation established in 1981. Its members are NZX listed companies and other listed entities, with an executive comprising selected officers of NZX listed entities and representatives of some of the larger corporate law firms. Since inception, LCA has provided a forum for discussion and exchange of views on issues of importance to entities listed on NZX. With today's sharp focus on corporate governance and the need for confidence and growth in our capital markets, LCA provides leadership for a collective voice for listed businesses.

The LCA is submitting on the Treasury's consultation paper (the **Treasury Paper**) because it is of significant importance to its members. It is also encouraging individual members to submit, particularly with a view to setting out details of their own experience with the Overseas Investment Act 2005 (the **Act**). It sees this consultation as an opportunity to relieve the unnecessary burden placed on NZX listed entities of seeking consents under the Act, when most members are fundamentally "New Zealand persons".

While many LCA members have views on all of the matters raised in the Consultation Paper, this submission focusses solely on the definition of "overseas persons" as it is critical that a more appropriate and targeted regime be introduced for New Zealand listed entities.

## Responses to consultation questions

### 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?

The LCA agrees with Treasury's identification of the numerous issues associated with the current definition of "overseas person" in the Act as it applies to listed bodies corporate.

Numerous listed bodies corporate in New Zealand are categorised as "overseas persons" under the current definition in the Act. However, most New Zealand listed entities have their "centre of gravity" in New Zealand, with a large proportion of New Zealand ownership, New Zealand headquarters and boards and senior management located in New Zealand and comprising primarily New Zealander employees. Furthermore, being listed entities, New Zealanders have the ability to acquire further interests in the entity at any time by buying shares on market.

The current definition of “overseas persons” imposes significant regulatory and commercial burdens on New Zealand listed entities, including:

1. some listed entities making upwards of four applications a year, with sensitive land applications often costing in excess of $100,000 of external costs (lawyer and OIO fees) in addition to the large burden placed on executive time and focus and sometimes significant delays completing transactions;
2. committing capital to less attractive projects to help demonstrate a “benefit to New Zealand” in the context of a sensitive land consent application;
3. disadvantaging listed entities’ commercial position when submitting offers or bids in a competitive process because:
    - vendor’s prefer unconditional offers (allowing much quicker timeframes and greater certainty);
    - particularly in respect of sensitive land applications, the relative cost of an OIO application (including the need to demonstrate a “benefit to New Zealand”) compared to the asset can have a material effect on the value the offer and its ultimate success; and
4. potentially forcing listed entities into sub-optimal premises or locations because preferred locations are “sensitive” and would require an application (as set out below, a large number of standard commercial premises, such as warehouses etc. are deemed to be sensitive, meaning it is unduly burdensome for an overseas person to enter into leases for such premises).

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

The LCA understands that a number of its members will make separate submissions setting out:

a) the significant costs incurred as a result of the current definition of overseas persons; and

b) how the LCA’s preferred overseas person definition (set out below) would apply to their business.

However, in general, a sensible definition of “overseas person” that excluded New Zealand listed entities with a genuine New Zealand presence would eliminate a large number of OIO applications annually and therefore eliminate a large amount of compliance burden, both cost and management time for listed companies and OIO staff.

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?

The LCA considers it important for the definition of overseas person, as it applies to entities with a primary listing on the NZX Main Board financial product market, to recognise:

a) that day to day variability in shareholdings outside of the listed entities' control – because shares are freely tradeable;

b) the limited actual impact on "control" of listed entities that are associated with small (less than 25%) financial product holdings by "overseas persons" even if combined holdings by overseas persons account for a majority of shareholdings; and

c) the practical difficulties of ascertaining beneficial ownership given the day to day variability in shareholdings (and deferred settlement of on-market trades on a T+2 basis), as well as the routine use of custodians, nominee companies and trusts in the context of listed entities.

A significant component of overseas ownership is passive portfolio ownership. A recent analysis by JBWere indicated that ownership of the New Zealand issuers considered (comprising 95.6% of the S&P/NZX All Index based on total market capitalisation) only included 7.8% ownership by "offshore strategic stakes", but 31.1% ownership by "other offshore owners" – primarily offshore managed funds, with a small portion of offshore retail investors.

LCA's preferred amendment (not considered in the Treasury Paper)

The LCA's preferred amendment (the **Preferred Amendment)** is set out below. The LCA's preferred amendment is not discussed in the Treasury Paper.

An overseas person includes a [*body corporate with a primary listing on the NZX Main Board*] (A), if an overseas person has obtained (either alone or together with its associate(s)) a 25% or more ownership or control interest in A and:

(i) the overseas person obtained consent for that transaction under section 12(b)(i) or 13(1)(a); or

(ii) the overseas person has notified A that it has obtained (either alone or together with its associate(s)) a 25% or more ownership or control interest in A in accordance with [*reference to new section introducing a primary obligation on overseas person to notify the listed company*].

The section referenced above imposing a primary obligation on overseas persons could be drafted as follows:

*An overseas person who (either alone or together with its associate(s)) has an 25% or more ownership or control interest in a listed issuer must disclose that fact to the listed issuer, within 5 trading days of this section becoming applicable as a result of—*

*(i) the listing of the listed issuer; or*

*(ii) the overseas person (either alone or together with its associate(s)) obtaining the 25% or more ownership or control interest in the listed issuer.*

The Preferred Amendment would exclude New Zealand listed bodies corporate from the definition of "overseas person" if no one "overseas person" (alone or together with its associates) holds more than 25% of the shares in the NZ listed entity (or the NZ listed entity had not been notified of such holding, whether directly or through the OIO consent process).

The definition of "associate" in the Act is broad. To make it work, there would need to be some exclusions for the types of relationship excluded from the definition of "relevant interest" provided for in section 238 of the Financial Markets Conduct Act 2013 (**FMCA**) or section 6(3) of the Foreign Acquisitions and Takeovers Act 1975 (Cth).

The Preferred Amendment could be subject to a "call in" right by the OIO or responsible Ministers. This would allow the OIO/Ministers to notify a listed entity that the OIO/Ministers consider that the entity should be an "overseas person" for the purposes of the Act on the basis that it is being controlled by overseas persons, with statutory guidance, and procedural protections, included in relation to the circumstances where this call in right may be used. An appropriate model for such a regime is Sub-Part 3 of Part 9 of the FMCA.

The key benefits of the Preferred Amendment include:

1. only treating listed bodies corporate as "overseas persons" if they are in fact effectively controlled by a single, identifiable "overseas person", consistent with the concept of "control" under the Takeovers Code.[2]

2. providing more certainty to listed bodies corporates when considering whether they are an "overseas person". A listed body corporate (A) will only become an "overseas person" if another "overseas person" (B) obtains a controlling stake in A. This would generally

require B to obtain consent under the Act. In obtaining consent, B effectively notifies A that it is now an "overseas person". In circumstances where B was not required to obtain consent (e.g. where the value of A's shares and assets was less than $100 million and it did not hold sensitive land), B would instead be required to directly notify A of its controlling stake; and

3. removing the issues identified by Treasury in relation to the 'tipping point' regime.

As set out in detail below, while still an improvement to the current definition of "overseas person", we believe that the Options considered in the Treasury Paper continue to leave listed entities subject to inappropriate uncertainty as to whether they might be an overseas person at any given time (or may at any moment become an "overseas person") and do not accurately capture when a listed entity becomes controlled by an "overseas person".

LCA's alternative option (as considered in the Treasury Paper)

If the Preferred Amendment is not adopted (contrary to LCA's strong preference), the LCA's preference would be to combine Options 1 and 2 in the Treasury Paper such that a listed body corporate will only be an "overseas person" if:

a) there is more than 49% overseas ownership of a class of voting financial products in the listed body corporate; **and**
b) the cumulative *substantial holdings* by overseas persons total 25% or more.

However, as foreshadowed above, Options 1 and 2 in in the Treasury Paper give rise to various practical difficulties for listed bodies corporate.

1. Practical difficulties with Option 1:

    - Listed entities do not have accurate or timely information of where their underlying shareholders live. Given the widespread use of custodians, nominee companies and trusts for listed company share ownership, the share register for a listed company does not enable the company to identify the geographic location of the beneficial owners.[3]

[2] Under the Takeovers Code, control is deemed to pass once a person holds or controls more than 20% of the voting rights in the company. A person cannot acquire more than 20% of the voting rights in a code company except in accordance with one of the permitted exceptions under the Takeovers Code (being a full or partial takeover offer or an acquisition or allotment approved by disinterested shareholders).

[3] Although the 'tracing' regime in ss 289-291 of the FMCA provides a listed issuer with certain powers to request details of beneficial ownership under the Financial Markets Conduct Act, these powers are time consuming and costly and impractical to use on a regular basis. Accordingly, the LCA does not believe that they provide a practical solution to the problem identified.

2. Practical difficulties with Option 2:

   - Listed entities may not be able to identify from substantial product holder disclosures whether a person with a *substantial holding* is an overseas person or not. In addition, substantial product holder disclosures require disclosure of "relevant interests" in financial products, which may not in fact accord to ownership or control interests for the purposes of the Act. Absent changes to the substantial product holder disclosure regime requiring persons to identify whether they are an overseas person, and whether or not they have an ownership or control interest for the purposes of the Act, Option 2 leaves listed entities uncertain as to whether they are an overseas person or not.

It is important that both Option 1 and Option 2 need to be satisfied before a listed entity becomes an "overseas person". This is because:

1. in relation to Option 1, a number of listed entities (particularly larger entities with significant indexed funds as shareholders) will still have more than 49% overseas ownership and this Option alone ignores the fact that those overseas shareholdings may be comprised of many unrelated de minimis holdings; and

2. in relation to Option 2, given the relatively concentrated nature of shareholdings on NZX, having an interest of 5% or more would not be uncommon. As global passive fund management continues to aggregate it is likely over time that fund managers, such as Blackrock or Vanguard, could routinely hold passive positions in S&P/NZX10 and S&P/NZX20 issuers well above a 5% level.

Irrespective of the definition of overseas person ultimately adopted, the LCA considers it important, and most beneficial to New Zealand that Option 4 in the Treasury Paper is implemented with clear guidelines and requirements, set out in more detail below. As noted above, the LCA's strong preference is the Preferred Amendment, rather than combining Options 1 and 2.

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?

The LCA is supportive of clear guidelines on when the exemption in Option 4 should apply. While the LCA agrees with many of the requirements in the Treasury Paper, it considers the requirements below inappropriate or unworkable for listed bodies corporate for the following reasons.

1. *it is at least 51 per cent owned by New Zealanders* – Given the daily fluctuations of ownership in listed entities and the difficulties set out above in relation to identifying the beneficial owners, this requirement should not apply to listed entities.

Furthermore, a listed entity can have a very strong connection to New Zealand, with its headquarters, employees and business operations being primarily in New Zealand. Accordingly, having a 51 per cent ownership threshold is likely to make the exemption unworkable for many listed entities that, in the ordinary meaning of the word, have a strong connection to New Zealand but have a majority of overseas ownership (or cannot rule out that they have a majority of overseas ownership).

2. *no 'foreign government' or its associate(s) owns equity in the entity* – The broad wording of this requirement would capture a large number of passive investment vehicles potentially "associated" with a foreign government, such as pension funds and superannuation funds. Such entities are common shareholders in listed entities.

   If this requirement is to remain, it should be accompanied by a 25% or more ownership threshold for a single overseas government investor.

## 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). 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 the Preferred Approach is adopted, this issue should fall away.

## Other Comments on the Regime

If a buyer which *qualifies* for the Australian OIO exemption wants to bid through a NZ Holdco, then it should also be entitled to rely on the Australian exemption. At present it is forced to use tax inefficient structures and bid out of Australia to obtain the OIO exemption. This is a nonsensical result and arguably means that NZ vendors risk being paid less for selling assets if Australian purchasers factor in the vendor's tax costs of using an inefficient structure to obtain OIO relief.