Major Electricity Users' Group

24 May 2019

Overseas Investment Act Reform
The Treasury
By email to overseasinvestment@treasury.govt.nz

Dear Treasury

Reform of the Overseas Investment Act 2005

1. This is a submission by the Major Electricity Users' Group (MEUG) on the Treasury consultation paper "Reform of the Overseas Investment Act 2005" published 16th April 2019.[1] MEUG members have been consulted in the preparation of this submission. This submission is not confidential. Some members may make separate submissions.
2. As a member of the BusinessNZ Affiliated Industries Group (AIG) MEUG has viewed the submission by BusinessNZ. MEUG agrees with and supports the submission of BusinessNZ.
3. MEUG's submission provides additional context on 2-topics:
   a) Lessons from the recent OceanaGold decision; and
   b) Should new tests apply to the electricity sector?

Lessons from the OceanaGold decision

4. The decision to block the purchase of land by OceanaGold to allow expansion of the Waihi gold mining operation was, in our view, arbitrary, biased and contrary to the long-term interests of New Zealand. Arbitrary decisions like this negatively affects overseas investor and lender sentiment. Over time if arbitrary decisions are biased in one direction then the country risk premium for New Zealand will increase leading to higher costs for overseas equity and debt.
5. Options in the consultation paper considering new discretionary decision-making powers will further exacerbate existing arbitrary discretionary making power risks.
6. A combination of increased risks from the OceanaGold decision and the possibility of new discretionary decision-making steps in the Overseas Investment Act will increase the country risk premium for overseas investors and lenders resulting in higher regulated electricity line monopoly charges and costs of equity and debt for generators. Hence electricity prices will increase for all consumers.
7. We see material benefits in *less*, not *more*, discretionary making - namely, lower costs of doing business and in turn lower costs to consumers

[1] https://treasury.govt.nz/sites/default/files/2019-04/overseas-investment-reform-consultation.pdf

Should new tests apply to the electricity sector?

8. The consultation paper considers if the existing investor test for sensitive assets needs reform. Possible reasons for widening the scope of the investor test to include electricity assets are discussed in paragraph 185. Two possible reasons refer to the electricity sector.

9. First, "there is limited ability to manage risks to national security associated with a particular investment" because the Act does not:

> – allow the government to assess whether an investment in a significant business asset (where the transaction does not include any sensitive land) is beneficial. This is despite the fact that investments in strategically important industries (such as transport and media) and critical infrastructure[59] (such as electricity distribution networks and financial markets) could provide opportunities for espionage or sabotage, and allow investors to exert inappropriate leverage over New Zealand,

10. Espionage and sabotage risks are taken seriously by the electricity sector. There is a comprehensive programme and network of key operators and the Electricity Authority working with the National Cyber Security Centre, part of the Government Communications Security Bureau, on cyber risks.[2] It's likely, but not-publicised, that non-cyber risks are also being managed jointly by relevant electricity sector parties and government agencies. Ensuring the efficacy of that work would be a more beneficial use of government and electricity sector resources than adding the electricity sector to an expanded list of sectors subject to an investor test in the Overseas Investment Act.

11. Second,

> ‣ there is limited ability to deny consent to transactions (above the monetary threshold) that could be seen to present risks of substantial economic harm to New Zealand, such as investments in critical infrastructure (such as the financial sector, electricity and water distribution networks, and fuel pipelines), entities that link New Zealand to global value and distribution networks, and where investors have access to subsidised capital that may distort the allocation of economic resources or trade flows, and

12. Subsidised capital or any subsidies are subject to trade-agreement rules. Tightening the compliance and surveillance regime for anti-competitive or harmful subsidies is a generic issue across many sectors of the economy. Analysis of potential trade barriers and subsidies by trading partners, making a case and getting resolution is not trivial. It's inconceivable an application by an overseas investor could consider such matters and a Minister could reach a reasoned decision in the much shorter time decision frames under the Overseas Investment Act. In the absence of robust analysis, the Minister would be left to exercise discretion leaving the decision wide-open to politicisation and a repeat of the outcomes seen in the OceanaGold decision. The Overseas Investment Act is the wrong tool to mitigate breaches of trade-agreements.

13. In the electricity sector overseas owned line monopolies are regulated by the Commerce Commission. Non-regulated owners of generation infrastructure, retailers and other service providers are in effect "regulated" by peer companies competing to innovate and lower costs in the mandatory wholesale spot market that is regulated by the Electricity Authority and general competition and consumer laws governed by the Commerce Commission.

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[2] https://www.gcsb.govt.nz/our-work/ncsc/

14. In both the regulated line and competitive parts of the sector it is difficult to conceive a scenario where subsidised overseas owners might prove harmful to the long-term interest of New Zealand electricity consumers. Our experience is the contrary with overseas owned regulated line monopolies and generators being amongst the more innovative and largest of investors in the electricity supply chain.

Yours sincerely

Ralph Matthes
Executive Director