POLICY POINT

FDI: Unjustified urgency

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Background

On 14 May, the Government introduced an Overseas Investment (Urgent Measures) Amendment Bill to the House and held its first reading on the same day. It had such little regard for public consultation the deadline for submissions was set for 4 pm on Monday, 18 May – giving submitters only two full working days.

The proposed urgent changes represent a substantial potential barrier for any Kiwi business to rescue itself by accessing foreign direct investment (FDI). Specifically, the regime requires each business, no matter how small, to get prior Ministerial approval when raising enough capital from a foreign person to exceed more than 25% of its equity or to increase that person's ownership to, or beyond, 50%, 75% or 100%.

Commentary

Currently, a business needs Overseas Investment Act consent for any acquisition valued at over $100 million.[1] The Bill proposes to drop this threshold to zero dollars.

The implications are potentially draconian. Consider the plight of a person running, say, a takeaway noodle shop which is under financial pressure due to the lockdown. Its best chance of surviving is to raise capital from a relative living overseas. Under this Bill, that shop must now go through the full OIA compliance process.

The complexity of the Act would likely defeat them, and the legal costs could be more than the extra capital raised. (Treasury has reported the cost can be $100,000, excluding application fees.)[2] The Minister can then take 10 working days to see if a so-called national interest test applies, the nature of which is also unclear, and another 30 working days to either make a decision or take another 30 days.

This implies the Government would prefer small and medium-sized enterprises fail if they cannot surmount the Bill's regulatory hurdles. The puzzle is why the Government would do that when Budget 2020, tabled in the House in the same week, said preserving jobs and businesses is a priority.

Minister of Trade and Development David Parker's reported justification is that the lockdown has shrunk the market value of many Kiwi businesses and he wants to avoid businesses being

[1] https://www.linz.govt.nz/overseas-investment/find-out-if-you-need-consent-invest-new-zealand/acquiring-business-assets

[2] The Treasury "Reform of the Overseas Investment Act 2005 – Phase 2 Regulatory Impact Assessment+, March 2020, page 16.

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sold overseas at a "bargain" price.[3] It makes no commercial sense for there to be two business values: the market value and David Parker's value.[4] Competing buyers and lenders, not David Parker, protect a business owner from selling at below market value. No law is needed to stop people from selling shares, houses, cars or any other asset when prices are low.

Important policy processes and principles

Governments should not undermine the principle of mutual benefit between willing buyer and willing seller. Reducing overseas investment in New Zealand will make Kiwis poorer more generally and depress the value of New Zealand's assets.

If a clear public benefit can be achieved by stopping a transaction between a willing buyer and a willing seller, under the benefit principle of taxation public should pay for the costs of achieving it. It would be unfair for this cost to fall disproportionally on the seller and would incentivise wasteful majoritarian exploitation.

As matters stand, the public interest case for stopping businesses from raising overseas capital when values are low is spurious. The Bill should not proceed with urgency, the due processes of select committee scrutiny, compliance with regulatory impact assessments and scope for meaningful public consultation must not be short-circuited.[5]

[3] The New Zealand Herald, "Government tweaking Overseas Investment Act to prevent fire sales to foreigners during Covid-19 crisis," 13 May, 2020.

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

[5] The proposed measure was not assessed in the Treasury's "Reform of the Overseas Investment Act 2005 – Phase 2 Regulatory Impact Assessment," March 2020.