



New Zealand Market Subcommittee

Australian Securitisation Forum

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By email

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Submission Overseas Investment Amendment Bill 2020

1. Introduction

- 1.1 The New Zealand Sub-committee of the Australian Securitisation Forum (the **ASF**) advocates on behalf of participants in the New Zealand securitisation industry. Our members include registered banks, wholesale funded non-banks lenders, trustees and investors that participate in securitisation transactions domestically and internationally.
- 1.2 The ASF appreciates the opportunity to provide feedback on the proposed amendments to the Overseas Investment Regulations (the **Regulations**) and the Overseas Investment Act (the **Act**).
- 1.3 This Submission is focussed on the proposed exemptions for financing transactions as described in the "Summary of Approach to Supporting Regulations" dated 15 May 2020.
- 1.4 The ASF strongly supports the changes.
- 1.5 Under the current provisions, financing transactions are treated differently depending on the legal form of the transaction. In our view, the Act and Regulations should focus on the substance of the transaction. So long as the relevant transaction is, in substance, a financing transaction, it should not require consent under the Act.
- 1.6 We think the proposed changes will remove unintended costs and time delays for lenders and ensure an efficient flow of funds to borrowers without affecting the purpose of the Act.

2. Current Regime

- 2.1 A traditional loan is exempt from the requirement for consent, and this has been explicitly recognised by the clarification introduced to section 6(9) of the Act by the Overseas Investment

(Urgent Measures) Amendment Act 2020.¹ This reflects the fact that a financing transaction does not involve the acquisition of an asset. It involves the creation of an asset (a claim by the lender against the borrower for repayment of the loan). Where a loan is secured over land, the acquisition of an interest in sensitive land under a security arrangement is exempted under Regulation 41.

2.2 As a result, ordinary course financing transactions do not require approval under the Act.

2.3 However, under the current regime, some financing transactions are subject to the Act, simply because of the legal form of the transaction.

2.4 In particular, this different treatment based on the form of the transaction has resulted in an undue burden being placed on lenders who fund through securitisation when compared with lenders who fund through traditional lending models. In a securitisation transaction, the financed assets are held by a special purpose entity. This results in an acquisition of receivables which may engage the Act if the special purpose vehicle is or is an associate of an overseas person, most commonly if the trustee of the special purpose vehicle or the sponsor of the securitisation (which would usually be the trust manager of the special purpose vehicle) is an overseas person.

2.5 The proposed changes to the Regulations, with the amendments we have suggested below, will ensure consistent treatment of financing transactions and remove inefficiencies.

3. **Exemptions from the Act: Portfolios or bundles of permitted security arrangements**

3.1 We support the removal of the requirement to obtain consent in relation to significant business assets (ie section 10(1)(b) of the Act) for acquisitions of permitted security arrangements under Regulation 42.

3.2 This makes the acquisition of permitted security arrangements consistent with the general secured lending exemption (Regulation 41) which does not require any consent.

3.3 For the reasons outlined below, the exemption should be extended to “*a permitted security arrangement*” as well as “*2 or more permitted security arrangements that are acquired together as a portfolio or a bundle*”. Without this change, the proposed exemption for loan purchases would not be available for the acquisition of a single secured loan.

3.4 We agree with the proposed conditions for the Regulation.

4. **Exemptions from the Act: Loans by financial institutions**

¹ However, the same clarifications as noted at paragraph 4.2 should be made to this new subsection (9).

- 4.1 We support the introduction of a permanent exemption for acquisitions of debt securities and related rights. This will ensure consistency with the general lending exemption discussed at paragraph 2.1.
- 4.2 A standing consent to this effect has already been included at clause 33 of Schedule 1AA of the Act (**Standing Consent**), however it is only effective for the epidemic period. We submit that the Standing Consent should remain in place after the epidemic period, with the amendments set out below.
- 4.3 The proposed exemption would apply to any type of financing transaction (rather than just loans) and would allow related rights and interests in property to be acquired. This is important as in almost all cases the relevant receivable will be acquired with a bundle of associated rights. These could include a guarantee of the amount owing, rights under an insurance contract or rights in the financed asset (for example, a finance lease of a vehicle). Without this change, the proposed exemption would apply in very limited circumstances and would not operate as intended.
- 4.4 To ensure the exemption only applies to financing transactions and is not used to acquire assets in New Zealand, we recommend that the same conditions apply as set out in Regulations 41(2)(b) and 42(b) and (c) (with appropriate amendments). This would ensure a consistent treatment of what are essentially the same type of transaction:

4.5 Proposed Exemption

We suggest that the exemption be included in the Regulations following the current regulations 41 and 42 given that they deal with closely related issues.

The requirement for consent does not apply to the extent that:

(a) giving effect to the transaction has the effect of a transfer of an interest or right that is an interest in or right to be paid money that has been, deposited with or lent to, or is otherwise owing by, any person together with any related rights or interests in property;

(b) the transaction is entered into in good faith and in the ordinary course of business; and

(c) the transaction is not entered into with the intention of making an overseas investment in sensitive land or an overseas investment in significant business assets or an overseas investment in fishing quota without consent.

- 4.3 As an alternative, the acquisition of the related rights and interests could be addressed in the exemptions for permitted security arrangements by way of amendment to Regulations 41 and 42.

5. **Exemptions from the Act: Residential mortgage backed securities**

- 5.1 Although the proposed exemptions for permitted security arrangements and acquisitions of loans should, with the changes suggested above, ensure that ordinary course securitisation

transactions will not require approval under the Act, we support the inclusion of a specific “securitisation exemption”.

- 5.2 The proposed introduction of a specific exemption which only applies to RMO transactions (which are simply one form of securitisation transaction) could potentially confuse the position. While the ASF supports the RMO exemption, we believe the RMO exemption should be expanded and apply to all securitisation transactions. This will avoid any potential confusion as to the application of the Act to securitisation transactions.
- 5.3 We can see no policy reason why an acquisition to support the issuance or management of RMO securities would be exempt while an acquisition to support the issuance or management of residential mortgage backed securities or other asset backed securities (for example, loans secured over auto receivables) would not. While we support the RMO exemption, it is important to ensure all lenders using securitisation transactions have the same certainty, this avoids any distortion to the market.

The additional reference to "special purpose entity" at (b)(i) (in our suggested amendments below) is to address the circumstance where mortgage loans may be sold from one special purpose entity (such as a warehouse entity) to another for the purposes of the securitisation programme. This is explicitly contemplated in the definition of "Seller" in the Reserve Bank's term sheet for RMO securities.

- 5.4 To address this, we suggest the following wording for the exemption:

The requirement for consent does not apply to the extent that:

- (a) *giving effect to a transaction is necessary or desirable to support, or are related to, the issuance or management of RMO's or other asset-backed securities issued in connection with a financing transaction;*
- (b) *the transaction is between (i) a registered bank, non-bank deposit taker or non-bank lending institution² or other special purpose entity established for the purpose of facilitating a financing transaction and (ii) a licensed supervisor in respect of debt securities under the Financial Markets Supervisors Act 2011 or other special purpose entity established for the purpose of facilitating the proposed transaction; and*
- (c) *the transaction is entered into in good faith and in the ordinary course of business.*

² To be defined as a person that carries on the business of borrowing and lending money, or providing financial services, or both.

Yours sincerely,



Chris Dalton

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