



New Zealand Market Subcommittee

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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 originally described in the “Summary of Approach to Supporting Regulations” dated 15 May 2020.
- 1.4 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.
- 1.5 Applying a consistent test 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.<sup>1</sup> 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). The Act can apply where a loan is secured over sensitive land, as there is the acquisition of an interest in sensitive land under a security arrangement. However, this acquisition 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 amendments we have suggested below will ensure consistent treatment of financing transactions and remove inefficiencies.

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<sup>1</sup> However, the same clarifications as noted at paragraph 4 should be made to this new subsection (9).

### 3. Current Position

3.1 As we understand it, the current position under the Act and Regulations in relation to financing transactions is as follows:

	Origination	Transfer
<b>Loan or debt securities</b>	No consent required, and not notifiable, as not "property" as defined in s 6(9)	Automatic Standing Consent in sch 1AA, cl 33
<b>Security arrangement</b>	Exempt and not notifiable – r 41	Exempt and not notifiable – r 42

3.2 In our view, the main issue remaining is that the Standing Consent should be made permanent and clarified so that it applies to all receivables.

### 4. Extension of the Standing Consent

4.1 We support the introduction of a permanent exemption for acquisitions of receivables and related rights. This will ensure consistency with the general lending exemption discussed at paragraph 2.1.

4.2 The Standing Consent included at clause 33 of Schedule 1AA of the Act (**Standing Consent**) should become permanent and remain in place after the epidemic period (with the amendments set out below).

4.3 The Standing Consent should expressly clarify that related rights and interests in property can also be acquired. A receivable will always be acquired with a bundle of associated rights (they cannot be separated). These could include a guarantee of the amount owing, rights under an insurance contract or rights in the financed asset (for example, if the receivable is an operating lease of a vehicle).

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 Standing Consent be made permanent by way of inclusion in the Regulations following the current regulations 41 and 42 given that they deal with closely related issues.

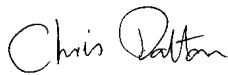
We suggest the following wording:

*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 in or right to be paid money that has been, deposited with or lent to, or is otherwise owing or payable 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.*

4.6 To reflect the intent of the exemption, we think the Regulation should be headed "**Exemption for transfer of receivables**". The current heading for the Standing Consent refers to "*transfer of certain debt securities*".

Yours sincerely,



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