

IMMIGRATION ARTICLE - AUGUST 2011

MIGRANT INVESTOR CATEGORY POLICY CHANGES: A CHANGE FOR GOOD?

On 25 July 2011 Immigration New Zealand (INZ) introduced a number of changes to the Migrant Investor Categories (MIC) following a recent review of existing policy.

The announcement was made shortly after confirmation was received from the Minister of Immigration that, since the implementation of the current MIC, NZ\$562million in funds had been attracted in potential investment capital. Whilst deemed successful, the Minister advised that changes were necessary to ensure New Zealand would receive the best return from these funds.

The question is whether the changes meet this objective and, perhaps further, what else could be contemplated to meet this objective?

REDUCTION OF PHYSICAL PRESENCE REQUIREMENT

Under the Investor Plus Category, where migrants are required to invest a minimum NZ\$10million in “acceptable investments” (refer below) for a period of three years, the minimum physical presence requirement of the principal applicant has been reduced from 73 days per year in each of the last two years of the investment period, to only 44 days per year in each of the last two years of the three year investment period.

This is a positive change, and no doubt has come about by pressure from existing and potential applicants under this particular category. In the writer’s experience, most high net worth investor applicants (initially) wish to limit their physical time in New Zealand due to their business/investment commitments overseas and their desire to avoid New Zealand tax liability on their world wide income.

The approach of reducing the physical presence requirement under this particular category is therefore sensible for two reasons.

First, it falls in line with reasonable requests from these investor migrants for a reduction.

Second, it assists the private sector to market this policy in what is globally a very competitive investor migration market. Any changes that make it easier to market and attract high net worth migrants and associated *directed* investments by way of the “*acceptable investment*” definition are desirable.

CHANGES TO ACCEPTABLE INVESTMENT CRITERIA

The previous definition of an “*acceptable investment*” as it then applied was set out in our recent prior article in NZLawyer.

From 25 July 2011 the definition of “*acceptable investment*” is as follows:

“F3.10.25 Definition of ‘acceptable investment’

- a An acceptable investment means an investment that:
- i is capable of a commercial return under normal circumstances; and
 - ii is not for the personal use of the applicant(s); and
 - iii is invested in New Zealand in New Zealand currency; and
 - iv is invested in lawful enterprises or managed funds that comply with all relevant laws in force in New Zealand; and
 - v has the potential to contribute to New Zealand’s economy; and

CHANGES TO ACCEPTABLE INVESTMENT CRITERIA (Con't)

F3.10.25 Definition of 'acceptable investment'

vi is invested in either one or more of the following:

- *bonds issued by the New Zealand government or local authorities; or*
- *bonds issued by New Zealand firms traded on the New Zealand Debt Securities Market (NZDX); or*
- *bonds issued by New Zealand firms with at least a BBB- or equivalent rating from internationally recognised credit rating agencies (for example, Standard and Poor's); or*
- *equity in New Zealand firms (public or private including managed funds); or*
- *bonds issued by New Zealand registered banks; or*
- *equities in New Zealand registered banks; or*
- *residential property development(s); or*
- *bonds in finance companies.*

Note: Convertible notes are considered to be an equity investment. New Zealand registered banks are defined by the New Zealand Reserve Bank Act 1989."

There are a few important points to focus on here. Some of the changes made are significant.

INVESTMENT INTO RESIDENTIAL PROPERTY DEVELOPMENT NOW PERMITTED

For the purposes of acceptable investment in to residential property development, this has been further defined as follows:

"F3.10.40 Residential property development

Residential property development(s) is defined as property(ies) in which people reside and is subject to the following conditions:

- a the residential property must be in the form of new developments on either new or existing sites; and*
- b the residential property(ies) cannot include renovation or extension to existing developments; and*
- c the new developments must have been approved and gained any required consents by any relevant regulatory authorities (including local authorities); and*
- d the purpose of the residential property investments must be to make a commercial return on the open market; and*
- e neither the family, relatives, nor anyone associated with the principal investor, may reside in the development; and*
- f the costs associated with obtaining any regulatory approval (including any resource or building consents) are not part of the principal applicant's acceptable investments."*

RESIDENTIAL PROPERTY - THE GOOD...

The addition of investment in to residential property development is a considerable change to the definition of "acceptable investment" under the MIC. Readers generally familiar with the MIC will recall that previously an investment in to residential property (or development) was expressly prohibited.

In part due to the perceived shortage of housing stock projected in the medium to long term term, the Government has decided to allow overseas investment into residential property development. This change in policy serves a few identified purposes.

First, it provides an avenue for the Government to look at (in a limited way) addressing the housing shortage by directing and utilising foreign capital. It is attractive in this sense, as the immigration "tap" can essentially be turned on or off quickly depending upon results and requirements at any time. This is a useful example of an identified domestic issue where an appropriate immigration policy can be utilised as an external driver to assist with addressing that issue.

Second, particularly for investors in South East Asia, investment in property development is quite attractive, especially due to current domestic restrictions for investors from the Peoples Republic of China (**PRC**). The only barrier in relation to large scale investment at this time (individual high net worth related investment from the PRC) is the application of the INZ transfer rules which, in the Chinese context that restricts large scale individual currency transfer, creates significant difficulty for applicants of the PRC to qualify. It remains to be seen how far the New Zealand Government is willing to go to attract and facilitate this type of large scale investment from the PRC which, if regulations were eased up in this transfer context, could be quite considerable.

RESIDENTIAL PROPERTY - THE GOOD... (Con't)

Third, and undoubtedly important, is the potential source of external capital to assist with the Canterbury rebuild. The economic activity that will commence in the Canterbury region will attract both institutional and individual high net worth migrants (it already is). A change to allow investment directly in residential property development, a core issue facing the Canterbury region now, is certainly welcomed and very sensible.

RESIDENTIAL PROPERTY - THE BAD...

Whilst there has been a wholesale change in relation to allowing investment in residential property development it is, for obvious reasons, designed to avoid risk of abuse related to residential developments of a direct personal benefit rather than an overall economic benefit, which is the intention of the policy.

At first review the only issue from an investment context is the exclusion of costs that can be associated with the acceptable investment. The wisdom of this direction to exclude regulatory approval costs is questionable, particularly in larger scale developments as these costs can be significant and, in context, are part and parcel of these investments.

It remains to be seen whether there will be slight changes to this particular part of the policy as INZ are clearly feeling their way with this. We suspect this area of policy will be one of negative focus, which is inevitable with such an open definition of “*costs associated with obtaining regulatory approval*”.

An example of INZ finding their way with this policy was identified when the policy was first released. A question and answer document was released providing that a Code Compliance Certificate and a Building Consent would be minimum requirements (subject to other criteria) before the residential property development could be considered acceptable for the purposes of an investment. A Code Compliance Certificate required, which is issued towards the end of the development? This error has now been corrected; although a cause for concern with this is the perceived lack of a request for industry engagement (in a legal sense) before this policy was implemented.

INVESTMENT INTO BONDS OPERATED BY FINANCE COMPANIES

This is also an interesting change, although limited, and lawyers should be mindful of the discretion element here (emphasis added below). The extended policy provides as follows:

- “c *A Business Immigration Specialist **may** consider bonds in finance companies as an acceptable investment where the finance company:*
- i is a wholly-owned subsidiary of,*
 - ii raises capital solely for, and*
 - iii has all its debt securities unconditionally guaranteed by a New Zealand Stock Exchange listed company or a local authority.*

Note: The value of an investment is based on the net purchase price (for example, less any accrued interest, commission, brokerage and/or trade levy), not on the face value of the investment.”

TRANSITIONAL POLICY

Quite sensibly, INZ has also implemented a transitional policy for existing applicants of the current MIC. Applicants who were in the process of obtaining a resident's visa under MIC and applicants who have already made acceptable investments under the old criteria have been given an opportunity to be considered (at no extra cost) for approval under the new policy, that will allow them to adjust the investments to fall in line with the new acceptable investment criteria should they elect to.

SUMMARY

So what do these changes mean?

In the view of the writer, the changes are quite aggressive and a significant departure from the MIC on offer over the past decade. Whether it will be effective to attract more foreign investment (or re-direct existing) in to current “*acceptable investments*” through the immigration angle is yet to be tested, although quite clearly stakeholders in the immigration and foreign investment area do have something to market here.

A clear message has been sent to the international immigration market that New Zealand really is open, and is flexible in relation to allowing foreign investment in to a wide range of acceptable investments. There is something now for every type of investor.

It remains to be seen how important the scale of external funds are to New Zealand in the controlled (individual) immigration context. Will the regulations in place be eventually relaxed to allow for increased individual investments from the PRC? In the view of the writer, and others in this industry, there would be no shortage of funds being transferred into New Zealand to the investments nominated under the immigration criteria from the PRC if some minor changes were made.

The question really is how far does the New Zealand Government wish (or need) to open the door? Watch this space.

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