Overseas Investment (Urgent Measures) Bill and the Overseas Investment Amendment Bill (No 3): Overview

14 May 2020

Context and Purpose

The Overseas Investment (Urgent Measures) Amendment Bill (the Urgent Measures Bill) and the Overseas Investment Amendment Bill (No 3) (the Other Measures Bill) (collectively, the Bills) reflect the outcomes of the Government's Phase Two review of the Overseas Investment Act 2005 (the Act), as well as additional reforms necessary to respond to the COVID-19 pandemic.

Information on both Bills is presented because the Bills are a package that work together to improve New Zealand's foreign investment screening regime.

This document is to assist the public in understanding the policy decisions that the Government has made as part of that review and further work, the rationale for them, and how the Bills reflect them (excluding some minor and technical amendments).

This document has been prepared by the Treasury. Further detail on the reforms is available on the Treasury's website https://treasury.govt.nz/news-and-events/reviews-consultation/overseas-investment-consultation.

The Treasury welcomes feedback, to inform the drafting of the legislation, as part of the Select Committee process.

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1. Reforms to strengthen the screening regime

Section 1 provides detail on the Bills' provisions to enhance the government's ability to manage risks posed by foreign investment.

This includes, in the **Urgent Measures Bill**:

- new powers to manage risks to New Zealand's national security, public order, and other national interests (*clauses 17, 52 and 53 of the Urgent Measures Bill*),
- enhanced enforcement tools (*clauses 35, 36, 38 and 42 of the Urgent Measures Bill),*
- new provisions related to the protection and sharing of information (*clauses 52 and 66 of the Urgent Measures Bill*), and

These provisions are all being introduced in the Urgent Measures Bill to ensure that the government has all necessary tools to protect New Zealanders' interests. They are covered in sections 1(a) to 1(d).

In the **Other Measures Bill**, it includes:

- specific changes to manage concerns related to how the Act protects farm land, recognises Māori cultural values, and manages certain types of water extraction on sensitive land (*clauses 8 and 9 of the Other Measures Bill*), and
- ensures the integrity of New Zealand's tax system (*clause 66 of the Urgent Measures Bill and clause 16 of the Other Measures Bill*).

These reforms are detailed in sections 1(e) to 1(g).

Throughout this section (and sections 2 and 3) of this document, references to the Bills are structured starting with the relevant Bill's clause/schedule, followed by the proposed new, amended, replaced, or repealed section of the Act.

a. Enhanced powers to manage national security and other risks to New Zealand's national interest (*Urgent Measures Bill*)

The Act currently allows no consideration of whether an investment ordinarily screened[1] poses risks to New Zealand's national security or public order, or other core national interests (such as economic interests), before granting consent. This is despite the fact that investments in certain critical national infrastructure or investments with significant non-New Zealand government involvement can raise particular concerns (for example, the use of assets for strategic, rather than commercial, reasons).

The Act also does not grant Ministers any ability to manage national security and public order risks posed by presented by investments not currently subject to screening, such as investments in small firms developing advanced dual-use technology (that is, technology with both civilian and military applications).

To resolve these issues, the Urgent Measures Bill would introduce three new powers. As outlined in section 3(a) of this document, the intention is that each of these powers would rest with the Minister responsible for the Act (currently the Minister of Finance) and could not be delegated to the regulator.

[1] That is, transactions involving sensitive land, significant business assets, or fishing quota.

The national interest test

For transactions ordinarily subject to screening, a new "national interest test" would allow Ministers to decline consent to any transaction that the Minister considers contrary to New Zealand's national interest (which includes national security interests, but also other core interests such as economic, environmental and cultural interests) (*clause 17, new sections 20A to 20G*)).

This test would be a co-equal part of the Act's consent framework (alongside the investor test and, where relevant, the benefit to New Zealand test), with consent dependent on applicants satisfying the requirements of each test. However, unlike the Act's other tests for consent, the onus would be on the government to demonstrate that an investment does not satisfy the national interest test, rather than for an investor to demonstrate that it does satisfy the relevant test. This is because, given foreign investment's varied benefits, the test's starting point is that applications are in New Zealand's national interest.

The Emergency Notification Regime

The second significant new power contained in the Urgent Measures Bill, the 'emergency notification regime' would require investors to notify the government of certain transactions that grant control of an existing New Zealand business but are not ordinarily subject to screening. This will allow the government to ensure that these transactions are not contrary to New Zealand's national interest. This power will be temporary, subject to review every 90 days, and only remain in force, if the Minister is satisfied that it is still necessary to respond to the COVID-19 emergency.

Critically, the 'emergency notification' power is not a consent regime, with investors not required to demonstrate that their investments do not pose risks or offer any benefits. Instead, the onus will be on the government to complete a risk assessment and determine whether action is necessary to manage risks to New Zealand's national interest.

The National Security and Public Order Call In power

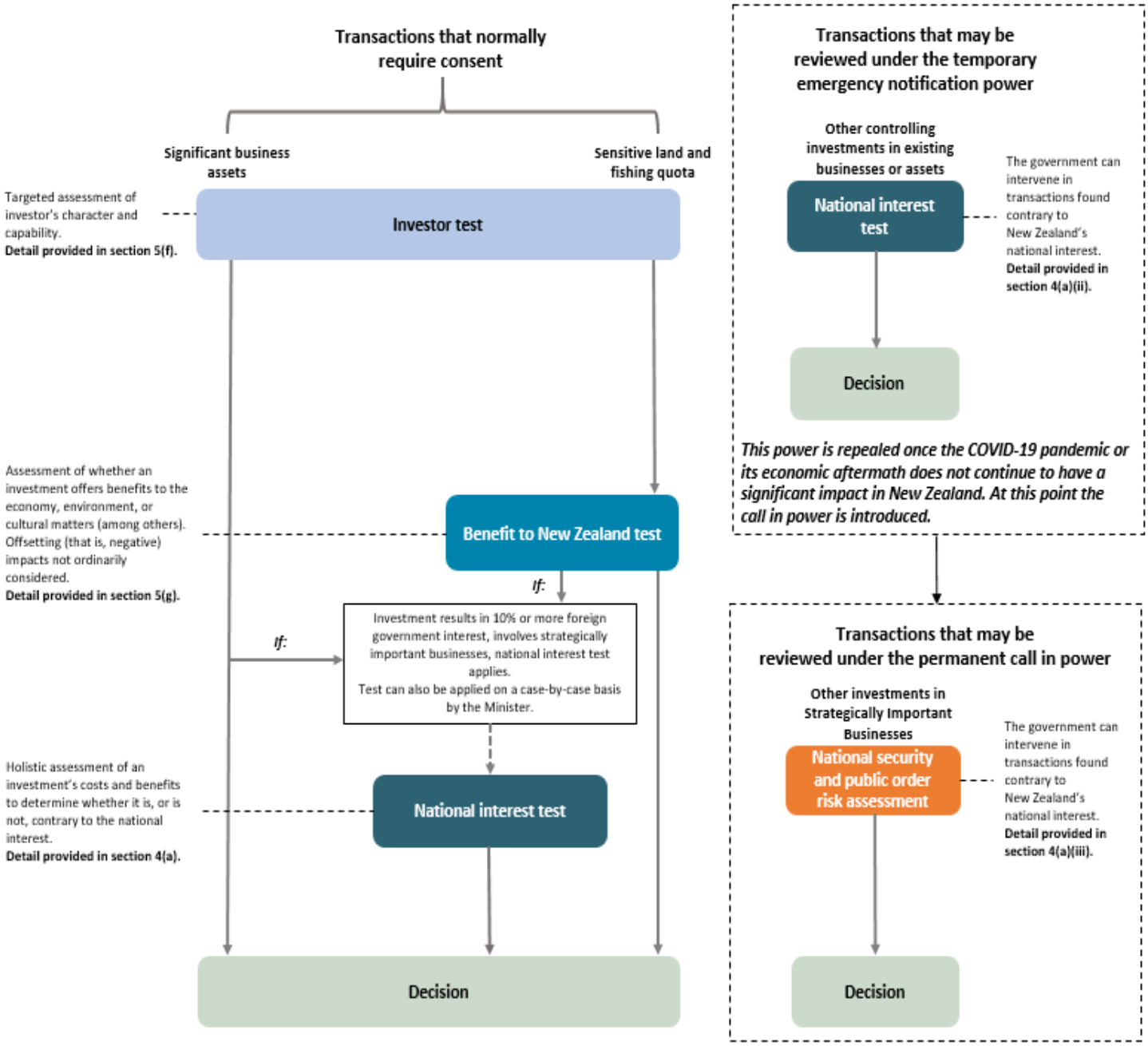
The Urgent Measures Bill includes a third significant risk management power, which will come into effect by Order In Council when the emergency notification regime is removed of after 24 months (whichever comes earlier) (*clause 2(2)(b))*. It will grant the government the power to determine whether certain investments in strategically important businesses give rise, or are likely to give rise, to a significant risk to New Zealand's national security or public order (*clause 52, new Part 3, sections 82 to 87*). This is referred to as the 'call in power'.

Like the emergency notification regime, the call in power is not a consent regime. The onus will be on the government to complete a risk assessment and determine whether action is necessary to manage any significant national security and/or public order risks. The government will not have the power to take action in respect of any other perceived or actual risks posed by these transactions – that is, it only allows consideration of national security and public order risks (unlike the national interest test, where broader risks can be considered).

Figure 1 depicts how these three powers will work together as part of the Act's broader consent framework over time.

Additional detail on the coverage and operation of the three new tests, as well as new Ministerial powers, is below.

Figure 1: The consent framework proposed by the Urgent Measures Bill



How the emergency notification regime, call in power and national interest test are expected to work in practice

This excerpt provides an overview of how the emergency notification regime, national interest test and call in power are expected to be operationalised. It is intended to provide more practical information on how these new tools will impact overseas persons investing in New Zealand. This excerpt is followed by the normal technical descriptions of the how the Bills' provisions set out these powers.

The Government's has indicated that it "continues to welcome high quality investments that support [its] plan for a productive, sustainable and inclusive economy."[2]

As a result, and across these three powers, officials will engage with investors as soon as possible to express any concerns and work with them to determine how government action could be avoided or less serious action could be taken (as relevant). This is with the goal of ensuring that the vast majority of transactions reviewed under the Act can proceed with appropriate risk management.

Implications of the national interest test

The national interest test is a backstop power intended to be used "rarely and only where necessary for protecting New Zealand."[3] The test has been designed and will be implemented in a way that delivers on this intention by:

- (as described above) placing the onus on the government to show that a transaction is contrary to the national interest (with decisions subject to judicial review),
- ensuring government makes a balanced assessment of transactions subject to the test, with decisions informed by advice coordinated across agencies (including the OIO, the Treasury, the Ministry of Foreign Affairs and Trade, and the security agencies); and
- the regulator engaging with investors as soon as practicable to express any concerns and work with the investor to determine how the transaction could proceed (if possible). While this process could increase the Act's burden on some investors, the intention is that in most cases these discussions would result in a transaction receiving consent.

The test's automatic application to certain types of transactions is not a signal that these transactions are inherently risky or less desirable than other types of investments. Rather, these investments have characteristics that may warrant additional scrutiny and the automatic application of the test is primarily to provide foreign investors with certainty of the process they are likely to face when investing in New Zealand's sensitive assets. Similar assets are also treated differently to other types of assets by the Australian government as part of their foreign investment review process.[4]

Implications of the emergency notification regime

The emergency notification regime (and associated risk management tools) will apply to transactions not ordinarily reviewed, which will require investors that would not have previously interacted with the Act to:

- learn about their obligations,
- potentially seek legal advice, and
- in rare circumstances have their transaction subject to conditions or blocked/unwound.[5]

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[2] See: https://www.beehive.govt.nz/release/national-interest-test-added-overseas-investment-rules

[3] ibid

[4] See the list of 'sensitive businesses' here: https://firb.gov.au/sites/firb.gov.au/files/2018/12/1-January-2019-Policy_.pdf

[5] That is, the Minister requires the investor to dispose of their interest.

Recognising this, the regulator is working rapidly to ensure that the effect on investors is as streamlined as possible by:

- issuing enhanced guidance and proactively engaging with legal professionals (and by extension their clients) to support community awareness of the power and the obligations it can impose, and
- cooperating with other relevant agencies would work to establish new forms, IT systems, and processes to ensure that the regulator can process transactions quickly from the time that the provisions commence.

To ensure that the power does not impose unnecessary regulatory costs on investors, an initial triage process will allow notifications of investments that pose little risk to proceed quickly without any intensive review by government.

Where a transaction could be contrary to New Zealand's national interest, it would be subject to more intensive review and:

- the investor would be advised, and
- the regulator would convene a group of relevant agencies (for example, the Ministry of Foreign Affairs and Trade on international obligations, economic agencies, the security agencies, and other agencies with subject matter expertise)[6] to develop advice.

Even after an investment has been subjected to more intensive review transactions can still be approved without any material government intervention.

For the small number of transactions that are found to be contrary to New Zealand's national interest, the government could then impose conditions to mitigate relevant risks or, where necessary, prohibit the transaction.

Implications of the national security and public order call in power

The national security and public order call in power will replace the emergency notification regime and is, in most respects, a narrower tool. For example:

- it will apply to a smaller subset of transactions,
- can only be used to manage national security and public order risks, rather than risks to New Zealand's national interest, and
- it is not mandatory for investors to notify the government of all call in transactions prior to these being completed, or wait for an assessment to be completed in respect of all types of call in transaction before they can proceed.

Like transactions reviewed under the emergency notification regime, it is expected that the regulator's systems will allow a significant number of call in transactions to be processed without any government action. This is because the call in power can only be used to manage significant risks to national security or public order.

Where a transaction was found to potentially present relevant risks it would be 'called in' they would be processed in much the same way as a notification escalated to further review under the emergency notification regime, including:

- where possible, the investor would be advised,[7] and

[6] For example, the Ministry of Culture and Heritage may be asked to provide advice on a transaction involving a media business with significant impact.

[7] There may be some circumstances where engagement with the investor is not possible. For example, this could be where the government's assessment is based on intelligence about an action that the investor is about to take that would harm national security, and government engagement could directly lead to that action being taken.

- the Minister may impose temporary conditions on the transaction to manage any potential but significant risks while considering if further action is required (reflecting that the transaction may already be concluded).

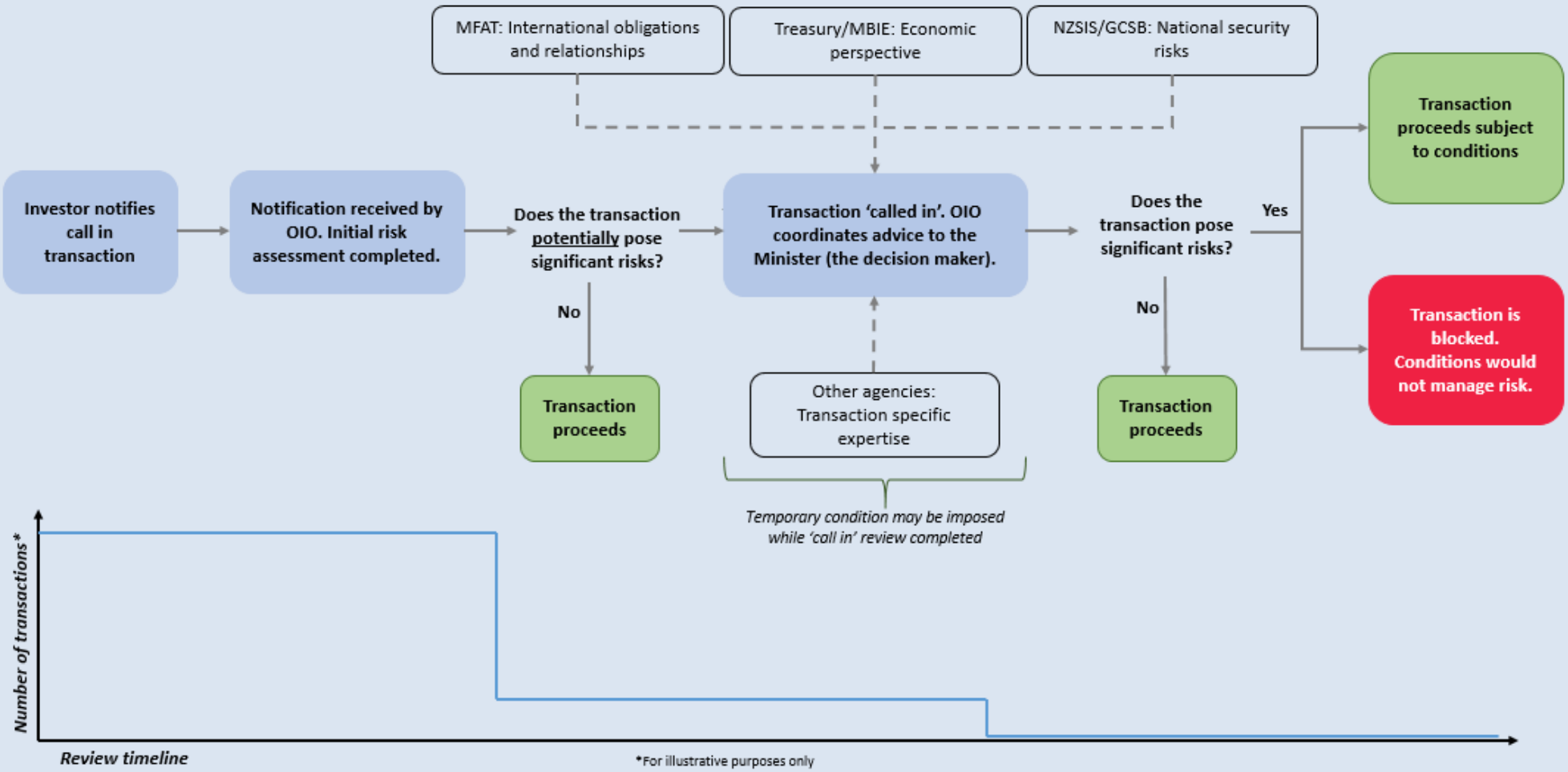
Similarly, after an investment has been 'called in', transactions may still be approved without any material government intervention.

For the small number of transactions that are found to pose a significant risk to national security or public order after being called in, the Bill works to ensure that governments respond proportionately to the risk being managed and that even at this stage transactions can proceed wherever possible. That is:

- the starting position would be the imposition of bespoke conditions to manage national security and public order risks,
- a transaction could only be prohibited (for transactions not yet entered in to) or sought to be unwound (for transactions that have been entered in to) if conditions cannot adequately manage the risk, and
- the Minister could only recommend statutory management if no other option was available.

Figure 2 provides a stylised overview of how a call in notification is expected to be assessed, and what actions may be taken to manage risks to national security or public order. The same process is will be used to process notifications received under the emergency notification regime, with the difference being that the notification power can be used to manage broader risks to New Zealand's national interest (rather than just significant risks to New Zealand's national security or public order).

Figure 2: Stylised depiction of process to assess a call in power notification



i. Transactions subject to the national interest test

The national interest test is a reserve power that will not be applied to all consent applications. However, to provide investors with certainty, the Urgent Measures Bill sets out that the national interest test would always apply to a range of transactions that always warrant additional scrutiny. These are referred to as 'transactions of national interest' (*clause 17, new sections 20A to 20B*) and include:

- transactions where a non-New Zealand government investor[8] obtains a direct, or a 10 per cent or greater indirect interest, in a sensitive asset (because foreign government's may invest to achieve strategic, rather than commercial, objectives) (*clause 17, new subsections 20A(1)(a) – 20A(1)(b)*), and

- transactions where an overseas person acquires an interest in sensitive land used to carry on a strategically important business, or a 25 per cent or greater interest in a strategically important business (because such businesses are critical to New Zealanders' wellbeing) (*clause 17, new subsections 20A(1)(c) – 20A(1)(e)*).

Strategically important businesses, in the context of the national interest test, are:

- entities with access to, or control over, dual-use or military technology,[9]

- critical direct suppliers to the New Zealand Defence Force, Government Communications Security Bureau and the New Zealand Security Intelligence Service (critical direct suppliers),

- designated ports and airports,

- designated electricity generation, distribution, metering and aggregation businesses,

- designated businesses involved in drinking water, waste water, or storm water infrastructure,

- designated telecommunications infrastructure or services,

- media businesses with significant impact,

- systemically important financial institutions and financial market infrastructure, and

- designated businesses involved in irrigation schemes.

The Urgent Measures Bill obliges the Minister to notify an investor if they consider that an application for consent involves a strategically important business and will

[8] As defined in section 6, consistent with the definition in the Overseas Investment Regulations 2005.

[9] That is, a technology listed in the strategic goods list subject to export control under section 96 of the Customs and Excise Act 2018 or otherwise prescribed in regulations.

be subject to the national interest test – unless the investor has already identified this in their application (*clause 17, new subsection 20A(2)*).

Defining strategically important businesses in the Bills

The Urgent Measures Bill will specify the categories of strategically important businesses (*clause 6, amended section 6*), however regulations will be used to refine the definitions for every category (except critical direct suppliers and media entities with a significant impact) (*clause 17, new sections 20D to 20G*). Refining these definitions in regulations will ensure that the government can respond quickly to any change in the nature of the relevant business (for example, changes in how telecommunication services are delivered) and any change in the level or types of risk that New Zealand faces. To provide investors with certainty that this power will not be used too expansively, regulations must:

- not capture a class of business that is broader than reasonably necessary to manage risks to national security or public order, and
- be made with regard to New Zealand's international obligations (*clause 52, new subsection 127(2)*).

Treasury's Regulations Disclosure Document details how the definitions of strategically important businesses will initially be refined.

Defining critical direct suppliers to defence and security agencies

Critical direct suppliers to the defence and security agencies will not be defined in regulations. Instead, they will be identified by the Minister, notified of their status, and listed on the internet, unless there would be reasonable grounds under the Official Information Act 1982 to not disclose that information (*clause 17, new section 20D*). For example, the release of certain suppliers' identities may pose national security risks.

To ensure that no more critical direct suppliers are added to this list than necessary to manage national security and public order risks, before deeming an entity as a critical direct supplier, the Minister must be satisfied that:

- the person is a direct supplier of goods or services to an intelligence or security agency,
- the goods or services are critical to the proper functioning of the agency, and
- the supply of those goods or services cannot readily be replaced (*clause 17, new section 20D*).

Publishing a list of critical direct suppliers will provide investors with a degree of certainty as to their obligations. To reduce remaining uncertainty regarding potential investments in unpublished critical direct suppliers, unpublished suppliers will have an obligation to confidentially inform prospective investors/successful investors of their status (as well as any additional information specified in the Gazette) as soon as reasonably practicable (*clause 17, new section 20E*).

Defining media businesses with significant impact

A media business with significant impact is a business that publishes news, information or opinion ('content'), or causes such content to be published if:

- all or a significant portion of the business involves the generation or aggregation of news, information or opinion (*clause 17, new subsection 20G(1)(a)*), and
- the business has a significant impact on the plurality of that content available to the public or a particular section of the public (*clause 17, new subsection 20G(1)(b)*).

For the avoidance of doubt, content is deemed available to the public (or a section of the public) irrespective of whether you have to pay for, subscribe to, or order, the content or whether the content is only targeted at particular groups of people (for example, only people who speak a certain language) (*clause 17, new subsection 20G(2)*).

Critically, unlike investments in other types of strategically important businesses, a transaction involving a media business will trigger screening requirements whether:

- at the time of the transaction, the entity satisfies the definition, or
- as a result of the transaction, the entity will satisfy the definition (*clause 17, new subsection 20G(1)(b)*). This could be triggered by, for example, a transaction that expands a relatively regional media business into one with a national presence.

While reviewing a transaction based on its potential outcome is unusual under the Act, it is appropriate given the risks that this part of the Bill seeks to manage – for example, the spread of misinformation or a reduction in media diversity. Only reviewing transactions involving entities that already had an impact on plurality would leave a significant gap in the regime, with the government unable to protect some of New Zealand's core interests, including democratic interests. However, it does create additional uncertainty for investors that may not be aware of whether a media-related transaction will be treated as a transaction of national interest. Requiring the Minister to notify applicants if an application will be subject to the national interest test reduces this risk.

In addition to the categories above, the Urgent Measures Bill also allows regulations to be made prescribing additional categories of strategically important businesses that the national interest test will always apply to investments in (*clause 52, new subsection 127(1)(c)*). This reflects the fact that, over time, additional classes of transaction may always warrant additional scrutiny in the same way as the categories specified above (for example, because the global risk environment changes).

Finally, the national interest test could be applied to any other transaction ordinarily screened under the Act at their discretion. This is important to ensure that Ministers have the discretion to assess applications that may not present as higher risk at face value or as higher risk today, but could in the future as the threat environment changes. Before applying the national interest test to an application that it would ordinarily not apply to, the Minister (who cannot be a Minister responsible for deciding on any other part of the application – see section 3(a) of this document) must consider that the application could be contrary to the national interest and advise the applicant of any decision to deem the transaction a transaction of national interest (*clause 17, new section 20B*).

ii. Transactions subject to the emergency notification regime

1. Transactions in scope of the emergency notification regime

The emergency notification regime will apply to all controlling investments by overseas persons in existing New Zealand businesses, irrespective of the value of that business. That is, any transaction that results in the following is within scope:

- a more than 25 per cent interest in a New Zealand business (c*lause 52, new subsection 82(2)(a)(i))*, and

- the increase in an existing more than 25 per cent interest in a New Zealand business to, or beyond (as relevant), a 50 per cent, 75 per cent or 100 per cent interest (c*lause 52, new subsection 82(2)(a)(ii)*).

These thresholds align with 'control thresholds' in the Companies Act, and the crossing of each threshold grants investors significantly greater control over an entity. That is:

- a more than 25 per cent interest grants negative control (the ability to block certain transactions and constitutional changes),
- a 50 per cent or greater interest grants positive control (the ability to direct the entity),
- a 75 per cent or greater interest means that no shareholder or group of shareholders can exercise negative control, and
- a 100 per cent interest grants total control of the entity.

In addition to investments in existing New Zealand businesses, the emergency notification regime will apply to the acquisition of certain proportion of an existing New Zealand business' assets. If the Act did not also capture assets, it would create opportunities for investors to circumvent the Act and create incentives to structure transactions in economically inefficient ways.

The threshold for asset acquisitions in scope of the emergency notification regime is to be set in regulations (c*lause 52, new subsection 82(2)(b)*). As outlined in Treasury's Regulations Disclosure Document, it is expected that this threshold will initially be set at acquisitions of assets worth more than 25 per cent of the relevant business' total asset value. This is consistent with the threshold for screening a transaction to acquire an interest in a New Zealand business.

2. Notification requirements under the emergency notification regime

Investors must notify the government of all transactions subject to the emergency notification regime before they are completed (c*lause 52, new subsection 85(1)*).

Further, investors cannot give effect to such transactions until the government has concluded its review of the transaction (c*lause 52, new subsection 85(2)*).

These requirements reflect the additional risks associated with foreign investment across a broad spectrum of transactions for the period of the disruption resulting from the COVID-19 pandemic.

3. Tests under the emergency notification regime

The government will review all notifications received under the emergency notification regime (c*lause 52, new subsection 84(1)*).[10] This is to determine whether the

[10] The government also has the ability to review non-notified transactions.

transaction gives rise, or is likely to give rise, to risks to New Zealand's national interest (*clause 52, new subsection 84(4)).*

If a transaction is found to, or likely to, pose risks to New Zealand's national interest the Minister can take a number of actions to manage these risks. Additional detail on these actions is in section 4(a)(v) of this document.

4. Review of the emergency notification regime

The emergency notification regime is proposed to be a temporary addition to the Act. Reflecting this, the emergency notification regime is to be reviewed at least every 90 days to determine whether it should still remain in place. The Minister must recommend that the emergency regime is removed (and replaced with the call in power) if they are satisfied that the effects of the emergency no longer justify the emergency notification regime continuing in place (*clause 52, new subsection 87A(1)).*

In undertaking this assessment, the Minister responsible for the Act must have regard to (*clause 52, new subsection 87A(2))*:

- the economic, social, and other effects of the emergency in New Zealand,
- any risks to New Zealand's national interest associated with transactions by overseas persons, and
- New Zealand's international relations and international obligations.

If the Minister is satisfied that the emergency notification regime is no longer required, they must recommend the commencement of section 60A, which replaces the emergency notification regime with the national security and public order call in power (*clause 52, new subsection 87A(3))*.

iii. Transactions subject to the national security and public order call in power

Once the emergency notification regime has expired, the call in power will be introduced. This will grant the government the enduring power to manage significant national security and public order risks posed by foreign investments in certain strategically important assets not ordinarily subject to screening. This contrasts to the national interest test, which can only be applied to transactions that would ordinarily require consent, and the emergency notification regime, which can apply to any controlling investment in a New Zealand business.

The call in power is introduced by clause 53, which has the effect of:

- introducing some additional call in power specific provisions (such as the threshold for investments in listed entities), and
- amending relevant provisions of the emergency notification regime (such as the risks to be managed, which are significant national security and public order risks as opposed to risks to the national interest).

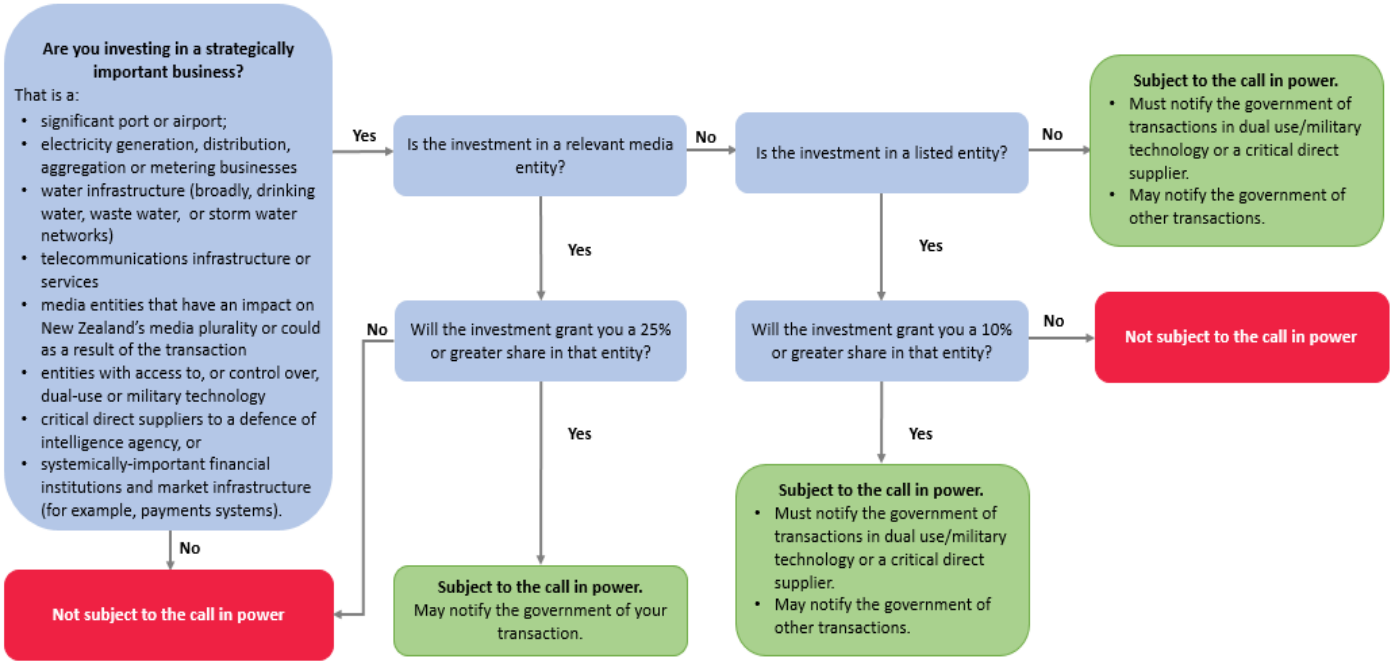
For this reason, section references to the Urgent Measures Bill are often identical in respect of the emergency notification regime and the call in power, but the clause reference differs. All references to clause 53 only relate to the call in power.

Table 1 provides a summary of the information included in this section of this document. It is also depicted in Figure 3, with the perspective of determining whether a prospective transaction would be subject to the call in.

Table 1: Overview of transactions captured by the call in power

Assets or entities within scope:	**Military and dual use technology**	**Critical direct suppliers to defence and security services**	**Sensitive information**	**Media**	**Critical national infrastructure**
Trigger level (excluding the acquisition of listed equity securities that do not grant a disproportionate level of access to, or control over, the target entity):	0%	0%	0%	25%	0%
Trigger level for the acquisition of listed equity securities other than those listed above:	10%	10%	10%	25%	10%
Notification mechanism:	Compulsory	Compulsory	Voluntary	Voluntary	Voluntary
When notification required:	Prior to giving effect to the transaction	Prior to giving effect to the transaction, unless investing in unpublished critical direct supplier where notification can occur to up a period post-closing set in regulations	Prior to giving effect to the transaction, or up to a period post-closing set in regulations	Prior to giving effect to the transaction, or up to a period post-closing set in regulations	Prior to giving effect to the transaction, or up to a period post-closing set in regulations

Figure 3: Overview of transactions captured by the call in power



1. Asset categories in scope of the call in power

The call in power will apply to investments in broadly the same categories of strategically important businesses as the national interest test will always apply to, with three exceptions (*clause 6(2), amended subsection 6(1) and clause 52(12), amended subsection 6(1)*). The call in power will:

- apply to investments in entities that develop, produce, maintain or otherwise have access to sensitive information,[11] recognising that access to this data can empower foreign actors to exert leverage over New Zealanders and/or the New Zealand government (and that the national interest test can be applied on a case-by-case basis to ordinarily screened transactions that may present these risks),

- not apply to investments in irrigation schemes. This reflects that investments in these assets are unlikely to pose national security or public order risks, but could give rise to broader national interest concerns, and

- not apply to any other category of strategically important business specified in regulations as relevant to the national interest test. That is, regulations cannot prescribe additional categories of strategically important businesses that will be subject to the call in power. This will provide investors with certainty as to the call in power's maximum scope.

[11] The definition of sensitive information will be refined in the regulations. It will broadly include genetic, biometric, health, sexual orientation and behaviour, and financial information about individuals as well as government data relevant to national security and public order (c*lause 6, amended section 6*).

2. Thresholds for transactions covered by the call in power

The call in power will increase the government's ability to manage significant national security and public order risks posed by overseas persons' control of, or access to, strategically important businesses (except in the case of media businesses with significant impact, where only control risks are to be managed).

Control risks can emerge when an investor has the ability to direct or limit an asset's use to coerce New Zealand in a way that is advantageous to the investor or a foreign state. For example:

- control over certain infrastructure, such as electricity or water supply, may leave New Zealand in a vulnerable position if the supplier withdrew service, and
- control over a media entity that has a significant impact on the plurality of content, could allow a foreign actor to spread misinformation in an electorate with the intention of undermining the integrity of New Zealand's elections.

Access risks can emerge when an overseas person has the ability to access information, physical or cyber control systems, or physical facilities that underpin the functioning of an asset and/or its ability to deliver goods and services. This can give rise to opportunities for espionage or to exert leverage over New Zealanders. For example, an overseas person acquiring access to a military technology may result in a foreign state acquiring it too.

Investment size or value does not always correlate with the existence of these risks. That is, risks can arise even when an overseas person only acquires a small share of an asset or an entity. For this reason, the call in power will apply to <u>any</u> transaction to acquire an interest in a strategically important business (excluding a media business with significant impact) (*clause 53, new subsection 82(2)(a)(iii)*). This is to ensure that the call in power, coupled with the national interest test, will equip the government to manage national security and public order risks associated with investments in strategically important businesses, irrespective of the size of the business being invested in, or the size of the interest being acquired.

The exception to this 'zero threshold', are investments that result in an investor holding less than 10 per cent of a publicly listed entity's shares, unless the investment grants disproportionate access to, or control of, that entity (*clause 53, new subsection 82(2)(a)(ii)*, with disproportionate access and control defined in *clause 53, new subsection 82(3)*.[12] The Companies Act 1993, Financial Markets Conduct Act 2013, listing rules, and commercial incentives make it extremely unlikely that the acquisition small interests in listed entities can pose risks and therefore reviewing all such transactions would impose unnecessary regulatory and administrative burden.

For media entities, recognising that only control (rather than control and access) risks are relevant (for example, the ability to direct or block certain types of reporting), the threshold for screening is obtaining a greater than 25 per cent interest (*clause 53, new*

[12] Disproportionate access and control includes, for example, observer or participation rights on the Board.

subsection 82(2)(a)(i)). These investments grant investors 'negative control'[13] and screening is therefore justified.

3. Notification requirements for transactions covered by the call in power

The call in power's effectiveness will rely, in large part, on the government's ability to detect relevant transactions. Recognising this:

- transactions involving dual-use and military technology, and critical direct suppliers – which are generally higher risk – must be notified to the government (*clause 53, new section 85*), and

- all other transactions covered by the call in power, may be notified to the government (*clause 53, new section 86*).

Timing of notifications

Reflecting their higher risk profile, mandatory notifications are required prior to the relevant transaction being given effect to, unless the investment is in an unpublished critical direct supplier. These investments, again with the exception of investments in unpublished critical direct suppliers, cannot be completed until the government has completed this review (*clause 53, new subsections 85(1) – 85(3)*).

For investments in unpublished critical direct suppliers, recognising that an investor may not learn of the entity's status until after the transaction has been completed, notification will be allowed up until a period after completion specified in the regulations (*clause 53, new subsection 85(4)*).

Failure to lodge a mandatory notification prior to the relevant deadline may result in the imposition of an administrative penalty (*clause 45, new subsection 52(1)*). It may also be subject to enforcement action (for example, where the investor did not lodge a mandatory notification with the intent of circumventing the Act). The government would also retain the ability to intervene in such transactions to manage national security and public order risks in the future.

For voluntary notifications, investors will have the opportunity to notify the government of their transaction either prior to completion, or up until a period after completion specified in the regulations (*clause 53, new section 86*).

iv. Minister's powers to review call in transactions

The Minister responsible for the Act must review all notifications to determine whether the transaction poses national security or public order risks (*clause 53, new subsection 84(1)*). Once this review has been finished, the Minister must notify the investor of whether the transaction can proceed (and any relevant conditions), cannot proceed or, in the case of completed transactions, whether the investor should dispose of their interest (*clause 52, new subsection 84(2)*). The Minister must also disclose the reasons for this decision (section 1(a)(v) of this document includes additional detail).

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[13] Negative control gives an investor the right to block a special resolution at a shareholder meeting.

The Minister also has the ability to review any non-notified transactions on a discretionary basis to determine whether they pose national security or public order risks (*clause 53, new subsection 84(3)*). This review can occur at any time before or after the transaction is entered into.

v. Minister's powers to respond to national security, public order and other risks

This section discusses new powers to manage national security and pubic order risks under the call in power and national interest risks under the temporary emergency notification regime.

An overview of these powers, and when they may be used, is included in Table 2. Figure 4 separately depicts how these powers may apply to a transaction reviewed under the call in power.

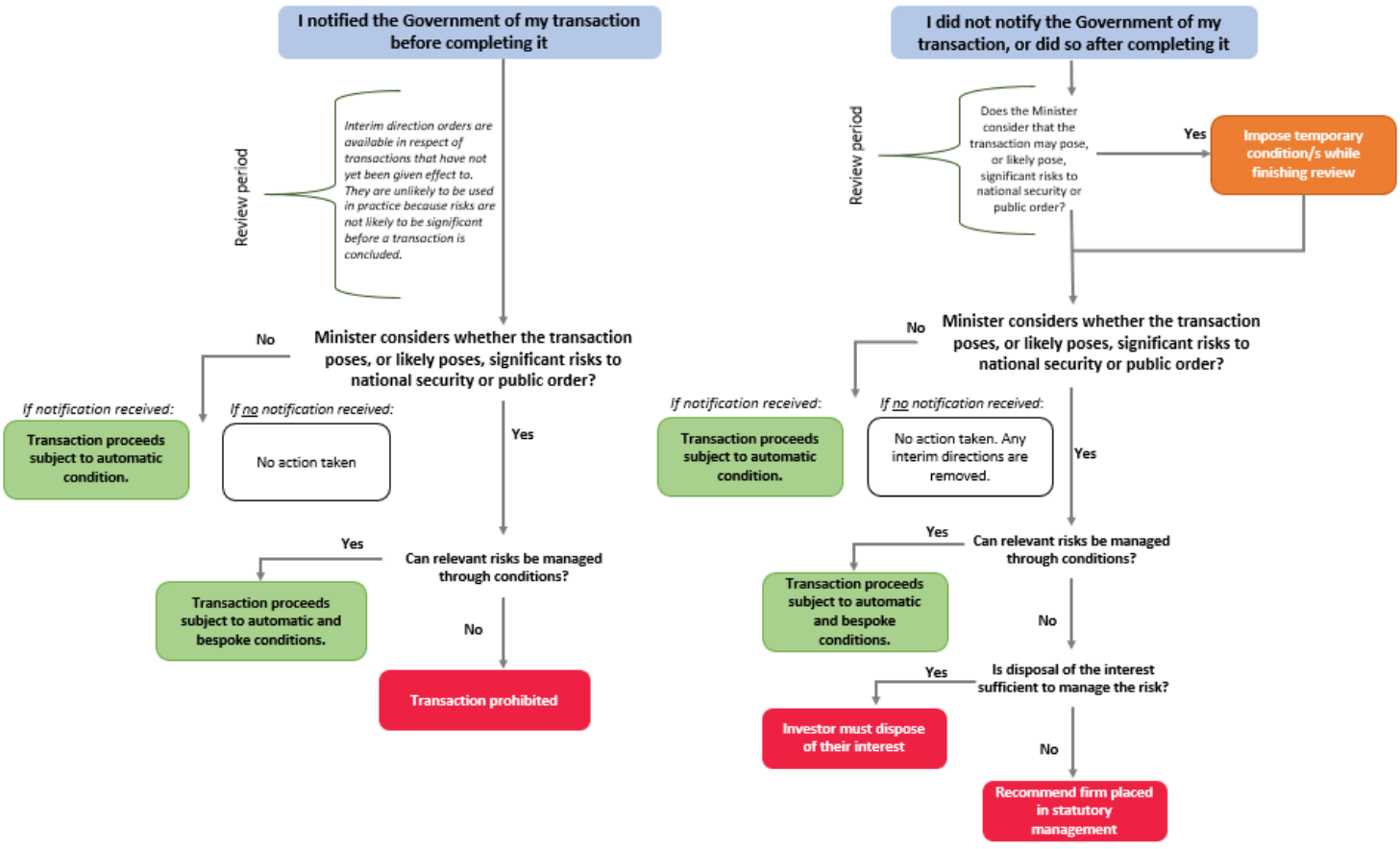
Table 2: Overview of new powers to manage national security and public order risks

Type of power	Level of intervention	When the power may be used	Threshold for using the power	Outcome of using the power
Issue a direction order	Limited	Any transaction under the emergency notification regime.	No threshold.	Transaction proceeds.
Issue a Direction Order with the automatic condition	Limited	Any call in transaction.	No threshold.	Transaction proceeds.
Issue an Interim Direction Order	Limited	Any call in transaction. Any transaction under the emergency notification regime.	The Minister considers that the call in transaction could give rise to a significant risk to national security or public order.	Conditions apply while transaction reviewed further.

Type of power	Level of intervention	When the power may be used	Threshold for using the power	Outcome of using the power
Issue a Direction Order with bespoke conditions	Moderate	Any call in transaction. Any transaction under the emergency notification regime.	In respect of a call in transaction the Minister considers that a transaction gives rise, or is likely to give rise, to a significant risk to national security or public order. In respect of a transaction notified under the emergency notification regime, the Minister concludes that the transaction is contrary to New Zealand's national interest.	Transaction proceeds subject to specific conditions.
Issue a Prohibition Order	Strong	Call in transactions identified pre-closing. Any transaction under the emergency notification regime.	In respect of a call in transaction: • The Minister has reasonable grounds to believe that a transaction gives rise, or is likely to give rise, to a significant risk to national security or public order, and • is satisfied that the risk could not be managed by issuing a Direction Order. In respect of a transaction notified under the emergency notification regime, the Minister concludes that the transaction is contrary to New Zealand's national interest.	Transaction blocked.
Issue a Disposal Order	Strong	• Non-notified call in transactions. • Call in transactions notified post-closing. • Call in transactions where a direction order has been revoked and national interest transactions where false information was provided or conditions are breached.		Investor must sell their interest.

Type of power	Level of intervention	When the power may be used	Threshold for using the power	Outcome of using the power
Recommend Statutory Management by Order in Council	Strongest	In respect of call in transactions, as above.	• The Minister has reasonable grounds to believe that a transaction gives rise, or is likely to give rise, to a significant risk to national security or public order, and • is satisfied that the risk could not be managed by issuing a Disposal Order or a Direction Order.	Take steps to manage risks arising from investors' actions and remove investor's access to and/or control over sensitive assets.

Figure 4: Overview of how risk management powers may be used for transactions screened under the national security and public order call in power



Limited intervention – issue a direction order

For reviewed call in transactions[14] that do not pose significant national security or public order risks and notifications under the emergency notification regime that are not contrary to New Zealand's national interest, the Minister can issue a direction order allowing the transaction to proceed (*clause 52, new subsection 88*). Once such an order has been issued, the Minister cannot generally take any other action in respect of that transaction, providing investors with certainty as to their investment's status.

Direction orders issued in respect of notifications received under the emergency regime can be issued without any conditions being imposed (*clause 52, new subsection 88(3))*.

Direction orders issued in respect of call in transactions are subject to an automatic condition (which is also applied to transactions of national interest) (*clause 53, new subsection 88(2)*).

The new national security and public order automatic condition

All national interest transactions and direction orders will be subject to a new automatic condition requiring the relevant investor not to act, in relation to sensitive assets, with a purpose or intention of adversely affecting national security or public order (*clause 20, new section 25C* and *clause 53, new subsection 88(2)*).

This means that an investor would need to intentionally try to disrupt New Zealand's national security or public order before the government could revoke a direction order or take action in respect of a consented transaction. Factors that could result in risk management actions being taken in respect of non-notified transactions, such as a change in the global risk environment or the investor unintentionally acting in a way that created national security risks, would not breach the condition (reflecting the additional security that notification grants investors).

The automatic condition grants the Minister the ability to intervene in transactions, on rare occasions, after consent or a direction order has been issued. This is intended to reduce the number of transactions that may be declined under the Act, relative to a scenario where this 'safety valve' was not available.

Limited intervention – issue an interim direction order

When reviewing a call in transaction that may pose significant risks to national security or public order or a transaction notified under the emergency notification regime that may pose risks to the national interest, the Minister has the power to issue an interim direction order (*clause 52, new section 91*).

The interim direction order allows the government to impose temporary conditions on a transaction (for example, limiting access to certain sensitive information) while reviewing it to determine whether the threshold for more significant action is met. Temporary conditions imposed under such an order are enforceable like other conditions imposed under the Act, however would only apply until:

- the order expires because the relevant time period specified in regulations has been met (*clause 52, new subsection 91(4)(a)*),

[14] That is, call in transactions that have been notified or the government has become aware of through other means.

- the Minister takes another action to manage national security or public order risks in respect of a call in transaction or national interest risks in respect of a notification received under the emergency notification regime (for example, issues a direction order with permanent conditions) (*clause 52, new subsection 91(4)(b)*), or

- it is revoked (*clause 52, new subsection 91(5)*).

The ability to issue an interim direction order ensures that the Minister can respond proportionately to a potential risk, even where the Minister may only have limited information. Without such a power, there is a risk that Ministers may use more powerful tools than necessary to manage potential risks.

Moderate intervention – allow the transaction to proceed subject to bespoke conditions

Direction orders can also be issued to allow a transaction to proceed subject to conditions. This is relevant to:

- call in transactions that give, or likely give, rise to significant risks to national security or public order, or

- transactions notified under the emergency notification regime that pose risks to New Zealand's national interest, but

- those risks are judged to be manageable.

Before issuing such a direction, the Minister must consider the transaction's risks as well as New Zealand's international obligations, and may consider any benefits posed by the transaction (*clause 52 new subsections 88(3)-(4), and clause 53, new subsections 88(4)-(5)*).

The Minister will be able to vary these conditions with the investor's agreement (*clause 52, new section 89*). This is analogous to the process for varying conditions imposed on consent applications.

In respect of call in transactions, this power can only be exercised where that notification has been reviewed by the government (whether because notification was received, or the government becomes aware of the transaction through other means).

Once such an order has been issued, the Minister cannot take any other action in respect of that transaction except in rare circumstances (detail below).

Benefits of notifying the government of a call in transaction

Once it receives a notification, the government must conduct a risk assessment and take an action to manage any significant national security or public order risks.

The large majority of notified call in transactions are expected to receive a direction order allowing the transaction to proceed (with or without specific conditions). A direction order offers significant benefits to investors, in that the Minister is unable to take any future action to manage national security or public order risks in respect of that transaction unless that direction order is revoked (*clause 52, new section 90*), which can only occur in very limited circumstances. These are:

- breaching a condition (including the automatic condition imposed on all direction orders), or
- the investor obtaining their direction order using materially false or misleading statements or documents (or omitting to provide relevant information), or
- the investor contravened an enforceable undertaking.

This contrasts to investors undertaking call in transactions that do not notify the government of their transaction. In this case, the government can take actions to manage national security or public order risks at any time, irrespective of whether those risks arise through a direct action of the investor or circumstances outside their control (for example, a foreign law change).

The certainty that direction orders provide is intended to create additional incentives for investor to notify the government of relevant transactions.

Strong intervention – prohibit the transaction

For:

- call in transactions that give rise to, or likely give rise to, significant risks to national security or public order that the government becomes aware of before they have been entered into, or
- notifications received under the emergency notification regime that give rise to, or likely give rise to, risks to New Zealand's national interest, and
- these risks cannot be managed through conditions,

the Minister can issue a prohibition order (*clause 52, new section 92*).

Before issuing such an order, the Minister must have regard to New Zealand's international obligations, and may consider any benefits posed by the transaction.

Strong intervention – order disposal of the relevant interest

Prohibition orders are only relevant in respect of call in transactions and transactions covered by the emergency notification regime that have not yet been entered into (that is, are not yet complete). For certain completed transactions, the Minister may instead order the investor to dispose of their interest (*clause 52, new section 93*). This situation could arise in four situations:

- it is a call in transaction that was notified to the government post-closing (as can occur for investments where notification is voluntary, or investments in non-public critical direct suppliers),

- it is a call in or emergency notification regime transaction that was not notified to the government,

- it is a call in or emergency notification regime transaction that was notified to the government and subject to a direction order, however that direction order has been revoked (*clause 52, new section 90*), or

- it is a national interest transaction that received consent or transaction that was notified under the emergency notification regime or call in power and received a direction order, however actions to manage significant national security or public order risks can still be taken consistent with *clause 52, new section 112*.

Recognising that the conditions of disposal will need to vary on a case-by-case basis (for example, disposal may need to occur faster where risks are closer to materialising), the Minister has significant latitude to formulate the disposal order (*clause 52, new subsection 93(2)*). In all cases, however, failure to comply with the conditions of a disposal order will be an offence and the Court can enforce the order.

Strongest intervention – recommend the appointment of a statutory manager

A situation could arise where the conditions for issuing a disposal order are present, but there are reasons to believe that a disposal order would not manage significant national security and public order risks. This could be, for example, due to intelligence that suggests that an investor is unlikely to comply with the disposal order in a timely way or that issuing a disposal order may trigger the investor to act in a way that generates further national security risks.

In these circumstances, the Minister may recommend that the Governor-General, by Order in Council, declare that a person who owns sensitive assets is subject to statutory management (*clause 52, new section 95*). The appointed statutory manager's objectives are then to manage relevant risks, including by removing the investors' access to and control of the sensitive assets, without unnecessarily harming the business, interests in the business, and the overseas person's interests (*clause 52, new section 99*).

This is the Bill's most powerful risk management tool and it is rightly unavailable unless all other options have been exhausted/considered to be inadequate. This power operates in the same way across both the emergency notification regime and call in power (that is, it is not amended by clause 53).

The statutory manager's powers

A statutory manager to manage significant national security or public order risks will have all the powers available under the Corporations Investigation and Management Act 1989 (CIMA). Beyond carrying on the business and preserving legitimate interests in the business, these powers can only be used to manage national security and public order risks (unless the entity is regulated by the Reserve Bank of New Zealand (RBNZ) – see below). The most notable powers include (*clause 52, new section 105*):

- all powers, rights, and privileges of the business,
- for body corporates, all the powers of the members in general meeting and of the board of directors,
- for corporations other than body corporates, all the powers exercisable by its governing body,
- the powers of a liquidator,
- to retrieve property that was improperly removed, and
- to establish a new corporation and transfer parts of the business to the new corporation.

Collectively, these powers allow the statutory manager to take actions that remove the overseas person's access to, or control over, sensitive New Zealand assets where that access or control gives rise to national security or public order risks. Statutory management allows (*clause 52, new sections 101 to 104*):

- the business to continue without creating ongoing risks to national security or public order while the overseas person's connection to the business is removed (which could include, for example, moving sensitive assets into a new corporation, or selling the overseas person's interest off to a buyer that does not give rise to relevant risks), and
- the business to run without creating relevant risks once the period of statutory management ends (for example by, if necessary, amending the entity's constitution and governance arrangements, or terminating risky contracts or other legal arrangements).

When a statutory manager is appointed, a moratorium is imposed that severely restricts how people can interact with the business, including prohibiting debts being claimed from the business (*clause 52, new section 105(a)*). To keep the business running as normal, the statutory manager can waive parts the moratorium.

Statutory management of entities regulated by the RBNZ

The Bill includes special provisions governing how an entity regulated by the RBNZ (for example, a registered bank) can be placed into statutory management, and how statutory management should be conducted if this does occur. This recognises that placing such an entity into statutory management could have negative consequences for financial system stability. The main changes are that:

- the Minister must consult the RBNZ before recommending that a regulated entity be placed into statutory management (*clause 52, new sections 111(1)-(2)*),

- the statutory manager would be jointly directed by the regulator and the RBNZ (*clause 52, new section 111(6)*), and
- in exercising their duties, the statutory manager must have regard (in addition to the ordinary purpose of statutory management in new section 94) to the need to maintain public confidence in the operation and soundness of the financial system and the need to avoid significant damage to the financial system (*clause 52, new section 111(3)*).

vi. Reporting requirements for transactions subject to the national interest test, emergency notification regime, or call in power

To support public and investor confidence in the national interest test, emergency notification regime, and call in power, and create Ministerial accountability, it is important that these three powers (and associated risk management tools) are used transparently.

Consequently, Ministers will be required to publish any:

- decision to decline consent on national interest grounds, and
- any decision to take other actions to manage national security and public order risks related to call in or national interest transactions (other than issuing a direction order only subject to the automatic condition) (*clause 52, new subsection 129(1)*).

This publication must include both a summary of the decision as well as the reasons for it being taken (*clause 52, new subsection 129(2)*).

The only exception to this requirement is where there are good reasons for withholding that information under the Official Information Act 1982 (*clause 52, new subsection 129(3)*). This could include, for example, where the release of information may give rise to a national security risk.

b. Enhanced enforcement and risk management tools (*Urgent Measures Bill*)

Stronger enforcement powers will improve the government's ability to manage the risks of overseas investment and support the operation of new powers to manage national security and other risks. Reforms to the regulator's enforcement powers are all contained in the Urgent Measures Bill.

The regulator has enforcement tools that are effective for responding to relatively serious breaches that warrant disposal of the investment, and low-level breaches that require less formal tools, such as amnesty notices. However, current tools do not allow the regulator to effectively respond to:

- breaches where the current maximum level of pecuniary penalty ($300,000) may not sufficiently deter non-compliance,

- mid-level breaches, which require sufficiently serious sanctions to deter future non-compliant behaviour but do not warrant court action. The regulator's principal tool in such circumstances, settlement agreements, are of limited effectiveness in such circumstances because they are not directly enforceable, and

- specific national security and public order risks.

i. Increased pecuniary penalties

Pecuniary penalties are an important tool for deterring non-compliance, however they are currently too low to always achieve this. To ensure that they serve this function, the Urgent Measures Bill increases the maximum fixed penalty and creates a maximum fixed penalty for individuals of $500,000 and of $10 million for other parties (*clause 38, amended subsection 48(2)(a)*).

The significant increase reflects the high threshold at which a pecuniary penalty is likely to have strong reputational or financial deterrent effects on a corporate investor, or an investor acting with some intention of disrupting New Zealand's public order or other core national interests.

The differential upper limit reflects the often-significant difference in the ability of individuals and other parties (such as corporations) to pay a pecuniary penalty. These penalties are consistent with those found in the Commerce Act 1986.

ii. Enforceable undertakings

The Urgent Measures Bill improves the regulator's ability to respond to mid-level breaches by empowering it to enter into enforceable undertakings.

Enforceable undertakings grant the regulator a broad discretion to accept an undertaking from an investor to take specific actions (*clause 35, new section 46A*), in exchange for the regulator agreeing not to bring proceedings in respect of a contravention or an alleged contravention of the Act (*clause 35, new section 46E*). The undertakings can be Court enforced, with maximum pecuniary penalties for breach of an undertaking set at $50,000 for an individual, and $300,000 for other parties (*clause 436, new subsection 46F(2)(a)*).

Because enforceable undertakings are intended to respond to breaches/alleged breaches of the Act that otherwise may be taken before a Court, it is critical that they operate transparently so that the public can have confidence in the regulator's enforcement of the Act. To achieve this, the regulator must publish any decision to accept an enforceable undertaking, including:

- a summary of the circumstances and nature of the contravention/alleged contravention,

- why an enforceable undertaking is the appropriate response, and

- any amounts payable under that undertaking (*clause 35, new subsections 46C(1) and (2)*).

Enforceable undertakings will allow the OIO to respond to breaches and alleged breaches of the Act in a more proportionate and tailored way. This is expected to increase compliance with the Act.

These powers are modelled on similar provisions in the Commerce Act 1986 and Health and Safety at Work Act 2015.

iii. Injunctive relief

To manage potential risks to national security or public order, but also potential offenses more generally, it is important that the regulator can seek a Court order to prevent actions that may result in a breach of the Act. To achieve this, the Urgent Measures Bill clarifies that the Court can grant an injunction when a person is going to act in a way, or fail to take an action, that will contravene the Act or regulations (*clause 42, new section 51AAA*). This is consistent with powers granted to other regulatory agencies, including the Commerce Commission and Financial Markets Authority.

This provision is not intended to expand the High Court's jurisdiction, only to clarify the actions that the regulator can seek from the Court.

c. Other reforms to strengthen the regime (*Urgent Measures Bill*)

i. Ensuring classified security information is protected

Any action to manage significant national security or public order risks is likely to be informed by classified security information (CSI). Consistent with other decisions taken under the Act, such risk management actions may be reviewed or enforced in Court, where the CSI would normally need to be disclosed to the non-Crown party and heard in open court consistent with natural justice requirements.

However, disclosure of CSI might compromise New Zealand's national security or international relations (for example, by compromising sources of intelligence). It is therefore necessary that CSI can be protected from unsafe disclosure.

Consistent with analogous regimes (particularly drawing on the Telecommunications (Interception Capability and Security) Act 2013), the Urgent Measures Bill therefore contains explicit provisions on how CSI should be managed during Court proceedings. These provisions protect CSI, while respecting the right to natural justice and the principle of open justice to the extent possible and are compliant with New Zealand's Bill of Rights Act. Specifically, the Urgent Measures Bill seeks to balance these goals by:

- granting the head of a security or intelligence agency, or the Attorney General (for information not held by a security or intelligence agency), discretion to certify that that information is CSI (in accordance with a legislative definition) (*clause 52, new section 114(1)(c)*),

- requiring the Crown to disclose CSI to the court, but not to the non-Crown party unless done so in accordance with specified protections or procedures (including by excluding the non-Crown party from parts of the proceedings) (*clause 52, new section 115*),

- mitigating the impacts on the non-Crown party's natural justice rights by allowing the court to appoint a special advocate that can access and respond to the CSI on behalf of the respondent (*clause 52, new sections 117 to 122*), and

- requiring the court to determine the proceedings on the basis of the CSI, even if that information is not able to be fully disclosed or responded to by all parties in the proceedings (*clause 52, new section 123*).

Relying on the existing general civil law to balance the protection of CSI against natural and open justice rights is undesirable because it is:[15]

- uncertain: CSI could be managed via three different existing methods (the common law doctrine of public interest immunity, the Crown Proceedings Act 1950 and the Evidence Act 2006) and it is unclear how these interact or which takes precedence,

- unfair: claims by the Crown of public interest immunity (at common law or via its expression in the Crown Proceedings Act) can disadvantage the respondent without any mitigations available, and

- insufficient: there is no statutory authority for the Court to use a closed procedure to hear CSI in the absence of the non-Crown party (where necessary), nor are there mitigations available to protect the non-Crown party's natural justice rights if this was to occur.

There is an ongoing piece of work being completed by the Government to respond to work by the Law Commission in relation to national security information in courts. The Government has indicated that Parliament should expect to see the outcomes of this work at a later date.

ii. Information sharing on national security and public order risks

There are a range of government agencies that hold information relevant to determining whether a transaction gives rise to national security or public order risks.

For the call in power and national interest test to work as intended, it is therefore critical that relevant agencies can share this information (which could include personal information). However, the Privacy Act 1993 can create practical and potential legal difficulties that limit agencies' ability to share personal information needed to assess national security and public order risks.

To resolve this, the Urgent Measures Bill establishes a statutory information-sharing regime between prescribed government agencies (*clause 52, new section 126*). This empowers these agencies to disclose any information they hold in relation to the performance or exercise of their functions, duties, or powers, if they have reasonable grounds to believe that the disclosure of that information is necessary or relevant to assessing national security and/or public order risks that might arise from a proposed or actual overseas investment.

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[15] As identified by the Law Commission in its 2015 report *The Crown In Court: A Review Of The Crown Proceedings Act And National Security Information In Proceedings.*

To balance the need for privacy, against the need to ensure that national security and public order risks can be managed, the disclosure of personal information that did not meet this threshold would not be permitted.

Further agencies may be added to the information sharing regime through regulations, if necessary (for example, because transactions that pose significant national security risks become more common in a sector of the economy where another agency has relevant expertise).

iii. Information sharing on money laundering and terrorism financing risks

Property and business investments can be used for money laundering. While the national interest test and call in power will allow these risks to be better managed through New Zealand's foreign investment screening regime, they do not overcome the fact that the regulator cannot share transaction information to assist in enforcement of money laundering and countering financing of terrorism laws more broadly.

To resolve this, the Urgent Measures Bill amends the Anti-Money Laundering Countering Financing of Terrorism Act 2009 (AML/CFT Act) to empower the regulator to exchange information collected under the Act with other regulators and the police as necessary to ensure compliance with the AML/CFT Act (*clause 58, new subsection 140(2)(pa) in the AML/CTF Act*).

d. More enduring protection for farm land (*Other Measures Bill*)

This section details amendments to strengthen requirements for the acquisition of farm land by overseas persons. These provisions are contained in the Other Measures Bill.

i. Higher threshold for the acquisition of farm land

Farm land has significant cultural value and is a core part of New Zealand's economy.

In 2017, the Government issued a Ministerial directive letter that raised the bar for overseas investments in rural land (all non-urban land over five hectares, excluding forestry land). This required overseas persons to deliver greater benefits – with a genuine point of difference from what a New Zealander could, or would, do – to obtain consent to acquire rural land (relative to other types of land).

The Other Measures Bill embeds this requirement in the Act in a more targeted way by focussing on land that is or includes farm land of at least five hectares (*clause 8, new section 16A(1C)*), rather than rural land more generally. Consistent with the directive letter, however, before granting consent to such a transaction Ministers must:

- give economic benefits and New Zealand participation or oversight high importance relative to other factors that make up the benefit to New Zealand

test when considering the application (*clause 8, new subsection 16A(1C)(a)*),[16] and

- ensure that the application offers substantial benefits against these factors (for example, the introduction of new technology) (*clause 8, new subsection 16A(1C)(b)*).

To ensure that these requirements are not unnecessarily burdensome, the Minister will have flexibility to not apply them where not appropriate to do so (for example, where the regulatory burden is disproportionate to the relevant transaction) (*clause 18, new subsection 16A(1D)*). This includes transactions that:

- are minor or technical (for example, this could include a boundary adjustment for land already in overseas ownership), or

- where the overseas person's level of ownership or control does not materially change.

ii. Enhanced advertising requirements for farm land

Farm land must be advertised before it is offered to an overseas person to help ensure that New Zealanders have the opportunity to acquire, enjoy and use farm land. However, the current advertising requirements are complex and do not meet this objective (for example, currently advertising can occur after a sale agreement has been entered into, with such advertising unlikely to be genuine).

At the same time, the regulator does not have flexibility to allow alternative forms of advertising even when they may be the most appropriate option for some pieces of farm land (for example, land of such high value that only a limited pool of known individuals would be interested).

The Other Measures Bill puts forward a number of changes to better ensure that the farm land advertising requirements deliver on this objective. That is:

- advertising must occur before an agreement has been entered into with an overseas person (*clause 7, replaced subsection 16(1)(f)*), and

- the Minister will have the ability to:

    - exempt both particular investments and classes of investments from the requirements (*clause 10, replaced subsections 20(1)(a)-(b)*),[17] and

    - exempt a person or class of persons from some of the advertising requirements (for example, the requirement for public advertising in the example provided above) (*clause 10, new subsection 20(2)*).

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[16] This does not preclude Ministers from giving other factors high relative importance as well (*clause 8, new subsection 16A(1E)*). For example, for environmentally sensitive pieces of farm land, it may also be appropriate for the environmental factor to receive high relative importance.

[17] Note, this power already existed under the Act but has been redrafted.

To ensure confidence in how the Minister exercises this flexibility, the Other Measures Bill includes protections to ensure that such exemptions are responsibly issued. For example:

- exemptions can only be issued when it is necessary, appropriate or desirable based on the particular investment case (*clause 10, new subsection 20(3)*),
- the exemption cannot be broader than reasonably necessary to address those relevant circumstances (having regard to the Act's purpose) (*clause 10, new subsection 20(4)*),
- exemptions cannot be in force for more than five years (*clause 10, new subsection 20(10)*), and
- exemptions and reasons for them being granted must be published on the internet (unless, in the case of individual exemptions only, reasons for withholding publication would exist under the Official Information Act 1982) (*clause 10, new subsections 20(7)-(8)*).

e. Better recognising Māori cultural values (*Other Measures Bill*)

When considering whether to consent to an investment in sensitive land, the Act allows decision makers to consider protections for certain natural and physical resources and sites of significance to Māori, such as wāhi tapu. Consultation with iwi, however, indicated that the Act could support greater awareness of, and access to, culturally sensitive sites, such as wāhi tūpuna, by expanding what can be considered as a benefit of foreign investment.

As part of broader changes to the Benefit to New Zealand test, the Other Measures Bill creates additional incentives for investors to increase their knowledge of such sites and provide, protect or enhance access across land to such sites for the purposes of exercising kaitiakitanga, or stewardship of historic heritage or the environment. It does so by empowering decision makers to also consider the provision of such factors as a benefit under the benefit to New Zealand test. (*clause 9, replaced subsections 17(2)(c)-(d)*).

f. Better recognising the importance of water (*Other Measures Bill*)

There are a range of public concerns about overseas investments involving water bottling or the bulk export of water for human consumption that cannot currently be considered when determining whether to grant consent to an overseas investment in sensitive land.[18] These include:

- potential negative environmental effects, and
- that overseas persons may profit from a high-value resource without paying a charge.

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[18] The Act currently allows for only limited consideration of the environmental impact of proposed investments in sensitive land involving water bottling — decision makers can consider whether there are mechanisms in place to protect or enhance significant indigenous vegetation or fauna, for example, but not broader impacts on water quality and sustainability.

The Resource Management Act 1991 (RMA) is the principal tool for managing the environmental effects of water extraction (including water bottling). However, recognising legitimate public concerns on this issue, the Urgent Measures Bill will enable Ministers to consider whether any investment in sensitive land that includes water bottling or bulk water extraction for human consumption will have a positive or negative effect on water quality and sustainability, before granting consent (*clause 9, new subsection 17(2)(v)*).

This will be the only factor in the benefit to New Zealand test where decision makers can consider whether a proposed investment will have a negative effect, and deduct any negative effect from the overall benefit offered by that transaction (*clause 9, subsection 17(2)(v)*). This differs to other factors, where any negative effect against a factor can only be set-off against positive effects on the same factor (for example, loss of jobs in one location against increased jobs in another), with the worst possible outcome of this offsetting being that no benefit is recorded (that is, the assessment cannot result in a 'net negative effect' that is subtracted from the overall level of benefit. Section 2(g)(i) of this document provides additional detail on the rationale for this.

g. Enhanced tax disclosures (*Other Measures Bill*)

There are public concerns about overseas persons acquiring sensitive New Zealand assets and paying a low level of income tax in New Zealand.

The Income Tax Act 2007 (Tax Act) and international agreements are the main tools for regulating income tax in New Zealand. This recognises that the imposition of income tax is an issue with domestic and international dimensions. The Tax Act reflects international best practice in this area by:

- appropriately limiting double taxation that could reduce New Zealand's attractiveness to productive overseas investment, and
- maintaining New Zealand's tax base by limiting tax minimising activities.

Despite this, through the consent requirements it imposes on investments in significant business assets, the Act can also play an important role in protecting the integrity of New Zealand's tax base.

For example, the Act already grants decision makers the ability to consider an investor's history of tax compliance before granting consent as part of the investor test. The Urgent Measures Bill maintains this position by ensuring that when considering whether an investor is suitable to own or control sensitive New Zealand assets, Ministers can consider:

- any penalties incurred in the last 10 years associated with an abusive tax position or tax evasion (or similar act), or
- any non-payment of $5 million or more in tax due and payable at the time of the application (*clause 15, new subsections 18A(4)(e)-(f)*).

In addition to the above, the Other Measures Bill includes a new requirement for investors in significant business assets to disclose information about their proposed investment's tax structure and treatment (*clause 16, new section 38A*). Information

about large investments at this stage will assist Inland Revenue in monitoring compliance with New Zealand tax law.

An exhaustive list of the types of tax information applicants are required to provide will be included in the regulations (see Treasury's Regulations Disclosure Document). This information will not determine whether an investment gains consent, but an application cannot proceed unless it is provided.

2. Reforms to reduce regulatory burden

Section 2 details reforms to reduce the Act's regulatory burden.

The **Urgent Measures Bill** includes provisions to:

- reduce the amount of sensitive adjoining land subject to consent (*Schedule 1AAA of the Urgent Measures Bill*),
- reduce the number of fundamentally New Zealand entities that must get consent to acquire assets reviewed under the Act (*Schedule 1AAA of the Urgent Measures Bill*),
- reduce the number of small transactions that do not change control of sensitive assets that must get consent (*Schedule 1AAA of the Urgent Measures Bill*),
- reduce the number of low risk transactions completed by financial institutions that are subject to consent (*Clause 49 of the Urgent Measures Bill*)
- simplify the investor test (*Clauses 15-16 of the Urgent Measures Bill*), and
- introduce statutory time frames for decision making (*Clause 25 of the Urgent Measures Bill*).

These reforms are detailed in sections 2(a) to 2(g) of this document.

The **Other Measures Bill** includes provisions to:

- reduce the number of short term leases that are screened (*Clause 6 of the Other Measures Bill*),
- reforms to simplify the benefit to New Zealand test (*Clauses 8-9 of the Other Measures Bill)*, and
- introduce a 'repeat investor' process for investors that have previously satisfied the investor test (*Clause 14 of the Other Measures Bill*),

These reforms are detailed in sections 2(h) and 2(i) of this document.

The only exception to this is detail on the 'repeat investor' process, which is detailed with the other proposed changes to the investor test in section 2(f).

Additional information on exemptions proposed in this section

The Urgent Measures Bill includes provisions to effectively reduce the number of transactions screened by providing standing consent (as relevant) for a number of transactions.

This automatic/standing consent regime will remain in place until the Other Measures Bill is considered by Parliament, with this Bill replacing the Urgent Measures Bill provisions with permanent exemptions for these transactions.

This is consistent with the Government's view that changes that remove transactions from the Act's scope should not be progressed without a full Select Committee review process. Recognising, however, that these changes would deliver meaningful savings to businesses, the COVID 19 Bill includes provisions that effectively grant automatic consent.

a. Screening less "sensitive adjoining land" (*Urgent Measures Bill*)

Transitional provisions in the Urgent Measures Bill

The Urgent Measures Bill will provide a statutory standing consent for the acquisition of sensitive adjoining land that will not require consent under the Other Measures Bill for the period prior to the Other Measures Bill taking affect (*schedule 1, new part 4 in Schedule 1AA, section 32*).

In respect of transactions that require consent because of an adjoining land sensitivity that does not exist under the Other Measures Bill, and another sensitivity under the Act (for example, the land is also residential land), the consent requirements for that transaction are those that would apply if the adjoining land sensitivity did not exist (*schedule 1, new part 4 in Schedule 1AA, section 32*)

Overseas persons do not need notify the regulator of transactions entered into under the Urgent Measures Bill that are subject to automatic consent.

Additional detail on the types of sensitive adjoining land that will no longer require consent under the Other Measures Bill is below.

Enduring Provisions in the Other Measures Bill

The Act requires overseas persons to obtain consent to acquire not only land that is sensitive in its own right (for example, the foreshore), but in some circumstances also requires consent for the acquisition of land deemed sensitive because it adjoins land with sensitive characteristics.[19] However, some of this 'sensitive adjoining land' is easily accessible and of limited environmental, economic, or cultural value with the result that screening imposes disproportionate regulatory costs on investors relative to the risks being managed. For example, consent may be required to acquire commercial land in an industrial area because it adjoins land designated as a recreation reserve (such as a sports field).

[19] Adjoining land with sensitive characteristics is defined by Table 2 in Schedule 1 of the Act ('Table 2').

Other problems with the current treatment of sensitive adjoining land include the fact that adjoining land of similar sensitivity is not treated equally across New Zealand,[20] and that the sheer number of factors that can trigger an adjoining sensitivity increase the cost of determining if consent is required to complete a transaction (and thereby the Act's overall regulatory burden).

To address these issues, the Other Measures Bill will ensure that consent is no longer required for easily accessible sensitive adjoining land of less environmental, historic or cultural value, and make the way land is treated under the Act more consistent. It will do this by abolishing section 37 of the Act (*clause 15*) and, in general terms, no longer requiring consent to acquire land adjoining:

- regional parks of less than 80 hectares or that have not been protected under the Local Government Act 2002,
- esplanade strips and roads next to the sea or a lake,
- esplanade reserves and recreation reserves that are not managed by the Department of Conservation, and
- land that is subject to a heritage order, or includes a historic place or area.

This has the effect of the Act only requiring consent to acquire land adjoining, in general terms:

- marine and coastal area,
- bed of a lake,
- national parks,
- regional parks if they exceed 80 hectares in area,
- land held for conservation purposes under the Conservation Act 1987 (if they exceed 0.4 hectares in area),
- reserves managed by the Department of Conservation (if they exceed 0.4 hectares in area), and
- some land significant to Māori (if they exceed 0.4 hectares in area). This includes, for example, Māori reservations to which section 340 of the Te Ture Whenua Māori Act 1993 applies.

This change is expected to reduce the number of transactions screened under the Act by around 15 per cent. The full list of sensitive adjoining land proposed under this Bill is at c*lause 22(3)*.

[20] Section 37 of the Act and related legal instruments requires some sensitive adjoining land to be determined by reference to local authorities' zoning and planning arrangements.

The exception to this is land and reserves owned or managed by a collective group of Māori or where such a group have ownership, control, or participation rights. In respect of such land:

- regulations will be made to list the Treaty settlement legislation and other similar legislation which include references to the relevant land, and

- the regulator must keep a public internet list to provide investors with certainty as to any potential obligations they may have under the Act (*clause 25, new section 37A*).[21]

b. No longer screening fundamentally New Zealand entities (*Urgent Measures Bill*)

Transitional provisions in the Urgent Measures Bill

For the period prior to the passage of the Other Measures Bill, the Urgent Measures Bill will provide New Zealand listed issuers that satisfy relevant ownership and control criteria with consent in respect of all transactions entered into under the Act (*Schedule 1, new part 4 in Schedule 1AA, section 31)*.

Overseas persons do not need to notify the regulator of transactions entered into under the Urgent Measures Bill that have a standing consent.

Additional detail on how these changes are reflected in the Other Measures Bill is below.

Enduring Provisions in the Other Measures Bill

The way the Act defines overseas persons works well for individuals but not always as well for legal persons like companies, and managed investment schemes.

A body corporate is treated as an overseas person if it is 25 per cent or more owned or controlled by one or more overseas persons, irrespective of whether overseas persons have any actual ability to exercise control over sensitive assets (such as in widely held companies where coordination is difficult if not impossible).

This definition leads to some bodies corporate and managed investment schemes that most New Zealanders would consider to be fundamentally New Zealand entities, and that are majority owned/controlled by New Zealanders, being overseas persons. Requiring these entities to obtain consent is inconsistent with the Act's purpose.

The definition causes additional problems for listed bodies corporate. This is because an estimate of the ownership structure of a listed entity typically takes around five working days, and it can take longer to determine beneficial ownership, if at all. This results in:

[21] Note: this provision is introduced through the Urgent Measures Bill but only relevant to the operation of the Other Measures Bill.

- some bodies corporate that are close to, but have not reached, the 25 per cent threshold obtaining consent to ensure that they do not inadvertently breach the Act, and

- other bodies corporate likely unintentionally breaching the Act and exposing themselves to the risk of enforcement.

To resolve these issues for listed bodies corporate,[22] the Other Measures Bill introduces a new definition for 'New Zealand listed issuers' that includes both an ownership and a control test (as opposed to the single test that currently applies). That is, a New Zealand listed issuer will not be treated as an overseas person unless:

- an overseas person or persons have a 50 per cent or greater beneficial entitlement or interest in its securities ('the ownership test') (*clause 5, replaced subsection 7(3)(a)*), or

- an overseas person or persons holding 10 per cent or more of the listed entities' shares cumulatively have the right to:

    - control the composition of 50 per cent or more of the entity's governing body (*clause 5, replaced subsection 7(3)(b)(ii)(A)*), or

    - exercise or control more than 25 per cent of the entity's voting power (collectively the 'control test') (*clause 5, replaced subsection 17(3)(b)(ii)(B)*).

These changes mean that a listed issuer cannot be an overseas person unless the majority of economic returns flow offshore, or overseas persons have a conceivable ability to exercise negative control[23] over sensitive New Zealand assets.

In addition to this change for listed issuers, the Urgent Measures Bill grants the Minister the power to exempt persons, transactions, rights, interests, or assets that the Minister considers to be fundamentally New Zealand owned or controlled, or to have a strong connection to New Zealand, from the definition of overseas person (*clause 49, new subsection 61B(c)(viii)*).

The Government has agreed to make regulations setting exemption criteria for non-listed bodies corporate, managed investment schemes, and retirement schemes. These are detailed in Treasury's Regulations Disclosure document.

More broadly, the definition of overseas person for all other non-natural persons has been amended such that a more than 25 per cent interest must be held by overseas persons before the entity can be deemed to be an overseas person (*clause 7, amended section 7*). This reflects the fact that a more than 25 per cent interest is necessary to exercise negative control.

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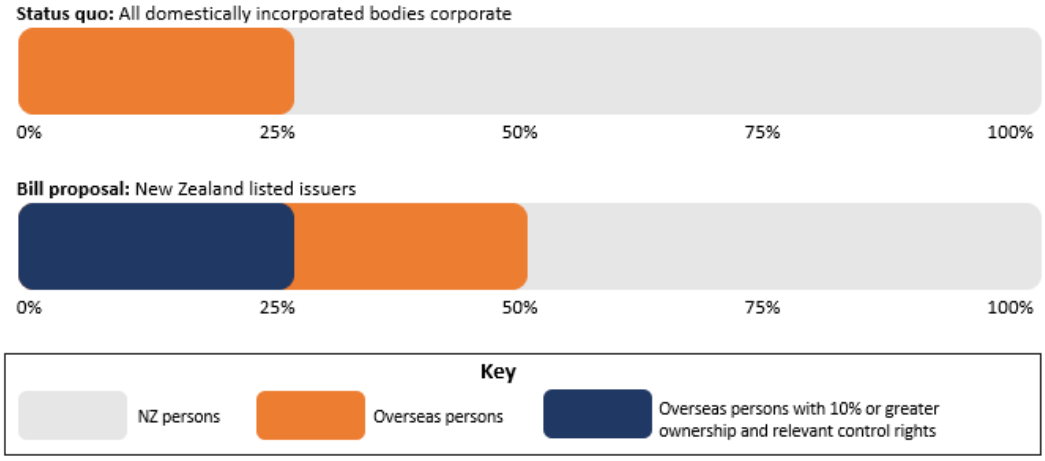
[22] That is, entities incorporated in, and listed on a financial market licensed in, New Zealand. It does not include entities that only have listed debt securities (*clause 6(2), amended section 6*).

[23] Negative control gives an investor the right to block a special resolution at a general meeting, as well as some significant transactions.

Figure 5 illustrates the new ownership and control thresholds for New Zealand listed issuers proposed by the Other Measures Bill.

Figure 5: Ownership and control thresholds for New Zealand listed issuers



c. No longer screening certain transactions that do not grant control (*Urgent Measures Bill*)

Transitional provisions in the Urgent Measures Bill

The Urgent Measures Bill will provide a statutory standing consent to certain 'tipping point' transactions that do not result in a New Zealand listed issuer breaching a control threshold and will not require consent once the Other Measures Bill has passed (*schedule 1, new part 4 in Schedule 1AA, section 31*). Overseas persons do not need notify the regulator of transactions entered into under the Urgent Measures Bill that are subject to automatic consent.

Additional detail on the enduring exemption for certain 'tipping point' transactions that is included in the Other Measures Bill is provided below.

Enduring provisions in the Other Measures Bill

An overseas person (a tipping point investor) requires consent for an investment that results in an entity (that they invest in) that already holds sensitive land or fishing quota becoming an overseas person.[24] As a result, a tipping point investor could be required to satisfy the benefits to New Zealand test even though they may have little to no control over any sensitive assets. The requirements disincentivise investment in New Zealand and increase the risk of overseas persons inadvertently breaching the Act. This is because:

[24] For example, if a company is 24.9 per cent overseas owned then an overseas person would be required to obtain consent if it purchases the final 0.1 per cent that 'tips' the company into being 25 per cent overseas owned and an 'overseas person'.

- for listed entities, consent requirements could be triggered many times a day, and securities may only be held for short periods (that is, compliance costs exceed likely returns),

- it is difficult to determine when a transaction will trigger a requirement for consent, and

- even if an entity seeks consent for its investment because it believes the investment's value will exceed the compliance cost, it is challenging to satisfy the screening criteria. This is because it is difficult to demonstrate any additional benefit to New Zealand from owning a small, non-controlling stake in an entity.

The Other Measures Bill amends the tipping point in respect of investments in New Zealand listed issuers so that it is only triggered if the relevant transaction resulted in the target entity (A) breaching the control test outlined in new subsection 8(3)(b) (*clause 6, replaced subsection 12(2)*). In effect, this means that post-transaction the overseas person would need to hold at least 10 per cent of a class of A's securities that conferred control rights before consent for triggering the tipping point could be required.

This resolves the tipping point's primary problems for investments in New Zealand listed issuers because:

- the screened transaction could result in the overseas person gaining a degree of control over sensitive New Zealand assets that were obtained without consent (because the owner was not previously an overseas person), and

- it will be simple for overseas persons to determine if their transaction will require consent, because all substantial product holders and their shareholdings in a listed entity are reported publicly.

d. Facilitating trade in residential mortgage obligations (*Urgent Measures Bill*)

The RBNZ has developed a new type of residential mortgage backed security to support confidence and liquidity in New Zealand's financial markets (residential mortgage obligations, 'RMOs'). This instrument does this by:

- reducing contingency risks for the RBNZ as a lender of last resort by ensuring financial intermediaries supply sufficient high quality and liquid assets, and

- providing issuers and investors with an additional funding and investment instrument, supporting the development of deeper capital markets.

Trade in RMOs involving overseas persons may require consent because they could grant the owner an interest in significant business assets. Given the cost and delay that this would impose on transactions involving RMOs, consent requirements could significantly undermine the RBNZ's ability to deliver on its financial stability objectives.

To resolve this, the Urgent Measures Bill adds an additional purpose the Act's exemption making power to ensure that the Minister may make regulations exempting persons, transactions, rights, interests, or assets as necessary to support the issuance and management of these RBNZ-regulated securities (*clause 49, new subsection 61B(c)(ix)*).

e. Facilitating lending (*Urgent Measures Bill*)

Currently the Act requires registered banks and other financial institutions that are overseas persons (which is most of New Zealand's financial institutions by market share) to receive consent to lend more than $100 million through one or more related transactions. This is despite the fact that lending in the ordinary course of business is very low risk and supports economic growth.

To resolve this, the Urgent Measures Bill adds an additional purpose to the Act's exemption making power to ensure that the Minister may make regulations exempting persons, transactions, rights, interests, or assets as necessary to support the issuance of loans when this is done by financial institutions (*clause 49, new subsection 61B(c)(iva)*).

f. Better targeting the investor test (*Urgent Measures Bill, unless noted otherwise*)

This section details the changes to the investor test, which applies to almost all transactions. It provides a framework for Ministers to determine if an overseas person is suitable to invest in New Zealand. However, it has a range of problems:

- it does not have a clear purpose,
- it enables consideration of irrelevant matters,
- investors who are unlikely to pose risks are screened,
- the way that offenses and contraventions by corporate entities are considered is complex and has gaps, and
- there is a lack of flexibility about when investors can sit the investor test.

Changes to the investor test are largely in the Urgent Measures Bill. Changes to the investor test's requirements are included in the Urgent Measures Bill due to the significant regulatory savings they will generate for investors.

The repeat investor process is introduced through the Other Measures Bill, reflecting the significant process changes required to support its implementation.

i. Clarifying the investor test's purpose

The investor test does not have a clear purpose. This creates uncertainty for decision makers when assessing investors under the test and for investors about whether they are likely to pass the test.

The Urgent Measures Bill makes clear that the test's purpose is to "determine whether investors are unsuitable to own or control any sensitive New Zealand assets, by assessing whether they are likely to pose risks to New Zealand, based on factors relating to their character and capability" (*clause 15, new subsection 18A(1)*). Decision makers would have regard to this purpose when assessing whether an investor meets the test.

ii. Only considering relevant factors

The factors in the investor test are too broad and allow decision makers to consider matters that are not relevant to determining if an investor should be allowed to invest in sensitive New Zealand assets (for example, spurious allegations). This is primarily due to the requirement to consider "any other matter" as part of the test. This imposes unnecessary costs and delays on investors and drives risk averse behaviour in the regulator.

The Urgent Measures Bill addresses this by narrowing the factors that can be considered, in general terms, to (*clause 15, new subsection 18A(4)*):

- certain types of serious offences and contraventions of New Zealand or foreign legislation and allegations of such offences and contraventions for which proceedings have been served but not completed,
- any penalty imposed by the court in the last 10 years for a contravention of the Act or Regulations,
- various prohibitions or bans imposed on the investor under the Immigration Act 2009, the Companies Act 1993 and other domestic and equivalent overseas legislation, and
- penalties imposed on the investor for an abusive tax position, tax evasion or a similar act, or tax defaults where the amount due and payable (including any interest and penalties) is NZ$5 million or greater at the time the application is made.

iii. Only screening the right investors (Urgent Measures Bill and Other Measures Bill)

Currently, some investors who are unlikely to pose risks are required to meet the investor test. In particular, New Zealanders – who are able to purchase sensitive assets in their own right without consent – can still be subject to the test, as can investors that have previously satisfied the test ("repeat investors"). This creates unnecessary costs and delays.

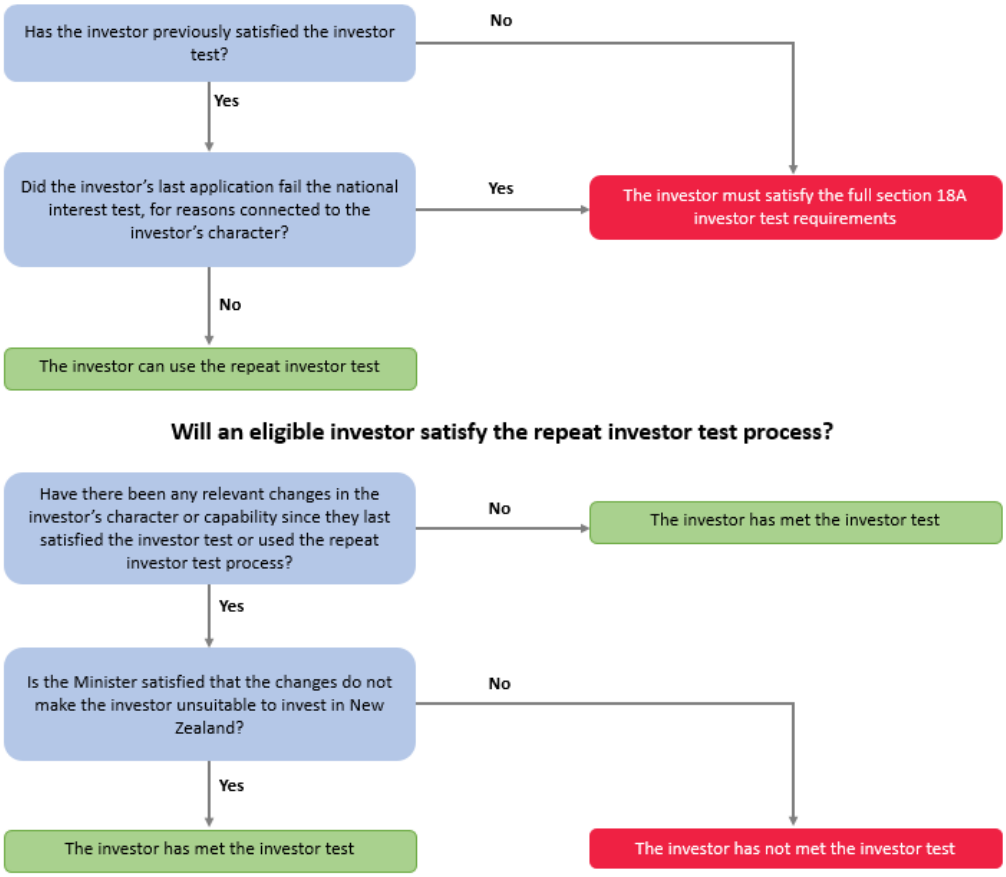
In response:

- the Urgent Measures Bill sets out that New Zealanders will no longer be required to satisfy the investor test (*clause 15, new subsection 18A(2)*), and
- the Other Measures Bill sets out that repeat investors will be able to go through a streamlined 'repeat investor test' process when making new investments (*clause 14, new section 29A*).

The streamlined process would simply require the investor to lodge a statutory declaration detailing whether any relevant changes have occurred to their character or capability. If no such changes have occurred, or any changes are determined by the Minister to not make the investor unsuitable to invest in New Zealand, the investor test will be satisfied

Figure 6 provides a process map for the repeat investor test to be introduced in the Other Measures Bill.

Figure 6: Process map for the repeat investor test process for repeat investors



iv. Clarifying how corporate character is assessed

The investor test does not allow decision makers to consider offences and contraventions of New Zealand or foreign laws (nor allegations of such) by corporate entities looking to acquire sensitive assets, unless the action can be attributed to an individual involved in the investment (such as a director). Given the relevance of such conduct to determining whether an investor has the character and capability to invest in New Zealand, this is a significant gap.

To resolve this, the Urgent Measures Bill ensures that offences and contraventions committed by a non-natural person can be considered under the investor test in their own right, regardless of whether they can be attributed to an individual (*clause 15, new subsection 18A(4)*).

v. Providing greater flexibility to investors

Currently, investors can only determine if they will satisfy the investor test by lodging an application for consent. Consequently, overseas persons can find themselves unable to bid competitively on significant business assets due to the need to make offers conditional on obtaining consent. This, at the margin, can undermine economic efficiency.

The Other Measures Bill provides investors with the ability to sit the investor test at any time, separate from any consent application (*clause 14, new section 29A(1)*). If successful, the investor could then use the streamlined investor test process for future applications. This allows investors to expedite their application to acquire sensitive assets, particularly in respect of significant business assets where the investor test is the only test that must be met (other than for transactions of national interest). It also provides investors the flexibility to verify whether they meet the investor test, before incurring the cost of a full consent application.

g. Introducing statutory timeframes for decisions (*Urgent Measures Bill*)

The Act does not require the regulator or Ministers (as relevant) to make decisions on consent applications within a set period. The regulator is, however, subject to a statement of performance expectations (SPEs) for completing applications. The regulator reports on its performance against these timeframes in the LINZ annual reports, and through data published on its website. Despite this, New Zealand's average processing times are lengthy by global standards and this can significantly increase investor uncertainty and costs relative to interacting with screening regimes in other jurisdictions.

To resolve this, the Urgent Measures Bill empowers the Governor-General to make regulations setting timeframes for the exercise of functions and powers, performance of duties, and provision of services, under the Act (*clause 25, new subsection 37B(1)(a)*). As outlined in Treasury's Regulations Disclosure Document, the Government only intends to bring statutory timeframes into effect for the emergency notification regime when the Urgent Measures Bill commences.

i. Specifying what constitutes a complete consent application or notification

To support the regulator in meeting their statutory timeframes, it is important that investors provide them with a complete consent application or call in notification (as relevant), which includes all material necessary for the government to determine whether consent should be given or an action to manage a national security or public order risk should be taken (as relevant).

To achieve this, the Urgent Measures Bill empowers the Minister to specify the requirements of the following in the regulations:

- a complete consent application (*clause 18, replaced subsection 23(1)(c)*),
- a complete notification under the emergency notification regime (*clause 52, new subsection 87(1)(c)*), and
- a complete call in notification (*clause 52, new subsection 87(1)(c)*).

Investors will likely have to improve the standards of their applications if they are to consistently meet these requirements.

ii. Consequence of statutory timeframes not being met

Statutory timeframes will create additional certainty for investors, and establish clear signals for the regulator around the level of resources to dedicate to each transaction.

Consistent with similar regulator regimes, the timeframes introduced in the Urgent Measures Bill will not create any legal right, or affect or limit the way in which a person exercises a statutory power under the Act (*clause 25, new subsections 37B(1)-(2)*). This does not mean that breaching a timeframe would not have legal consequences.

The failure to meet statutory deadlines would create a risk of judicial review. Further, the regulator is subject to the Ombudsmen Act 1975 meaning that the Ombudsman could investigate decisions or acts by the regulator that are contrary to legislative requirements.

To further support the regulator's compliance with timeframes, the Urgent Measures Bill requires the regulator to report annually on its performance processing applications (*clause 25, new subsection 37A(1)(b)*).

h. No longer screening short term leases (*Other Measures Bill*)

Leases and other 'less-than-freehold' interests (for example, profits-à-prendre) over sensitive land are subject to screening if their term is three years or more, including any rights of renewal. This reflects that such interests have many of the characteristics of ownership (for example, possession and, in some cases, rights to alter the land).

These similarities must be balanced, however, against their differences. For example, the fact that leases are generally less sensitive than freehold interests because the benefit of the land will return to the owner. Therefore screening shorter-term leases can impose disproportionate costs on investors relative to the risks. It can also create perverse incentives for overseas persons to purchase land outright (because the process and cost to get consent are the same).

To better target the Act at interests in land that are more equivalent to freehold interests, the Other Measures Bill will increase the threshold for screening less than freehold interests in sensitive land (other than residential land) to 10 years (*clause 6, replaced subsection 12(1)(a)*), whether that threshold is met through a single or cumulative leases. To ensure that this change is applied consistently across the Act, existing exemptions for the acquisition of forestry rights contained in clause 6 of Schedule 3 of the Act will be available in respect of rights with terms of up to 10 years, rather than three (*clause 25, replaced clause 6(4)(b)(i)*).

The threshold for screening non-freehold interests in residential land will remain unchanged because these interests become more equivalent to freehold interests over a shorter period.

Calculating the total term of interest in land

The threshold for screening a less than freehold interest in land is currently only calculated with reference to the interest sought (including any rights of renewal), not any previous interests held. This will no longer be the case, with screening requirements also applying to consecutive interests that cumulatively breach the threshold. This is to reduce the chance of investors entering into a series of shorter-term leases that nevertheless result in an interest in land more akin to ownership (for example, five consecutive five-year leases), without obtaining consent.

In calculating whether a lease meets the 10-year threshold, the following interests must be included.

- The remainder of any current term of the interest at the time that it is acquired (*Schedule 2, new Schedule 1A, subsection 1(1)*). For example, if acquiring an entity with a 10 year lease, where eight years have expired, the interest being obtained is for two years.
- Any rights of renewal of that interest (*Schedule 2, new Schedule 1A, subsection 1(1)*). For example, if entering into a five year lease, with a right to renew for a subsequent five years, the relevant term is 10 years.
- Any previous interest that relates to the same or substantially the same land (*Schedule 2, new Schedule 1A, subsection 1(1)-(2)*).

To be counted, the previous interest would have to be:

- held by the same overseas person (A), an associate of A, or a person that A had a more than 25 per cent ownership or control interest in (*Schedule 2, new Schedule 1A, subsection 1(2)(a)*), and
- be consecutive in time to the relevant interest being sought or to another previous relevant interest (*Schedule 2, new Schedule 1A, subsection 1(2)(b)*). To reduce the risk of overseas persons structuring leases to avoid consent requirements, 'consecutive' includes periods between interests separated by any periodic lease or a period of less than four months (*Schedule 2, new Schedule 1A, subsection 1(4)*).

Note: The Urgent Measures Bill clarifies one aspect of how leases are treated under the Act. That is, that periodic leases[25] are not an interest in land that requires consent (*clause 56, replaced Schedule 3, subsection 2(1)*). This is consistent with existing operational practice and Parliamentary intent and the change is only being made to enhance investor certainty.

i. Simplifying the benefit to New Zealand test (*Other Measures Bill*)

The benefit to New Zealand test applies to most transactions involving sensitive land (and in a modified way, fishing quota). The test establishes a framework for Ministers to determine whether such investments will be beneficial by assessing applications against up to 21 different economic, environmental and cultural factors. However, the

[25] That is, leases that are terminable at will by the grantor or grantee and offer no certainty of term of four months or more

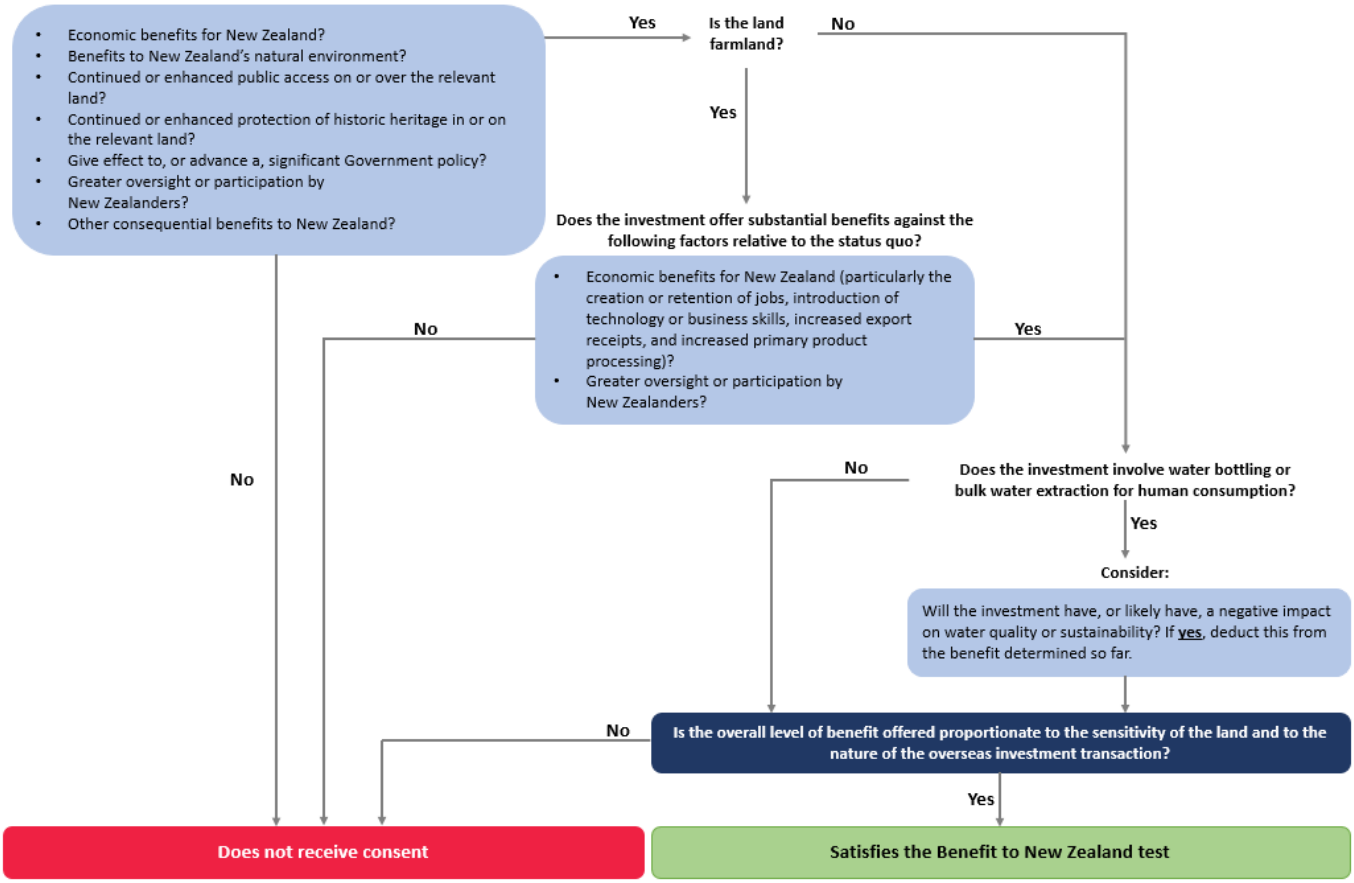
test is unnecessarily complex and significantly contributes to the long time that it can take to receive consent. The test's primary problems are that:

- the large number of test factors (and overlaps between them) increase compliance costs and limits decision makers' ability to holistically assess an investment,
- the ability to specify additional benefit factors in regulations reduces investor certainty and allows the government to effectively amend primary legislation,
- there is uncertainty about what the test allows consideration of (that is, the benefits of an investment, or the benefits and any potential costs associated with the investment),
- the 'counterfactual' test used to determine if an investment should receive consent is highly theoretical, and
- the Act always requires investments in non-urban land greater than five hectares to offer 'substantial and identifiable' benefits, while lower level of benefits can be sufficient to acquire particularly environmentally or culturally sensitive land.

This section of the briefing details how the Other Measures Bill amends the benefit to New Zealand test to resolve these issues.

Figure 7 provides an overview of how the proposed new benefit to New Zealand test will operate, including in respect of farm land and investments involving water bottling/bulk water extraction for human consumption (discussed in section 2(b) and 2(d) of this document, respectively).

Figure 7: Operation of the proposed 'benefit to New Zealand' test



i. Reducing the number of factors against which benefit is assessed

The benefit to New Zealand test's large number of factors can result in applications being structured to meet as many factors as possible (even if the likelihood of a benefit arising against a factor is doubtful), or to use one action to satisfy many different factors. This encourages lengthy, complex, and fragmented applications that are more costly and time consuming for investors to prepare and for the regulator to assess.

The Other Measures Bill replaces the 21 existing factors (split across the Act and the regulations) with seven broadly framed and intuitive factors that nevertheless do not reduce the range of benefits that can be considered when determining whether to grant consent. That is (*clause 9, replaced subsection 17(1)*):

- an economic benefit factor,
- an environmental benefit factor,

- a public access factor,[26]
- a factor related to the protection of historic heritage,[27]
- a factor related to the advancement of significant government policies,
- a factor related to New Zealanders' involvement in the overseas investment (for example, higher levels of New Zealand ownership would be recognised as a benefit), and
- a broad catch all 'other consequential benefits' factor.

In addition to simplifying the factors, consistent with best practice regulatory design, the Other Measures Bill removes the government's ability to add factors to the test by regulation.

ii. Clarifying what can be considered under the test

There is currently public uncertainty about what aspects of an investment can be considered under the benefit to New Zealand test.

To remove this uncertainty, the Other Measures Bill clarifies that when assessing applications under the test, the regulator will only generally be able to consider an investment's prospective net benefits against each factor. That is:

- the regulator will be able to consider any offsetting costs within a factor (for example, the loss of ten jobs in one region could be counted against an increase of 20 jobs in another), with the worst case outcome of this assessment being that no benefit is recorded against that factor (that is, a negative net impact cannot be recorded against a factor), but
- negative impacts against a factor cannot be deducted against other factors (or parts of factors) or the overall level of benefit, unless
- there are negative impacts on water quality or sustainability associated with an overseas investment in sensitive land that involves water extraction for bottling or in bulk for human consumption (clause 9*, new subsection 17(2)(b)(v)*).[28]

This is for two reasons:

- it is difficult to consider investments or behaviours that comply with New Zealand's broader regulatory regime (which all overseas persons are subject to) as nevertheless detrimental to New Zealand under this Act, and

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[26] Benefits relevant to this factor will include to access to culturally sensitive sites for stewardship or exercising kaitiakitanga, as detailed in the section "Better Recognising Māori cultural values".

[27] Benefits relevant to this factor include supporting entry of wāhi tūpuna or agreement to land being set apart as a Māori reservation, as detailed in the section "Better Recognising Māori cultural values".

[28] The exception to this is the specific factor related to investments in sensitive land for water bottling or bulk water extraction for human consumption, as detailed in the section "Better recognising the importance of water".

- the national interest test will ensure that the government is equipped to undertake a broader risk assessment and deny consent in the rare cases where appropriate (for example, where national security risks are present). Conducting such assessments in respect of all investments subject to the benefit to New Zealand test would undermine the objective of streamlining the consent process for most investments.

iii. Simplifying the counterfactual

Decision makers use a test, defined in case law, to determine if a proposed investment is likely to benefit New Zealand. The test compares what is likely to happen if an overseas investment proceeds with what is likely to happen without it ('the counterfactual').[29] The theoretical nature of the test has made it one of the Act's most complex and time-consuming elements, with a number of stakeholders reporting that when it was introduced it doubled the time and cost of filing applications.

To resolve this, the Other Measures Bill introduces a simple 'before and after' counterfactual where Ministers must assess an investment's level of benefit against the state of affairs before the transaction takes effect (*clause 8, replaced subsection 16A(1)(a)*). For clarity, this assessment does not capture any future plans for the land or other hypothetical assessment – the comparison point is simply the land and activities on the land as they currently exist.

In isolation this change could make it easier for some overseas persons to acquire sensitive land (for example, where they will be offering benefits equivalent to those that the land's existing owner would have delivered). However, this risk is reduced by:

- embedding a higher threshold for farm land (discussed in section 2(b) of this document), and

- introducing a general requirement for benefits to be proportional to the sensitivity of the land (detailed in the next section of this document).

Any residual risk is offset by this change's significant regulatory and administrative savings, with a corresponding increase in New Zealand's investment attractiveness.

iv. Introducing a general requirement for benefits to be proportional to the sensitivity of the land

The Act currently requires investors to offer 'substantial and identifiable' benefits to acquire non-urban land over five hectares, but imposes no such requirement in respect of other types of particularly sensitive land (for example, land on offshore islands). This requirement fails to reflect the diversity in the nature and importance of sensitive land screened under the Act.

To improve the Act's coherence, the Other Measures Bill introduces an explicit requirement for the regulator to consider whether the benefits offered by a prospective investment are proportionate to:

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[29] A common counterfactual scenario is if the asset was purchased by 'an adequately funded New Zealand buyer', what would the outcome of their investment be relative to those offered by the overseas person.

- the relevant land's sensitivity (for example, its size and any sensitive features associated with the land, which could include the existence of native flora or fauna (*clause 8, replaced subsection 16(1A)(b)(i)*), and

- the nature of the overseas investment (for example, whether the interest being acquired is freehold or a lease, or whether the transaction will result in higher or lower levels of overseas ownership) (*clause 8, replaced subsection 16(1A)(b)(ii)*).

3. Other material amendments to the Act

Section 3 outlines other material changes to the Act.

In the **Urgent Measures Bill**, this includes:

- new arrangements for Ministerial delegations (*clause 22 of the Urgent Measures Bill*),

- amendments to the Act's exemption criteria (*clause 49 of the Urgent Measures Bill*),

These are detailed in section 3(a) to 3(b) of this document.

In the **Other Measures Bill**, this includes:

- changes regarding the offer of fresh and seawater interests to the Crown (*clause 12 and Schedule 3 of the Other Measures Bill*), and

- minor technical amendments to certain provisions regarding the acquisition of residential land (*clauses 24-25 of the Other Measures Bill*).

These are detailed in section 3(c) to 3(e) of this document.

Section 3 also outlines the consequential amendments to the Fisheries Act 1996 (*Subpart 2 of the Urgent Measures Bill and Subpart 1 of the Other Measures Bill*) and commencement and transitional provisions for both Bills *(clause 2 and Schedule 1 of the Urgent Measures Bill and clause 2 and Schedule 1 of the Other Measures Bill*).

a. Changes to Ministerial delegations (*Urgent Measures Bill*)

The national interest test, emergency notification regime, and national security and public order call in power are reserve powers, to be exercised rarely and only when necessary to manage significant risks. However, there is a chance that some overseas investors and trading partners may view these tools as a sign of New Zealand's screening regime becoming more restrictive. This would undermine efforts to improve New Zealand's attractiveness to high-quality productive investment.

To help reduce the chance of this occurring, the Urgent Measures Bill (*clause 22, amended section 32*) sets out that the Minister responsible for the Act (generally the

Minister of Finance) is responsible for making decisions under the three new powers[30] and that:

- they cannot delegate this power to the regulator or,
- in respect to applications for consent, delegate this power to another Minister with decision making powers on the same application.

Having a senior Minister responsible for exercising these tests is consistent with similar regimes (for example, the President is the decision maker under the United States' regime and the Treasurer is the decision maker under Australia's regime) and is intended to provide investors with confidence that the powers will be exercised in a considered and responsible way.

This departs from the Act's current operation, with Ministers able to delegate all of their powers to other Ministers and to the regulator. However, this change is justified by the need to signal clearly that these are backstop powers and the potentially serious consequences for an investor subject to decisions made under the relevant provisions.

b. Amending the Act's exemption making powers (*Urgent Measures Bill*)

i. Temporary changes to the Act's exemption making powers

In addition to the changes above, the Urgent Measures Bill proposes to temporarily expand the Act's exemption making power to allow persons, transactions, rights, interests, or assets (or classes of such) to be exempted from consent requirements when necessary or desirable to respond to an epidemic in New Zealand (*clause 48, new subsection 61(1)(lc)*).

Any exemptions made under this power are revoked six weeks after the date on which the Other Measures Bill receives Royal assent (*clause 48, new subsection 61(3))*.

ii. Enduring changes to the Act's exemption making powers

The Overseas Investment Amendment Act 2018 narrowed the circumstances where exemptions could be given, including by mandating that exemptions could only be granted where the Act's purpose could still be substantially achieved through the exemption's terms and conditions.

This requirement has narrowed the circumstances when exemptions can be given to a greater extent than anticipated, increasing compliance costs where previously transactions would have received an exemption.

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[30] That is, for example, the imposition and variation of conditions, disposal and prohibition orders, and recommendations regarding statutory management. The Minister will be able to delegate the ability to the regulator to issue direction orders where they contain no conditions other than the automatic condition detailed at subsection 88(3).

To resolve this, the Urgent Measures Bill proposes that exemptions would not have to substantially achieve the Act's purpose, but could be granted to provide flexibility where compliance with the Act is impractical, inefficient, unduly costly or unduly burdensome, taking into account the sensitivity of the relevant assets and the transaction's nature (*clause 49, amended subsection 61B(a)*). This strikes a better balance between ensuring that the Act's objectives are met, while preserving the Minister's flexibility to not apply the Act when appropriate.

The Urgent Measures Bill does not change the general circumstances under which exemptions can be given on an enduring basis, with the exception of, as previously noted:

- expanding the Minister's ability to issue exemptions to facilitate trade in and management of RMOs,
- the issuance and management of loans where this is done in the ordinary course of business, and
- to exempt certain fundamentally New Zealand entities from the definition of overseas person).

c. Clarifying and streamlining the Crown's acquisition of special land (Other Measures Bill)

The Act currently includes provisions for foreshore, seabed, riverbed and lakebed ('special land' in the Act, renamed "fresh or seawater areas" in the Bill) to be offered to the Crown before being purchased by an overseas investor.

However, these provisions are applied inconsistently (for example, offering special land to the Crown is just one of the factors in the general benefit to New Zealand test but is a requirement in the special forestry test) and the offer process itself is complex and time-consuming, causing delays for consent.

The Other Measures Bill clarifies and streamlines the offer requirements by:

- introducing an automatic condition of consent which requires **all** investments in sensitive land that involve fresh or seawater areas to comply with the new acquisition process that is described in Schedule 5 *(clause 12, new subsection 25D(2)*), and
- shifting the acquisition process so that it takes place post-consent (currently it must occur prior to the overseas investors' consent being granted) (*clause 12, new subsection 25D(2)*).

To clarify how the Crown should manage the acquisition of fresh or seawater areas, the Bill also:

- requires the Crown to acquire the fresh or seawater area (recognising the high ownership value associated with such interests) unless the Minister for Land Information:
    - is not satisfied that the conservation or amenity value of the fresh or seawater outweighs the potential risks, liabilities, or costs of acquisition and

ownership (*Schedule 3, new schedule 5, section 4*), or

- is not satisfied with the compensation payable to the owner and/or or third parties (*Schedule 3, new schedule 5, section 5*),

- provides for the fresh or seawater interest to vest in the Crown free from all estates or interests in that land (*Schedule 3, new schedule 5, sections 7 and 8*), and
- gives the owner and any third party whose registered interests are affected by the acquisition process a right to compensation (*Schedule 3, new schedule 5, sections 9 and 10*).
- protects the Crown's right to acquire a fresh or seawater area through registration of a 'water areas acquisition notice' with the Registrar-General of Land (*Schedule 3, new schedule 5, sections 11 and 12)*.

Regulations will provide further detail on the acquisition process. Their proposed content is included in Treasury's Regulations Disclosure Document.

d. Minor amendments to the operation of provisions relating to the acquisition of residential land (*Other Measures Bill*)

This section details minor amendments to improve the operation of certain provisions of the Amendment Act related to the acquisition of residential land. These changes are all provided for in the Other Measures Bill.

i. Changes to the requirements for obtaining consent to acquire residential land for non-residential purposes

The Act provides that an overseas person can acquire residential land for a non-residential purpose, such as a business purpose. However, the Act is not clear whether an investor can only receive consent for purchases related to an existing business or also for purchases related to starting a new business on the relevant land.

To remove this uncertainty, the Other Measures Bill makes clear that consent is available in both circumstances (*clause 24, amended schedule 2, section 12(2)(c)*).

ii. Clarification of the non-occupation requirements

Overseas persons with consent to acquire residential land (other than as their primary place of residence),[31] must generally not occupy the land. This ensures that residential land acquired by overseas persons remains available to New Zealanders to live in.

The drafting of the non-occupation requirements have created uncertainty about whether occupation of the land is not allowed under the Act in all circumstances, such as builders living on a site while it is being developed.

To remove this uncertainty, the Other Measures Bill amends the Act to clarify that the non-occupation requirement pertains to use of the land as a home or short- or long-term residence (*clause 24, amended schedule 2, subsection 17(3)*).

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[31] That is, the consent was not received through satisfying the commitment to reside test.

e. Ability to reintroduce the emergency notification regime

To ensure that the government has the flexibility necessary to respond to any future crises that may similarly justify the expansion of the Act to transactions not ordinarily screened, the Other Measures Bill includes the power to make regulations that have the effect of reinstating the emergency notification regime (in whole or part) (*clause 18, new subsection 59A(1)).*

The Minister may make a recommendation to reintroduce the emergency notification regime only if they are satisfied that the effects of the emergency justify this (*clause 18, new subsection 59A(2))*. In making this determination, the Minister could consider, for example:

- the economic, social, and other effects of the emergency in New Zealand,
- any risks to New Zealand's national interest associated with transactions by overseas persons, and
- New Zealand's international relations and international obligations.

This is a non-exhaustive list and the matters to be considered when determining whether to reintroduce the emergency notification regime will be specific to each prospective emergency.

f. Amendments to the Fisheries Act 1996 (*Both Bills*)

The Act sets out all the types of overseas investments that require consent. However, it only sets out the full consent criteria in respect of investments in sensitive land and significant business assets. The requirements for acquiring an interest in fishing quota are largely in the Fisheries Act 1996 (the Fisheries Act).

The requirements for acquiring fishing quota largely mirror those for acquiring sensitive land. The Bills propose to amend the Fisheries Act to maintain this. In particular, the Fisheries Act will be amended to:

- make clear, through the Urgent Measures Bill, that an investment cannot receive consent unless the investor test, benefit to New Zealand test, and – if relevant – national interest test are satisfied (*clause 63, replaced section 57G of the Fisheries Act*),
- align, through the Other Measures Bill, the factors for determining whether an investment in fishing quota is beneficial (where relevant) with those for acquiring sensitive land (*clause 28, replaced section 57H of the Fisheries Act*).

The only difference between the factors for determining the level of benefit associated with a proposal to acquire fishing quota relative to sensitive land will be the absence of a factor relating to public access and water bottling/bulk water extraction for human consumption. This is because these factors are not relevant to the acquisition of, or an interest in, fishing quota.

g. Commencement and transitional provisions for the Urgent Measures Bill

This section provides an overview of the how the reforms in the Urgent Measures Bill will take effect as well as transitional provisions being introduced to support their operation.

i. Commencement of provisions in the Urgent Measures Bill

The reforms will be introduced in stages to balance the need to make changes as quickly as possible (to improve New Zealand's investment attractiveness and the government's ability to manage significant risks, particularly risks created, and amplified by, the COVID-19 pandemic), while ensuring that:

- the reforms are subject to appropriate Parliamentary and public scrutiny, and
- the regulator and other affected agencies have the structures, processes, and resourcing in place to ensure that they work effectively. This staging also recognises that some parts of the Bill will not operate without regulations being made, which will take additional time.

Consequently, the expectation is that the Emergency Bill will come into effect in three tranches:

- Tranche 1: 14 days (that is, two weeks) post-Royal assent - all changes in the Emergency Bill except for the new investor test and national security and public order call in power,
- Tranche 2: 12 months following Royal assent from the Emergency Bill – the new investor test, and
- Tranche 3: 24 months following Royal Assent from the Emergency Bill – the national security and public order call in power (specifically provisions that grant the government the power to review call in transactions, and impose obligations on investors in respect of call in transactions).

While this is the expected staging, provisions can be brought into effect earlier by Order in Council (*clause 2(3)*). This flexibility may be valuable, for example, if the regulator is better placed to introduce the investor test sooner than anticipated (given the regulatory savings it will generate for investors), or if the emergency notification regime is removed earlier than 24 months after Royal assent, with the call in power to then take effect.

For the avoidance of doubt across this section (unless explicitly noted otherwise):

- existing exemptions and regulations will remain in force unless revoked (*Schedule 1, new part 3 in Schedule 1AA, sections 22 and 23*)) and will equally apply to consent applications, transactions notified under the emergency notification regime, and call in transactions,
- changes will apply to transactions entered into on or after relevant provisions commence; and to applications received by the regulator on or after the

provisions' commencement date, regardless of when the transaction was entered into (*Schedule 1, new part 3 in Schedule 1AA, subsection 15(2)*); and

- persons that have previously received consent for transactions that would not require consent after the passage of the Urgent Measures Bill because they are no longer overseas persons/are subject to automatic consent (as relevant), will be able to apply to have any conditions of those consents removed from the date that those new definitions of overseas persons commence (*Schedule 1, new part 3 in Schedule 1AA, section 16*).

Table 3 includes a summary of when different aspects of the Urgent Measures Bill are expected to commence.

Table 3: Commencement timing for the Urgent Measures Bill

Tranche:	Tranche 1	Tranche 2	Tranche 3
Provisions coming into effect:	*Changes to remove/automatically consent transactions* • Changes to the definition of overseas person (that is, no longer screening fundamentally New Zealand entities) • Tipping point for investments in New Zealand listed issuers • Reductions in categories of 'sensitive adjoining land' *Changes to the review process* • The national interest test and provisions to support it • The temporary emergency notification regime *Changes to regulatory powers* • New enforcement powers • Clarified Court powers • New information gathering and sharing powers • New national security and public order risk management powers • Protection of classified security information • New exemption making powers • New temporary regulation making powers to support the emergency notification regime • Timeframes for decision making (though these will not take effect except in respect of the emergency notification regime)	*Changes to the review process* • New investor test	*Changes to the review process* • The national security and public order call in power

Tranche 1 of the Urgent Measures Bill: Provisions coming into effect 14 days after Royal assent

The commencement timing for these changes is provided in clause 2(1).

1. Changes to remove transactions

All of the reforms in the Urgent Measures Bill that result in transactions receiving consent without submitting an application or notification to the regulator take effect two weeks after the Amendment Bill receives Royal assent. That is (in general terms):

- changes to the definition of overseas person that reduce the number of entities subject to the regime (in particular higher thresholds for deeming a New Zealand listed issuer an overseas person),
- changing the 'tipping point' provisions in respect of investments in New Zealand listed issuers, and
- no longer screening less sensitive types of 'sensitive adjoining land'.[32]

2. Changes to the review process

The following changes to the review process will also come into as part of the first Tranche:

- the national interest test and relevant supporting provisions, including:
    - provisions relating to critical direct suppliers, and
    - provisions relation to determining whether a media business has significant impact, and
- the temporary emergency notification regime.

3. Changes to regulatory powers

The following reforms relating to the Act's administration and enforcement will also come into effect as part of Tranche 1:

- enforcement provisions and clarified Court powers,
- information gathering and sharing powers,
- national security and public order risk management powers,
- powers to protect classified security information in Court proceedings,

[32] The regulator's requirement to maintain a list of sensitive adjoining land under section 37 will be removed, and replaced with a requirement for regulator to maintain a list of sensitive adjoining land relating to a collective group of Māori, as part of this change.

- timeframes for decision making (though timeframes will only be introduced in regulations for the emergency notification regime at this time),

- temporary regulation making powers to support the emergency notification regime's operation, and

- exemption making powers.

None of these amendments will apply to matters (including, for example, applications or contraventions of the Act) that occurred prior to their commencement, except for:

- the ability to enter into enforceable undertakings (*Schedule 1, new part 3 in Schedule 1AA, subsection 21(2)(a)*),

- seek injunctions (*Schedule 1, new part 3 in Schedule 1AA, subsection 21(2)(b)*), which can be used in respect of breaches or alleged breaches that occurred before or after the Act's commencement,

- amendments to the regulator's information gathering powers, which can be used in respect of any relevant matter (except national interest or call in transactions) regardless of whether it occurred before or after commencement of the Act (*Schedule 1, new part 3 in Schedule 1AA, section 20*).

Tranche 2 of the Urgent Measures Bill: Provisions coming into effect 12 months after Royal assent

The new investor test (as it applies in both the Act and the Fisheries Act) is to come into effect 12 months after the Urgent Measures Bill receives Royal assent, unless it is brought into effect earlier. For clarity, the new factors will apply to events that occurred prior to commencement (such as convictions) just as they would apply after commencement (*Schedule 1, new part 3 in Schedule 1AA, subsection 18*).

Its commencement is provided for in clause 2(2)(a).

Tranche 3 of the Urgent Measures Bill: Provisions coming into effect 24 months after Royal assent

The provisions to enable the national security and public order call in power are to be introduced 24 months following Royal assent ((*clause 2(2)(b)*). This reflects that the call in power will not come into effect until the emergency notification regime has been removed (the timeframe for which cannot be known in advance).

To provide investors with additional flexibility, and reduce the risk of the regulator receiving a large number of notifications when the call in power starts, investors will be able to lodge a call in notification prior to commencement and have it processed as if the call in power had commenced (*Schedule 1, new part 3 in Schedule 1AA, section 24*).

ii. Provisions to support the implementation of the Urgent Measures Bill

The Urgent Measures Bill contains a number of complex changes that could have a range of unintended consequences. To manage this risk, the Urgent Measures Bill includes a temporary regulation making power that allows the Governor General, by order in Council, to make regulations for the purpose of providing that, subject to any conditions stated in the regulations, specified provisions of the Act do not apply or continue to apply, or apply with modifications or additions, or both, during the whole or any part of the transitional implementation period (*Schedule 1, new Part 3 in Schedule 1AA, subsection 26(1)*).

To ensure that this power is no wider than necessary to manage transitional issues, regulations can only be made under this power if the Minister is satisfied that the regulations are:

- Necessary or desirable for the orderly implementation of the Act, and
- Are consistent with the intended purpose of the specified provisions (*Schedule 1, new Part 3 in Schedule 1AA, subsection 26(2)*).

To further limit the scope of this power, the power will be repealed one year after the Urgent Measures Bill received Royal assent and any regulations made under this section that are in force at that date will also be revoked (*Schedule 1, new Part 3 in Schedule 1AA, subsections 26(3*)) *and 26(4)).*

h. Commencement and transitional provisions for the Other Measures Bill

The Other Measures Bill will also commence in three tranches.

- Tranche 1: 42 days (that is, six weeks) post-Royal assent - all changes in the Other Measures Bill except for changes to the benefit to New Zealand test, the acquisition of fresh or seawater areas, and farmland advertising,
- Tranche 2: six months following Royal assent from the Other Measures Bill – new provisions regarding the acquisition of fresh or seawater areas and farmland advertising, and
- Tranche 3: 12 months following Royal assent from the Other Measures Bill – amendments to the benefit to New Zealand test.

While this is the expected staging, provisions can be brought into effect earlier by Order in Council (*clause 2(2)(b)*). This flexibility may be valuable, for example, if the regulator is better placed to introduce the amended benefit to New Zealand test sooner than anticipated (given the regulatory savings it will generate for investors).

Further, consistent with the Urgent Measures Bill:

- existing exemptions and regulations will remain in force unless revoked (*Schedule 1, new part 3 in Schedule 1AA, sections 22 and 23*)) and will equally apply to consent applications, and call in transactions, and

- changes will apply to transactions entered into on or after relevant provisions commence; and to applications received by the regulator on or after the provisions' commencement date, regardless of when the transaction was entered into (*Schedule 1, new part 3 in Schedule 1AA, subsection 15(2)*).

Table 4 includes a summary of when different aspects of the Urgent Measures Bill are expected to commence.

Table 4: Commencement timing for the Other Measures Bill

Tranche:	Tranche 1	Tranche 2	Tranche 3
Provisions coming into effect:	*Changes to remove transactions* • Changes to the definition of overseas person (that is, no longer screening fundamentally New Zealand entities) • Tipping point for investments in New Zealand listed issuers • Reductions in categories of 'sensitive adjoining land' *Changes to the review process* • Repeat investor test • Collection of information for tax purposes *Changes to regulatory powers* • Ability to introduce an emergency notification regime in the future	*Changes to the review process* • Enhanced farmland advertising requirements • New provisions managing Crown acquisition of fresh or seawater areas	*Changes to the review process* • The simplified benefit to New Zealand test

Tranche 1 of the Other Measures Bill: Provisions coming into effect 42 days after Royal assent

The commencement timing for these changes is provided in clause 2(1).

1. Changes to remove transactions

The Other Measures Bill would replace the standing consent regime introduced in the Urgent Measures Bill with permanent exemptions for those transactions. That is (in general terms):

- changes to the definition of overseas person that reduce the number of entities subject to the regime (in particular higher thresholds for deeming a New Zealand listed issuer an overseas person),

- changing the 'tipping point' provisions in respect of investments in New Zealand listed issuers, and

- no longer screening less sensitive types of 'sensitive adjoining land'.[33]

2. Changes to the review process

The repeat investor pathway will come into effect as part of tranche 1.

For the avoidance of doubt, the new 'repeat investor' pathway would not become available to investors until they have satisfied the new investor test (*Schedule 1, new part 3 in Schedule 1AA, subsection 18)*.

3. Changes to regulatory powers

The new power to reinstate the emergency notification regime (or a regime similar to it) will also come into effect as part of tranche 1.

Tranche 2 of the Urgent Measures Bill: Provisions coming into effect 12 months after Royal assent

Enhanced farmland advertising requirements and changes to the requirements around, and process for, acquiring fresh or seawater areas will take effect six months after Royal assent.

Their commencement is provided for in clause 2(2)(a).

Tranche 3 of the Urgent Measures Bill: Provisions coming into effect 12 months after Royal assent

The provisions to enable the new benefit to New Zealand test will take effect 12 months after Royal assent ((*clause 2(2)(b)*). This reflects the additional operational complexity associated with the introduction of the benefit to New Zealand test relative to other reforms contained in the Other Measures Bill.

[33] The regulator's requirement to maintain a list of sensitive adjoining land under section 37 will be removed, and replaced with a requirement for regulator to maintain a list of sensitive adjoining land relating to a collective group of Māori, as part of this change.