

The Treasury

Reform of the Overseas Investment Act Information Release

May 2020

This document has been proactively released by the Treasury on the Treasury website at

<https://treasury.govt.nz/publications/information-release/phase-2-overseas-investment-act-reform>

Information Withheld

Some parts of this information release would not be appropriate to release and, if requested, would be withheld under the Official Information Act 1982 (the Act).

Where this is the case, the relevant sections of the Act that would apply have been identified.

Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Key to sections of the Act under which information has been withheld:

- [1] 6(a) - to avoid prejudice to the security or defence of New Zealand or the international relations of the government
- [2] 6(b)(i) - to avoid prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the Government of any other country or any agency of such a Government
- [23] 9(2)(a) - to protect the privacy of natural persons, including deceased people
- [33] 9(2)(f)(iv) - to maintain the current constitutional conventions protecting the confidentiality of advice tendered by ministers and officials
- [36] 9(2)(h) - to maintain legal professional privilege
- [39] 9(2)(k) - to prevent the disclosure of official information for improper gain or improper advantage.

Where information has been withheld, a numbered reference to the applicable section of the Act has been made, as listed above. For example, a [33] appearing where information has been withheld in a release document refers to section 9(2)(f)(iv).

Copyright and Licensing

Cabinet material and advice to Ministers from the Treasury and other public service departments are © **Crown copyright** but are licensed for re-use under **Creative Commons Attribution 4.0 International (CC BY 4.0)** [<https://creativecommons.org/licenses/by/4.0/>].

For material created by other parties, copyright is held by them and they must be consulted on the licensing terms that they apply to their material.

Accessibility

The Treasury can provide an alternate HTML version of this material if requested. Please cite this document's title or PDF file name when you email a request to information@treasury.govt.nz.

Treasury Report: COVID-19 Economic Response: detailed options to amend the Overseas Investment Act

Date:	17 April 2020	Report No:	T2020/914
		File Number:	IM-5-3-8-9 (COVID Response Reforms)

Action sought

	Action sought	Deadline
Minister of Finance (Hon Grant Robertson)	Note the contents of this report.	None
Associate Minister of Finance (Hon David Parker)	<p>Agree to detailed design proposals for amendments to the Overseas Investment Act 2005 (the Act) and associated Regulations to:</p> <ul style="list-style-type: none"> temporarily screen additional transactions worth less than \$100 million; exempt additional low-risk transactions and bring forward some already agreed exemptions; introduce new regulation making powers to manage risks associated with the rapid development and drafting of these proposals; and seek Crown funding (rather than fees) to support the operation of any new tool to screen additional transactions worth less than \$100 million. <p>Agree the process for working to pass these reforms through Parliament.</p> <p>Agree, in your capacity as Attorney General, that the Parliamentary Counsel Office can begin drafting legislation to implement these changes.</p> <p>Agree to the Treasury confidentially consulting technical experts on any legislative reforms.</p> <p>Refer this report to relevant Ministerial colleagues.</p>	By 20 April 2020

Contact for telephone discussion (if required)

Name	Position	Telephone	1st Contact
[39]	[39]	[39]	n/a (mob) ✓
Thomas Parry	Manager International , International	[39]	[23]

Minister's Office actions (if required)

Return the signed report to Treasury.

Refer the report to: Rt Hon Winston Peters, Minister of Foreign Affairs; Hon Phil Twyford, Minister for Economic Development; Hon Andrew Little, Minister of Justice and Minister Responsible for the GCSB and NZSIS; Hon Shane Jones, Associate Minister of Finance; Hon James Shaw, Associate Minister of Finance; Hon Damien O'Connor, Minister of Agriculture; Hon Stuart Nash, Minister of Fisheries and Minister for Small Business; Hon Kris Faafoi, Minister of Commerce and Consumer Affairs; and Hon Eugenie Sage, Minister for Land Information.

Note any
feedback on
the quality of
the report

--

Enclosure: No

Treasury Report: COVID-19 Economic Response: detailed options to amend the Overseas Investment Act

Executive Summary

On 6 April 2020, officials provided advice on how the COVID-19 pandemic, and related economic downturn have changed the foreign investment risk environment (T2020/851 refers). Particular risks are that the Act:

- does not provide the ability to scrutinise investments in businesses worth less than \$100 million (unless they include sensitive land), even though falling firm values are increasing the chance that overseas persons will acquire productive businesses at ‘fire sale’ prices; and
- requires a range of low risk, economically valuable transactions to be reviewed, slowing these transactions down just as their need is increasing.

To respond to these issues, you (Minister Parker) requested officials develop advice on options to amend the Act. This report provides options to:

- temporarily allow the review of business investments worth less than \$100 million (*Policy consideration 1*);
- exempt certain additional low-risk debt financing transactions from the Act’s consent requirements and bring forward implementation of other exemptions already agreed to by Cabinet (*Policy consideration 2*);
- introduce new regulation making powers to manage transitional risks associated with the rapid development and drafting of these proposals (*Policy consideration 3*); and
- fund the operation of any emergency power to screen additional transactions and the implementation of the national interest test (*Policy consideration 4*).

The report also seeks your agreement on how these reforms should be presented to Parliament; to begin work with Parliamentary Counsel Office (PCO) on legislation; and to consultation with technical experts on draft legislation.

This report is provided to the Minister of Finance to ensure his visibility of all Treasury work to respond to the COVID-19 pandemic.

Policy consideration 1: Design of an emergency power to review business transactions

The Government has rolled out an unprecedented business support package, and is considering what additional options may be available to protect economically significant businesses. By preserving firm value and viability, these reforms significantly contribute to our ability to manage foreign investment risks. However, even with these measures, we expect businesses will need urgent debt and equity injections to remain viable. There is currently no way to guarantee these investments are consistent with our national interest.

Consequently, officials recommend that you introduce an emergency notification power (based on tools developed in the Phase Two reform) to manage these residual risks without imposing undue costs on businesses. In general terms, this power would:

- apply to investments by overseas persons in certain existing businesses not ordinarily subject to screening (for example, because they are worth less than \$100 million), and result in:

- a 25 per cent or greater interest in the business, or
- increasing a holding to, or beyond, a 50, 75, or 100 per cent interest.
- require investors to notify the government of, and provide basic information on, such transactions through a short form;
- if necessary, empower the Minister to impose conditions on, block, or unwind, transactions contrary to New Zealand’s national interest (with Ministers given discretion to determine what constitutes the national interest), with other transactions proceeding quickly;
- be supported by the Act’s full suite of enforcement and associated tools; and
- be subject to periodic review every 90 days and only remain in force while the COVID-19 pandemic continues to have a significant impact globally and in New Zealand.

A critical consideration is which businesses should be captured by the emergency power. Balancing our limited information about the risks, as well as the economic and resourcing risks of having to review more transactions than necessary, we recommend applying the emergency power to:

- all investments in Strategically Important Businesses¹ (SIBs), recognising that investments in these types of business present the most significant national security and economic risks; and
- investments in any other businesses with at least \$10 million in revenue in either of their last two financial reporting periods. This will bring at most around 8,000 medium and large businesses into the screening regime. Businesses of this scale are most likely to offer significant positive externalities to their regions, or have particular importance in the sectors that they operate in.

While this is our recommended approach, if you prioritised the Government’s ability to manage foreign investment risks over other concerns, an alternative option is to screen investments in non-SIB businesses with at least \$5 million in revenue over the same period. This would bring in around an additional 7,000 businesses into the regime, but likely place significant pressure on agencies and delay economically beneficial transactions.

We note that these are both higher thresholds than adopted in Australia. However, because we already screen a greater proportion of business investments than Australia because of the broad definition of sensitive land, and because New Zealand is more reliant on foreign capital than Australia (which has deeper domestic capital markets), we consider that a lower threshold would offer less benefits, and impose economic costs that are more significant.

In addition to the question above about the power’s scope, we also seek your guidance on two additional features that would reduce the tool’s regulatory burden, but reduce the government’s ability to manage risk. That is:

- whether investors can proceed with their transaction before hearing from the government as to whether their transaction could proceed (on the basis that action may be taken by the government in the future); and
- whether the government should be required to make a decision on transactions screened under the new tool within a statutory timeframe.

¹ In general terms, these SIBs include: critical national infrastructure (such as ports, airports, electricity generation and telecommunications), developers of military and dual use technology, critical direct suppliers to defence and the intelligence community, and media businesses that impact on the plurality of content available in New Zealand. The Government has the ability to expand this list through regulations.

Policy consideration 2: Exempting low risk transactions from the Act's consent requirements

The global pandemic is affecting New Zealand businesses' viability. Two features of the Act are combining to limit businesses' access to essential capital at the time:

- unlike most other foreign investment regimes, the Act requires many low risk economically valuable transactions to get consent; and
- the Act requires overseas persons (including New Zealand's largest banks) to get consent to provide credit and enter transactions to manage their risk portfolio.

The Act includes narrow exemptions to mitigate these factors, including exemptions from the requirements to obtain consent when acquiring a 'security interest' and when purchasing two or more 'security interests' (such as a securitised parcel of loans). However, there are minor issues with these exemptions that are limiting lending. In particular:

- banks cannot issue loans over \$100 million or more without consent. This is because the loan is treated as a Significant Business Asset (SBA) in its own right, despite it not granting claim over any additional real assets; and
- overseas persons cannot acquire securitised assets worth \$100 million or more without consent, despite the fact that the asset does not grant a claim over any real asset.

To resolve these, and other issues that limit capital flows, we recommend that you:

- bring forward minor, Cabinet-endorsed, amendments to two existing exemptions that allow for increases in existing shareholdings and corporate restructures to the date of Royal assent; and
- make additional tightly constrained exemptions that allow banks to lend more than \$100 million, and overseas persons to acquire securitised parcels of loans worth more than \$100 million, without consent, subject to the transaction being in the ordinary course of business, in good faith, and with no intent of acquiring sensitive assets.

Without action, the introduction of any emergency screening tool will amplify these issues. Such a tool would require these transactions to receive consent irrespective of their value.

Policy consideration 3: New regulation making powers

The COVID-19 Overseas Investment Response Bill will introduce complex new powers that significantly expand the Act's scope. These powers will be designed and drafted quickly and are unlikely to be subject to standard Parliamentary review. This introduces the risk of:

- capturing low risk and economically valuable transactions that either: should not be subject to review; or should be subject to less stringent requirements for the duration of the pandemic and recovery; and
- certain provisions, as drafted, having unforeseen transitional issues or errors.

To reduce these risks, we recommend that the COVID-19 Overseas Investment Response Bill include three temporary regulation-making powers.

- Regulation making power 1: The power to exempt certain transactions, or classes of transactions, from consent requirements to respond to a pandemic in New Zealand.

- Regulation making power 2: The power to amend consent requirements for classes of transactions, when necessary to respond to a pandemic in New Zealand.
- Regulation making power 3: The narrow power to use regulations to modify the Act where necessary or desirable to manage implementation or transitional issues.

The first two powers are consistent with principles of good legislative design. The third, the power to amend the primary Act through Regulations, is not. However, there is precedent for using such clauses to manage transitional issues associated with complex legislation. We judge that such a power is justified given its narrow scope and time-limited nature.

Policy consideration 4: Crown funding

The emergency expansion in the number of transactions subject to review under the Act and rapid implementation of the national interest test and other Phase Two reforms will place additional resourcing pressures on a number of agencies.

We seek your agreement that the costs of implementing the emergency notification powers are met from Crown funding. This approach is consistent with the government's Cost Recovery Principles. Protecting our essential security and economic interests is a public good with public benefits. It is effective because it encourages investors to notify the government of transactions and minimises the cost burden on them at a time of economic disruption. It is efficient because a new charging structure would otherwise need to be developed.

[1,33]

Process consideration 1: Ensuring urgent passage of the Bill

There are two options to ensure the urgent passage of the COVID-19 Overseas Investment Response Bill, while maintaining appropriate scrutiny.

- Option 1 (the 'dual track' process): The COVID-19 Overseas Investment Response Bill would be passed under urgency. It would not be referred to Select Committee and would include a sunset clause triggering its expiry after a fixed period.

At the same time as the Response Bill is passed, the Phase Two Reform Bill would undergo first reading and be referred to Select Committee. The Government and the Select Committee would then work together to ensure that this Bill is passed before the COVID-19 Overseas Investment Response Bill expires.

- Option 2 (the 'split bill' process): The Phase Two Reform Bill would be split into 'urgent' and 'non-urgent' components (officials consider that a large proportion of the Bill would fall into the 'urgent' category). The urgent components would combine with reforms covered in this report to form a bill to be passed under urgency.

At the same time as the 'urgent' Bill is passed, the remaining provisions of the Phase Two Reform Bill would undergo first reading and be referred to Select Committee. The

Committee would have scope to consider that Bill as well as provisions in the 'urgent' Bill and recommend changes for Parliament's consideration.

Officials consider that both options would meet the objectives described above. Option 1, however, may be seen by some as less consistent with constitutional norms (not all provisions in the Bill passed under urgency would relate to the pandemic) and involve more transitional complexity and uncertainty for investors.

Option 2 would delay some aspects of the Phase Two reform (because they would not come into effect until the non-urgent Bill had passed). However, it is not clear how material this is given that these 'non-urgent' provisions would also be likely to be delayed under Option 1 to ensure that provisions to support the COVID-19 response are prioritised.

In light of the benefits and risks presented by each option that officials are aware of, we recommend that you adopt Option 2 (the 'split bill' process).

Next steps

Following your decisions on this report, Treasury will prepare a draft Cabinet paper for your review seeking authority for amendments to the Act by 24 April. At this time, we will also provide advice on how the purchase of business assets (as opposed to businesses) should be screened under the emergency power, how the Bill's provisions should be implemented to prioritise the COVID-19 response, and how to ensure timely decisions on national interest assessments are made during the election period.

Cabinet would then be able to consider these reforms, and legislation to implement them, in early-May 2020. To support this, we seek your agreement to begin work with PCO to draft these reforms as soon as possible.

Finally, to support the law's integrity, we recommend that you allow us to confidentially consult with technical experts on draft legislation prior to it being introduced. These are complex reforms and this will help ensure that they operate as intended.

We recommend that you refer this advice to relevant colleagues as soon as possible, and initiate discussions about the policy changes and legislative process being considered.

Recommended Action

We recommend that you:

- a **Note** that to respond to issues posed by the COVID-19 global pandemic, Minister Parker agreed that officials would develop (T2020/851 refers), in general terms:
- i. options to scrutinise business investments not ordinarily screened under the Overseas Investment Act 2005 (the Act) to manage security and economic risks;
 - ii. targeted exemptions for low-risk lending transactions and transactions necessary to support lending (that is, securitisation);
 - iii. new regulation making powers to ensure that the any new legislative amendments operate effectively, transitional risks can be managed, and classes of low-risk transactions are not unnecessarily captured; and
 - iv. procedural options for urgently passing a “COVID-19 Overseas Investment Response Bill” through Parliament, while ensuring appropriate Parliamentary scrutiny.
- b **Note** that this report seeks your agreement on options for each of the matters referred to in recommendation a, with these to be reflected as your preferred approach in a Cabinet paper seeking authority for these changes.

Policy consideration 1: Design of a new tool to review business transactions not ordinarily screened under the Act

- c **Agree** to introduce a temporary emergency power allowing the government to review certain business investments by overseas persons not ordinarily screened under the Act, with the following core design features:
- i. it would apply to investments by overseas persons (as defined under the Act):
 - o acquiring 25 per cent or more of certain existing business (see recommendation 0); or
 - o increasing their interest in those same businesses to, or above, either 50, 75 or 100 per cent; subject to
 - ii. investors must notify the regulator of transactions within scope;
 - iii. if the Minister responsible for the Act finds a transaction to be contrary to the national interest, they could impose conditions on, block, or unwind the transaction after first notifying the investor; and
 - iv. the Minister and regulator have the same powers available to support the review of such transactions as if they were transactions ordinarily screened under the Act as amended by the Overseas Investment Amendment Bill (No 2).

Agree/disagree.
Associate Minister of Finance

EITHER:

- d **[Officials recommend] agree** that the emergency power can be used to screen investments in:
- i. all Strategically Important Businesses (SIBs) that the national interest test would automatically apply to under the Phase Two Reform Bill; and
 - ii. all other businesses that reported revenue of at least \$10 million in either of their prior two financial reporting periods.

Agree/disagree.

Associate Minister of Finance

OR

- e **agree** that the emergency power can be used to screen investments in:
- i. all SIBs that the national interest test would automatically apply to under the Phase Two Reform Bill; and
 - ii. all other businesses that reported revenue of at least \$5 million in either of their prior two financial reporting periods.

Agree/disagree.

Associate Minister of Finance

- f **Note** that we will provide additional advice on how the purchase of business assets (rather than businesses) should be treated under the emergency power, to mitigate the risk of 'asset stripping'.

- g **Agree** that any current or future exemptions that apply to transactions in significant business assets would also apply to transactions within scope of the emergency power.

Agree/disagree.

Associate Minister of Finance

- h **Agree** that the emergency power must be reviewed every 90 days and will only remain in force while the COVID-19 pandemic continues to have a significant impact both globally and in New Zealand.

Agree/disagree.

Associate Minister of Finance

- i [36]

- j **Agree** that, notwithstanding recommendation h, the power would remain in the Act with the government having the ability to reintroduce the power [1,36] in the future.

Agree/disagree.

Associate Minister of Finance

- k **Note** that the emergency power will impose additional regulatory burden on many low risk transactions, which risks:
- i. unnecessarily impeding the flow of debt and equity finance;
 - ii. imposing notification requirements on investments that would never pose risks to New Zealand's national interest;
 - iii. undermining New Zealand's attractiveness as an investment destination and risk being perceived as unnecessarily protectionist; and
 - iv. imposing significant pressure on the regulator, leading to delays.

- l **Indicate** if you wish to further mitigate these risks by:

- i. allowing investors to complete a transaction before the government has confirmed whether action is to be taken (at the risk it is subsequently unwound);
or

Yes/No

Associate Minister of Finance

- ii. imposing statutory timeframes on decision making under the emergency power.

Yes/No

Associate Minister of Finance

Policy consideration 2: Exempting low risk transactions from the Act's consent requirements

- m **Note** that the COVID-19 pandemic is increasing New Zealand businesses' need for capital, but that unique features of New Zealand's foreign investment screening regime, coupled with a primarily foreign-owned banking sector, result in many low risk capital injections being subject to consent. This makes it slower for businesses to access the funding they need, with negative economic consequences.

n **Agree** to bring forward minor amendments to two existing exemptions, agreed as part of the Phase Two review, to take effect from the date that the COVID-19 Overseas Investment Response Bill receives Royal assent, rather than six months after that date as planned. That is:

- i. amendments to allow existing shareholders to increase their interest in relevant New Zealand businesses, in narrow circumstances, without the need for consent (paragraph 64 of DEV-19-MIN-0285 refers); and
- ii. amendments to resolve an error that have unintentionally limited investors' ability to restructure their holdings of sensitive New Zealand assets where there is no change in the ultimate ownership or control of those assets, without consent (recommendation zz of T2019/3412 refers).

Agree/disagree.

Associate Minister of Finance

o **Agree** to exempt two additional classes of low risk transactions from the Act's consent requirements. That is:

- iii. the issue of loans by registered banks regulated by the Reserve Bank of New Zealand that would otherwise require consent; and
- iv. the acquisition of parcels of securitised loans by overseas persons that would otherwise require consent.

p **Agree** that the exemptions referred to in recommendation o be subject to constraints to ensure that they cannot be used to circumvent the Act. That is that the relevant transaction must:

- i. be entered into in the ordinary course of business,
- ii. occur in good faith, and
- iii. cannot be entered into with the intent of acquiring sensitive New Zealand assets that underlie the relevant loans (that is, the business or other assets that may secure the loans, rather than the cash flows associated with the loans).

q [36]

Policy consideration 3: New regulation making powers to support the operation of the COVID-19 Overseas Investment Response Bill

r **Note** that any COVID-19 Overseas Investment Response Bill will, due to its complexity, rapid preparation, and the way in which it expands the Act's perimeter, risk:

- i. capturing a range of low risk and economically valuable transactions that should either not be subject to review, or subject to less stringent review requirements during the economic downturn and subsequent recovery; and
- ii. creating unintended transitional issues and errors in policy design and legislative implementation.

s **Agree** to include three new temporary powers in the COVID-19 Overseas Investment Response Bill, with each removed once Select Committee and Parliament have finalised their consideration of the Bill's provisions (irrespective of the process chosen to pass these provisions). These are, powers to make regulations to:

- i. exempt any transaction, person, interest, right, or asset, or any class of transactions, persons, interests, rights, or assets from consent requirements to be made for the purpose of responding to a pandemic in New Zealand;
- ii. amend consent requirements for classes of transactions, when necessary to respond to a pandemic in New Zealand; and
- iii. modify provisions of the Act (but only those introduced through the COVID-19 Overseas Investment Response Bill) where necessary or desirable to manage implementation or transitional issues.

Agree/disagree.

Associate Minister of Finance

t **Agree** that the power referred to at recommendation s siii would be tightly constrained to ensure that any regulations made under that power are consistent with Parliament's intent.

Agree/disagree.

Associate Minister of Finance

u **Agree** that all three powers at recommendation s would be removed once the Select Committee and Parliament have concluded their review of the provisions of the COVID-19 Overseas Investment Response Bill.

Agree/disagree.

Associate Minister of Finance

Policy consideration 4: Additional Crown funding to support the COVID-19 Overseas Investment Response Bill

v **Note** that the introduction of the COVID-19 Overseas Investment Response Bill will result in additional resourcing pressures for affected agencies (particularly the Overseas Investment Office, the Act's regulator).

w [1,33]

x **Agree** that these costs be met by the Crown, and initially from baselines and already agreed funding for Phase Two, rather than investors, consistent with the approach to funding for the national security and public order call in power.

Agree/disagree.

Associate Minister of Finance

y [1,33]

z **Note** that we will provide you with further advice if it becomes clear current resources are not sufficient to meet the costs of implementation.

Process consideration 1: Ensuring urgent passage of the COVID-19 Overseas Investment Response Bill

- aa **Note** that officials consider that the COVID-19 Overseas Investment Response Bill should be considered by Parliament in a way that urgently responds to identified risks, but still ensures Parliamentary scrutiny.

EITHER:

- bb **[Officials recommend] agree** to:

- i. introduce and pass under urgency an 'urgent' Bill that includes the matters covered in this report as well as the provisions of the Phase Two Reform Bill most critical to the Government's COVID-19 response; and
- ii. introduce and refer to Select Committee a 'non-urgent' Bill that includes the remaining provisions of the Phase Two Reform Bill, with that Committee also given scope to consider and recommend changes to provisions considered as part of the 'urgent' Bill.

Agree/disagree.
Associate Minister of Finance

OR

- cc **agree** to:

- i. introduce and pass under urgency a COVID-19 Overseas Investment Response Bill that includes the matters covered in this report as well as all of the provisions of the Phase Two Reform Bill, with this Bill subject to sunset after a fixed period of time; and
- ii. hold first reading and refer the Phase Two Reform Bill as introduced to Select Committee for its review, with it to report back (and Parliament to consider its conclusions) before the COVID-19 Overseas Investment Response Bill (discussed at recommendation cc i) sunsets.

Agree/disagree.
Associate Minister of Finance

Other outstanding issues and next steps

- dd **Agree**, in your capacity as Attorney General, that officials can begin work with the Parliamentary Counsel Office to draft legislation to implement these proposals

Agree/disagree.
Associate Minister of Finance and Attorney General

ee **Agree** that officials will prepare a Cabinet paper for your review reflecting your decisions on this report by 24 April 2020, ahead of Cabinet consideration of these proposals – and legislation to implement them – in early-May 2020.

Agree/disagree.

Associate Minister of Finance

ff **Agree** that officials can confidentially consult on draft legislation with a small group of technical experts to better ensure that the Bill operates as intended and begin to build understanding of the reforms.

Agree/disagree.

Associate Minister of Finance

gg **Agree** to refer this report to the Minister of Foreign Affairs; the Minister for Economic Development; the Minister of Justice and Minister Responsible for the GCSB and NZSIS; all Associate Ministers of Finance; the Minister of Fisheries and Minister for Small Business; the Minister of Agriculture; the Minister of Commerce and Consumer Affairs; and the Minister for Land Information.

Refer/not referred.

Associate Minister of Finance

Thomas Parry
Manager International

Hon Grant Robertson
Minister of Finance

Hon David Parker
Associate Minister of Finance and Attorney General

Treasury Report: COVID-19 Economic Response: detailed options to amend the Overseas Investment Act

Purpose of Report

1. This report seeks your (Minister Parker's) agreement to the following policy matters:
 - the design of a temporary notification mechanism to allow the review of certain business transactions not ordinarily reviewed under the Overseas Investment Act 2005 (the Act) (*Policy consideration 1*);
 - to exempt certain additional low-risk debt financing transactions from the Act's consent requirements and bring forward implementation of certain other exemptions already agreed to by Cabinet as part of the Phase Two reform of the Act (*Policy consideration 2*);
 - to introduce new regulation making powers to manage risks associated with the rapid development and drafting of these proposals, particularly transitional risks (*Policy consideration 3*); and
 - to use Crown funding (rather than fees) to support the operation of any new tools to screen additional transactions worth less than \$100 million (*Policy consideration 4*).
2. It also seeks agreement to three process related matters:
 - the process by which these reforms should be presented to Parliament for its consideration and, ideally, subsequent passage (*Process consideration 1*);
 - in your role as Attorney General, permission for officials to begin work with the Parliamentary Counsel Office (PCO) to begin drafting legislation to implement these reforms; and
 - confidential consultation on any legislation with a select group of technical experts to mitigate any risk of it not operating as intended and support community understanding of the reforms once announced.
3. Your decisions on these matters will inform the preparation of a draft Cabinet paper seeking authority for any amendments to the Act.

Background and context

4. On 7 April 2020, you (Minister Parker) agreed that officials would develop detailed design options for a suite of supplementary amendments to the Overseas Investment Act 2005 (the Act), building on the Overseas Investment Amendment Bill (No 2) (the Phase Two Reform Bill), to respond to the economic, welfare, and security risks posed by the COVID-19 global pandemic. These provisions would collectively form a 'COVID-19 Overseas Investment Response Bill' (T2020/851 refers).

5. This was to respond to both existing issues with the Act and new risks created and revealed by the COVID-19 pandemic, including that falling firm values increase the risk that overseas persons may be able to acquire, strategically and economically important businesses without scrutiny. This is because the Act ordinarily only screens investments in sensitive land, such as farm land (irrespective of the land's value), investments in businesses and business assets worth \$100 million or more (or a higher amount that applies to some investors under our Free Trade Agreements), or fishing quota.
6. This briefing has been prepared in consultation with the Overseas Investment Office (OIO); Land Information New Zealand (LINZ); the Ministry of Foreign Affairs and Trade (MFAT); the Government Communications Security Bureau (GCSB); the New Zealand Security Intelligence Service (NZSIS); the Ministry of Business, Innovation and Employment (MBIE); the Ministry of Primary Industries (MPI), the Ministry of Justice (MoJ), New Zealand Trade and Enterprise (NZTE) and the Department of Prime Minister and Cabinet's National Security Group (DPMC).
7. This briefing is provided to the Minister of Finance to support his understanding of the range of measures being taken across government to respond to COVID-19.

Foreign investment risks raised by the COVID-19 pandemic

8. The COVID-19 pandemic and associated economic downturn are creating new foreign investment risks, and amplifying existing gaps in New Zealand's foreign investment screening regime. As noted above, we are concerned that falling firm values will create an opportunity for overseas persons to acquire, without government scrutiny or knowledge, ownership or control of business assets important to New Zealand during both the immediate pandemic and the subsequent economic recovery. This gap could result in the following:

[1]

- Ordinarily productive businesses that offer significant positive externalities to New Zealanders through, for example, employment, the generation or diffusion of intellectual property, or strong international connections, being acquired at prices that do not reflect their value to New Zealand and/or result in the loss of those broader societal benefits (for example, job losses). That is, there would be a transfer of some of New Zealand's wealth to the investor's jurisdiction.
- Significant portions of sectors of New Zealand's economy being foreign owned [1] which could pose risks. For example:
 - vertical integration could limit New Zealand businesses' access to key parts of the supply chain,
 - horizontal integration could reduce market competition, and
 - in future economic crises foreign investors may be more willing to withdraw from New Zealand than domestically owned firms. If firms with significant market share all retreated offshore, this could limit New Zealanders' access to goods and services.

9. These risks are relevant both in respect of entities that:

- would have been subject to screening prior to the economic downturn (for example, entities worth \$150 million at the start of the year now worth less than \$100 million), given their economic significance; and
- would not ordinarily be reviewed under the Act, given
 - the potential loss of positive externalities generated by these businesses could compound other effects of the COVID-19 pandemic (particularly in regional areas of New Zealand where fewer alternative employers, for example, may exist), and
 - that smaller businesses do, in some sectors of the economy, hold significant market share (for example, advanced technology). This increases risks of greater foreign control of certain sectors without action.

10. While these risks are present, it is difficult to estimate their size. While the OIO has not yet observed a material change in application numbers, it is reasonable to both expect many investors to temporarily leave the market given general global uncertainty and some investors to move aggressively to acquire businesses at low prices for commercial or strategic reasons.

11. While it is not possible to calculate the net impact of these changes in investor behaviour, many jurisdictions (including Australia and the European Union) are already moving to manage emerging economic and security risks by tightening their screening regimes. Others, others such as Germany, are instead considering addressing these risks through direct state investment in distressed businesses coupled with significant public support for businesses more generally (see Appendix 2 for additional detail).

Role of the Government's business support package in addressing the problem

12. In response to the decline in economic activity caused by the COVID-19 pandemic, the Government and Reserve Bank of New Zealand have made significant fiscal and monetary support available for businesses, including wage subsidies, tax changes, finance guarantees, and changes to insolvency law.

13. This business support package, [33] will – by preserving firm value and viability – help mitigate the foreign investment risks outlined above (see Appendix 4). However, even with this support in place, we still expect (and have evidence of) many New Zealand businesses needing foreign debt and equity investments to survive the initial crisis and support their, and the broader economy's, recovery.² This reality has driven this report's recommendations.

Policy assessment criteria and design principles

14. When assessing new policy options, we have, where possible, used the same criteria as the Phase Two reform. These are detailed in Appendix 1, but in general consider: how well an option manages risk; the extent to which it does or does not support investment in productive assets; and whether it is likely to result in more transparent, predictable, or timely outcomes. These remain relevant to the consideration of any new screening tools and exemptions, just as they were relevant to considering such matters as part of the broader Phase Two reform.
15. For some policy issues we have assessed options against how consistent they are with legislative best practice.
16. Further, in designing all policy options, we have started with a view that any new or amended tools should be as consistent as possible with any equivalent process, concept, or powers contained in the Overseas Investment Act (as amended by the Phase Two Reform Bill) and/or Overseas Investment Regulations (the Regulations). This is essential to support:
- investors', and their representatives', understanding of any policy changes;
 - the Treasury in developing policy details and communicating these with relevant agencies,
 - PCO, in rapidly drafting any policy changes; and
 - the regulator, in implementing any changes.

² Though the size of this risk is impossible to determine due to uncertainty around how both New Zealand business and overseas investors will respond to the crisis.

Policy consideration 1: Design of a new tool to review business transactions not ordinarily subject to review

Declining firm values and revenues increase the risk that overseas investments contrary to New Zealand's national interest will proceed without scrutiny. A temporary notification mechanism that gave Government space to review these transactions could mitigate these risks, but must be carefully designed to ensure that it does not impose significant economic costs.

Recommendation: Introduce a temporary emergency power that allows the government to review certain business transactions not ordinarily screened under the Act, with the following basic design features:

- investors must notify the regulator of transactions within scope;
- if the Minister responsible for the Act finds a transaction to be contrary to the national interest, they could impose conditions on or block the transaction after first notifying the investor;
- the Minister and regulator should have all necessary powers for screening such transactions as if they were transactions ordinarily screened under the Act (for example, information sharing, monitoring, and enforcement).

Problem to be resolved

17. The Act grants the government limited ability to manage risks posed by investment by overseas persons.³ To resolve this, a core part of the Phase Two reform agreed to by Cabinet was the introduction of:
- a 'national interest test', that would grant the government the ability to decline any investment ordinarily screened under the Act⁴ found contrary to New Zealand's national interest, and
 - a 'national security and public order call in power' that would allow the government to review and impose conditions on, block, or unwind certain transactions not ordinarily reviewed under the Act that pose, or are likely to pose, a significant risk to New Zealand's national security or public order.
18. However, even with these tools in place, the Government would not have the ability to manage the new foreign investment risks associated with the COVID-19 pandemic and associated economic downturn outlined from paragraph 8.

Recommendation

19. We recommend the introduction of a new temporary emergency notification power (the emergency power) to manage national security, public order and economic risks associated with investment during the periodic of economic disruption caused by COVID-19.
20. The features of the emergency power are detailed below. Critically, it would not be a new consent regime. Investors will not need to satisfy the ordinary tests for consent (such as the benefit to New Zealand test). The majority of investments will be processed quickly, with no action taken.

³ As defined in section 6 of the Act and Phase Two Reform Bill.

⁴ That is, transactions involving sensitive land, business assets worth at least \$100 million or a higher amount available to some investors under New Zealand's Free Trade Agreements, or fishing quota.

21. However, for those transactions found contrary to the national interest, the power would grant the government the ability to review and then impose conditions on, block or unwind them (for example, conditions could be imposed to preserve jobs).
22. The recommended features are calibrated to balance the need to manage risks, without overly constraining capital flows, where this may be critical to some businesses survival. In addition, the recommended design is as consistent as possible with:
 - the Phase Two Reform Bill (as set out in Appendix 3), and
 - the Government’s broader business support package (Appendix 4 provides an overview of how the emergency power would complement these packages).

Recommended scope

23. The emergency power can be used to review transactions by overseas persons (as defined in the Act, and amended by the Bill) to acquire:
 - more than 25 per cent⁵ of certain existing businesses (see pop out box, below) worth less than \$100 million, or the higher threshold that applies in respect of some investors through FTAs; and
 - increase an existing interest in the same types of New Zealand businesses to, or above (as relevant), 50 per cent, 75 per cent or 100 per cent.⁶
24. This targets the tool at transactions that grant overseas persons control, or greater control, of New Zealand businesses. This is appropriate given that the change of control of such businesses is the primary risk posed by foreign investment during the pandemic.
25. Exemptions available across the Act more generally would also apply to transactions that would otherwise be subject to review under the tool (for example, investments by qualifying retirement schemes).
26. In addition to the above, the purchase of certain business assets will also be subject to notification. Not notifying the purchase of business assets could give foreign investors opportunities to avoid the Act by ‘asset stripping’. However, there are significant complexities associated with screening business asset purchases and we will provide further advice on this on 24 April 2020.

Recommended thresholds for businesses subject to the emergency power

We recommend that the emergency power only apply to investments in certain businesses above a *de minimis* threshold to ensure that it is targeted at the transactions most likely to pose risks, and does not:

- unnecessarily reduce the flow of low risk debt and equity finance needed to support New Zealand businesses during this period of economic disruption with potentially significant economic costs,
- impose undue burden on the regulator and other agencies responsible for completing national interest assessments, diverting their resources from transactions most likely to pose national interest concerns, and
- [1]

⁵ This threshold is consistent with the general trigger for consent under the Act.

⁶ A more than 25 per cent interest grants negative control – the ability to block certain special resolutions at a general meeting. A 50 per cent or greater interest grants positive control – the ability to direct the company’s operation. A 75 per cent or greater interest grants the ability, on top of positive control, to block any attempts to block special resolutions. A 100 per cent interest grants complete ownership.

Based on our assessment of the national security and economic risks, the distribution of these risks across New Zealand businesses, and StatsNZ and Inland Revenue Department data, we recommend applying the emergency power to the following.

- All investments in Strategically Important Businesses⁷ (SIBs) that the national interest test would always apply to in respect of investments ordinarily subject to consent.
Investments in these types of entities present the most significant national security and economic risks [1]
It is therefore appropriate to screen all investments in these entities.
- All investments in any other businesses with revenue⁸ of at least \$10 million in either of their last two financial reporting periods.
This would bring around 8,000 businesses within the Act's scope. These are of a scale most likely to offer significant positive externalities to their regions, or have particular importance in the sectors that they operate in.

Investments in non-SIB businesses smaller than this are not generally expected to raise national interest concerns and requiring notification of, and potentially reviewing, these transactions would therefore impose significant costs on the New Zealand economy and burden on the OIO and other agencies.

We note that this is a higher threshold than adopted in Australia. However, New Zealand already screens a greater proportion of foreign investment transactions than Australia due to the amount of business investment subject to review because it involves sensitive land. Further, New Zealand is more reliant on foreign capital than Australia (which has deeper domestic capital markets), making the potential economic costs of proceeding without a threshold significantly higher.

Alternative threshold that prioritises risk management

An alternative option, if you placed additional weight on the Government's ability to manage foreign investment risks in non-SIB businesses, relative to the burden that the emergency power will have on the economy, the threshold for notification could be set at revenue of at least \$5 million in either of their last two reporting periods. This would bring up to around 7,000 additional businesses within scope of the Act (relative to our preferred option, with a total of around 15,000 entities within scope).

It is difficult to assess what impact this would have on the volume of transactions that the OIO would have to manage, but we expect that the growth would not be linear because smaller firms are less likely to receive foreign investment (that is, the volume of transactions would increase by a smaller multiple than the increase in businesses captured). Regardless, this option would place significantly more pressure on the OIO and other agencies.

Recommended notification requirements and process

27. Investors entering transactions within scope of the power must notify the OIO (the Act's regulator) of their transaction. We expect that a notification will be a short 2-5 page document (consistent with that proposed under the call in power) containing only basic information about the transaction, such as the identity of the investor and upstream ownership/control, links to foreign governments, and the nature of the business being purchased, including what the investor will have control over.

⁷ In general terms, these SIBs include: critical national infrastructure (such as ports, airports, electricity generation and telecommunications), developers of military and dual use technology, critical direct suppliers to defence and the intelligence community, and media businesses that impact on the plurality of content available in New Zealand. The Government has the ability to expand this list through regulations.

⁸ Revenue is a good proxy for firm size and importance, with historical data not subject to the same problems as market value is during this period of economic disruption. It is also a standard business reporting metric, making it easy for businesses and investors to determine whether the emergency tool would apply to them.

Recommended Ministerial powers

28. If the Minister responsible for the Act (ordinarily the Minister of Finance) considers that a reviewed transaction could be contrary to New Zealand's national interest, they would be required to notify the investor. After collecting additional information from the investor (where necessary), they could then impose conditions on, block, or unwind the transaction.
29. The national interest test grants Ministers broad discretion to consider an investor and the proposed investment to determine whether either raises national interest concerns. It should include consideration of a transactions prospective benefits, as well as risks, before a decision is taken.
30. Other transactions subject to the power that did not pose significant risks would quickly receive a 'direction order'⁹ from the OIO (in practice, a 'no action notice') allowing the transaction to proceed. The government would be unable to take any action in respect of those transactions in the future unless, for example, an investor obtained the direction order fraudulently.
31. To support the emergency power's implementation, the Minister's and the OIO's powers and functions would mirror those proposed for the call in power in the Phase Two Reform Bill (for example, enforcement and information sharing tools). These powers are detailed at Appendix 5.
32. In exercising these powers, Ministers will need to have regard to the counterfactual of the transaction not proceeding (which could include firm failure). For this reason, the imposition of conditions to manage investment risks should be the Government's first response where national interest concerns exist. Where there is no other option available than to block a transaction, Ministers will need to consider whether the benefits of the Crown potentially investing in the entity to ensure its viability outweigh any associated costs.

Other recommended design features

33. The emergency power will only remain in force while the COVID-19 pandemic continues to have a significant impact both globally and in New Zealand. To support this, the power would be subject to periodic statutory review (potentially against a set of criteria) every 90 days to ensure it is repealed as soon as it is no longer necessary.

[36]

34. To ensure that the government has flexibility to respond to any future crises, the tool would, however, remain as an enduring feature of the Act, with it able to be reactivated (for example, through an Order in Council) [1]
(We will provide you with further advice on how any restarted power would interact with an operating national security and public order call in power).
35. To avoid duplication and ensure that the OIO can concentrate on implementing the emergency power, the call in power (which is significantly narrower than the emergency power in most respects) would not come into force until the emergency power had been lifted. The risk of the call in power not coming into force is mitigated by

⁹ This would be similar to the direction orders contained in new section 88 of the Phase Two Reform Bill, however the automatic condition to manage national security and public order risks would not be applied.

the fact that most transactions covered by the call in power will also be covered by the emergency power.¹⁰

36. To support the OIO and investors, the Government would provide guidance on what types of transactions are likely to raise national interest concerns. The Minister would separately engage with the OIO on their risk tolerance for transactions reviewed under the emergency power.
37. Finally, consideration must be given to how the Government can ensure that transactions within scope of the power can continue to be progressed during the upcoming election period. We will provide advice on this, and the types of transactions that are more likely to raise national interest concerns, on 24 April.

Alternative and complementary options to reduce regulatory burden

38. While we consider that the emergency power should include the features above, we have identified additional options you may wish to adopt based on how the government balances:

- the need to manage foreign investment risks during the pandemic, against
- the fact that the free flow of capital is particularly critical at this time to support business resilience during the crisis, and their recovery after it.

39. We seek your decisions – based on your weighting of the above factors – on whether:

- the investor can proceed with their transaction before hearing from the government as to whether their transaction could proceed.

This would provide investors with additional flexibility if, in their judgement, the benefits of proceeding outweigh the risk that the government subsequently intervenes in their transaction (with government guidance on what types of transactions may trigger national interest concerns supporting this assessment). However, it would mean that the government likely needs to rely more on unwinding transactions (rather than blocking them), which [36] requires greater regulatory resources.

[36]

- The government should be required to either issue a ‘direction order’ or notify the investor that the transaction may be contrary to the national interest,¹¹ within a statutory timeframe (for example, 30 days).

Statutory timeframes would mitigate some of the uncertainty posed by the emergency tool (with its expansion capturing many small firms unfamiliar with the

¹⁰ Transactions to acquire less than 25 per cent of a strategically important business would not be caught by the emergency power, but would be caught by the national security and public order call in power.

¹¹ If an investment was considered to be potentially contrary to the national interest, the Minister would be able to extend the timeframe available to review it. This is consistent with the broader design of statutory timeframes agreed to as part of the Phase Two reform.

overseas investment regime) and support the free flow of capital during the pandemic.

However, statutory timeframes would not apply elsewhere across the Act, introducing inconsistencies, and potentially creating incentives for the regulator to prioritise processing lower-value and lower-risk transactions ahead of investments that are ordinarily subject to screening. It would also differ to the approach taken by most agencies at this time, where timeframes are being relaxed to manage COVID-19 related pressures.

40. If you elect to place greater weight on managing risks, economic costs could be reduced – but not eliminated relative to a design that included the matters referred to above – through strict and effective triaging of transactions by the OIO.

Policy consideration 2: Exempting low risk transactions from the Act's consent requirements

Fundamental differences in New Zealand's foreign investment screening regime and capital markets relative to most other comparable jurisdictions mean that a range of low risk and economically valuable transactions need consent. This is limiting New Zealand businesses' access to capital to support their resilience during the downturn, and their growth in the recovery.

Recommendations:

1. Bring forward two already agreed upon minor amendments to existing exemptions to support New Zealand businesses' access to debt and equity finance. That is:

- amendments to allow existing shareholders to increase their interest in relevant New Zealand businesses, in narrow circumstances, without the need for consent; and
- amendments to resolve a drafting error that have unintentionally limited investors' ability to restructure their holdings of sensitive New Zealand assets where there is no change in the ultimate ownership or control of those assets, without consent.

2. Exempt two new classes of low risk but highly economically valuable transactions from the Act's consent requirements, subject to a range of constraints. That is:

- the issue of loans by registered banks valued at over \$100 million, or any higher amount that may apply under New Zealand's Free Trade Agreements (FTAs) (whether this threshold is reached in one loan or multiple related loans); and
- the acquisition of parcels of securitised loans valued at over \$100 million, or any higher amount that may apply under New Zealand's FTAs.

Problem to be resolved

41. The global pandemic is already placing a number of New Zealand businesses under financial stress. While measures taken by the Government to date are reducing these pressures, we expect many productive New Zealand businesses to need additional debt and equity capital to survive this downturn and, critically, to recover and grow in the aftermath.
42. Unfortunately, two features of New Zealand's economy and legislation are combining to limit businesses' access to this critical capital at this time. This is because the Act:
- is distinct from many other foreign investment screening regimes, because it requires many low risk, economically valuable transactions, to obtain consent (rather than being principally focussed on reviewing investments in businesses that present risks to a country's national interest or national security); and

- requires foreign owned banks and other financial institutions (which make up the vast majority of New Zealand’s financial system) to seek consent to provide credit and enter transactions to manage their risk portfolios. This is not the case in countries with locally owned banking sectors and deeper domestic capital markets.
43. The particular risks posed by the COVID-19 pandemic have highlighted some limitations with existing exemptions, and increased the need for some new exemptions already agreed to by Cabinet as part of the Phase Two reform (that is, exemptions to better facilitate small increases in shareholdings and allow corporate restructures where there is no change in control of the underlying assets). Resolving these issues would support the economy, particularly if recommendations to introduce an emergency screening tool are adopted. This is because any such screening tool, if these exemptions are not adopted, will amplify issues associated with the Act’s over-capture.

Additional detail: Problems with existing exemptions

44. The Regulations already include an:
- exemption from the need to obtain consent when acquiring a ‘security interest’ (such as a mortgage) over sensitive land; and
 - exemption from consent requirements when obtaining two or more security interests (such as a securitised ‘parcel’ of loans) that grant an interest in sensitive land or fishing quota.¹²
45. These longstanding exemptions facilitate lending across the economy. The first allows banks and other lenders to acquire security against loans without consent, thereby allowing them to lend quickly. The second supports lenders in managing their portfolio risk by selling rights to the cash flow from a bundle of loans (that is, securitised loans) without the acquirer of these securitised assets obtaining consent. Ensuring that this type of portfolio management can occur quickly supports the provision of debt finance to the economy.
46. There are, however, minor issues with these exemptions that limit banks’ ability to lend and manage risk. In particular:
- while banks that are overseas persons (most of New Zealand’s banks) can acquire a ‘security interest’ against a loan without consent (that is, an interest in the underlying sensitive New Zealand asset), they need consent to issue loans of \$100 million or more.¹³ This is because the loan is treated as a Significant Business Asset (SBA) that needs consent under the Act in its own right, despite it not granting the bank a claim over any additional real asset; and,
 - while overseas persons can acquire securitised assets that grant an interest in sensitive land or fishing quota without consent, they cannot acquire securitised assets worth \$100 million or more, because then the asset is treated as a SBA. Again, this is despite the fact that the asset does not grant a claim over any tangible asset.
47. These issues could increase the number of New Zealand businesses seeking equity rather than debt financing during the pandemic because the process of granting a loan to a business is the same as buying a stake.

¹² See Regulations 41 and 42 of the Overseas Investment Regulations 2005.

¹³ Or a higher amount that may apply under New Zealand’s FTAs.

Recommendations

48. To better support New Zealand businesses' access to debt and equity capital during the downturn and subsequent recovery, we make two recommendations.
- Recommendation 1: Bring forward minor amendments to two existing exemptions already agreed as part of the Phase Two reform to take effect from the date that any COVID-19 Overseas Investment Response Bill receives Royal assent, rather than six months after that date as planned in the Phase Two Reform Bill. These are:
 - amendments to allow existing shareholders to increase their interest in relevant New Zealand businesses, in narrow circumstances, without the need for consent (paragraph 64 of DEV-19-MIN-0285 refers); and
 - amendments to resolve an error that has unintentionally limited investors' ability to restructure their holdings of sensitive New Zealand assets where there is no change in the ultimate ownership or control of those assets, without consent (recommendation zz of T2019/3412 refers).
 - Recommendation 2: Make minor new exemptions to remove two classes of transactions from the Act's consent requirements. That is:
 - the issue of loans by registered banks regulated by the Reserve Bank of New Zealand that would ordinarily require consent; and
 - the acquisition of parcels of securitised loans by overseas persons that would ordinarily require consent.
- To qualify for either of these exemptions, consistent with existing related exemptions discussed at paragraph 44, the transaction must:
- be entered into in the ordinary course of business,
 - occur in good faith, and
 - cannot be entered into with the intent of acquiring sensitive New Zealand assets that underlie the relevant loans (that is, the business or other assets that may secure the loans).
49. The first of these recommendations would support firm viability over coming months and have no impact on the government's ability to manage foreign investment risks. These reforms were to take effect six months after the Phase Two Reform Bill received Royal assent to manage Treasury and PCO resources. However, we judge that the economic benefits of bringing them forward justify this additional resource burden.
50. The second recommendation would be a more significant change. However, we believe that economic benefits will be significant, while the risk of such exemptions being used to circumvent the Act is low. This is because:
- the relevant interests to be exempted do not relate to the acquisition of a sensitive tangible asset in New Zealand, but merely revenue flows generated by New Zealand businesses,
 - in respect of both proposed exemptions, restricting this to transactions made subject to a range of constraints that have proven successful at protecting the Act's integrity when applied to other exemptions, and
 - restricting the lending exemption to registered banks further reduces any risk. Banks do not have a long term interest in the acquisition of non-banking assets (and can face additional prudential regulatory costs if they do).

Policy consideration 3: New regulation making powers to support the operation of the COVID-19 Overseas Investment Response Bill

Introducing complex legislation that fundamentally changes the Act's operation, drafted on short timeframes and not subject to standard Select Committee or Parliamentary review, risks unintended transitional consequences.

Recommendation: Introduce a range of new regulation making powers that allow:

- exemptions for transactions or classes of transactions from consent requirements to be made for the purpose of responding to a pandemic in New Zealand;
- consent requirements for classes of transactions to be amended, when necessary to respond to a pandemic in New Zealand; and
- provisions of the Act introduced by the COVID-19 Overseas Investment Response Bill to be amended where necessary or desirable to ensure the Act functions properly (that is, in general terms, to manage transitional issues and fix 'broken' drafting).

These regulation making powers should all be temporary, and be able to be revoked once Select Committee and Parliament have considered the changes being introduced under urgency.

Problem to be resolved

53. The COVID-19 Overseas Investment Response Bill, in whatever form that takes (see Process consideration 1), will introduce a range of complex new powers that significantly expand the Act's scope, that were designed by officials and drafted by PCO quickly and were not subject to standard Select Committee or Parliamentary review. This introduces two key risks.

- Risk 1: The risk of capturing a range of very low risk and economically valuable transactions that either: should not be subject to review; or should be subject to less stringent requirements for the duration of the COVID-19 pandemic and subsequent economic recovery if an enduring exemption is undesirable.

¹⁴ [1,36]

Addressing this risk will best ensure that the Act does not unnecessarily restrict economic growth.

- Risk 2: The risk that certain provisions of the Act, as drafted, present significant unforeseen transitional issues or include errors. Addressing this risk will best ensure that:
 - the reforms are seen as credible and workable, even ahead of a fulsome Select Committee and Parliamentary review being completed; and
 - transactions that are essential to business viability or recovery are not inadvertently prevented.

Recommendations

54. To resolve these problems, we recommend that the COVID-19 Overseas Investment Response Bill include three new temporary types of regulation making powers. This assessment has been informed by an assessment of various options ability to resolve the key policy problems and their consistency with legislative best practice, rather than the ordinary Phase Two reform criteria.

- Regulation making power 1: The power to exempt any transaction, person, interest, right, or asset, or any class of transactions, persons, interests, rights, or assets, from consent requirements for the purpose of responding to a pandemic in New Zealand.

This power would resolve the issue of unintentionally capturing transactions through the Act that present so little, if any, risk that screening requirements are disproportionately burdensome.

Any exemptions would be able to be made subject to any conditions Ministers desire to ensure that they are appropriately constrained and do not give rise to opportunities for circumvention of the Act.

- Regulation making power 2: The power to amend consent requirements for classes of transactions, when necessary to respond to a pandemic in New Zealand.¹⁵

[36]

- Regulation making power 3: The narrow power to modify provisions of the Act amended by the COVID-19 Overseas Investment Response Bill, where necessary or desirable to manage implementation or transitional issues.

This would ensure that unforeseen transitional issues or legislative oversights do not undermine the Act's efficiency and impose unnecessary costs on investors, New Zealand firms seeking additional capital, and ultimately New Zealand's economy. In practice, it should only be used if another legislative vehicle to fix any problems is unavailable (for example, an omnibus Bill).

55. The first two of these proposed Regulation making powers are consistent with principles of good legislative design. The exemption making power would operate

¹⁵ The exact form that this takes will be worked through with PCO. In practice, it may require more than one regulation making power.

consistently with how exemptions are considered under the Act more broadly, and be subject to the same checks and balances. Specific regulation making powers that allowed the amendment of certain consent requirements in limited circumstances would ensure that any such regulations have been foreshadowed by Parliament in its consideration of the Act.

56. The third proposed power, the power to effectively amend the primary Act through Regulations (though only for a narrow purpose), is a ‘Henry the VIIIth’ clause.
[36]
57. [36] but note that there is precedent for New Zealand using such clauses to manage transitional issues associated with the introduction of complex legislation.¹⁶ These provide workable examples of how such powers can be drafted.
58. Consequently, we recommend that the proposed regulation making power (with exact requirements to be finalised in consultation with PCO):
- can only be used to make regulations to modify the Act where necessary or desirable to manage implementation or transitional issues associated with the COVID-19 Overseas Investment Response Bill (as opposed to resolving more long-standing issues, if any).
 - is subject to appropriate constraints, including that in recommending regulations to the Governor-General, the Minister would need to be satisfied that the modification is consistent with Parliament’s intent.
 - be removed once Select Committee and Parliament have concluded their consideration of the Phase Two Reform Bill or ‘non-urgent’ Bill (depending on the process for Parliamentary passage ultimately adopted by Government – see Process consideration 1).
59. On balance, we consider that these protections are sufficient to protect the rule of law while ensuring that the government has the ability to manage risks associated with provisions developed in haste that do not work in practice imposing economic costs.
60. Each of these new regulation making powers would be repealed once Select Committee and the Parliament had concluded their review of the COVID-19 Overseas Investment Response Bill’s provisions. This removes the risk of any future government using the powers to grant broad, enduring, exemptions from the Act’s consent requirements.

Options not progressed

61. In designing this package of regulation making powers, officials considered a number of other options that – for various reasons – were judged unsuitable for managing the identified risks. In particular, the following were considered and rejected:
- Granting the Minister the ability to exempt transactions and classes of transactions themselves, rather than having to make recommendations to the Governor-General (as Regulation making power 1 would require). While this would have potentially allowed exemptions to be issued more quickly, the difference in speed would likely not have been materially different and outweighed by the lack of checks and balances on Ministerial power.
 - Granting the Minister the ability to streamline consent requirements through a general, broad, ‘Henry VIII’ provision rather than explicit regulation making

¹⁶ For example, see section 547 of the Financial Markets Conduct Act 2013, as enacted.
T2020/914 COVID-19 Economic Response: detailed options to amend the Overseas Investment Act

powers as set out in Regulation making power 2. [36]

- Relying on omnibus Bills, operational changes, and provisions in the Legislation Act 2012 to manage risks associated with legislative oversights. Ultimately these options were judged to be insufficient to mitigate the risks associated with potential legislative oversights or errors because:
 - there could be significant delay in developing and passing a new omnibus/targeted Bill,
 - legislative oversights or errors may be so unworkable as drafted that operational changes cannot resolve the issue,
 - the legislative oversight or error may not be able to be addressed through the general error correction mechanism in the Legislation Act (which enables only minor and technical changes, like spelling errors or incorrect cross-references).

Policy consideration 4: Additional Crown funding to support the COVID-19 Overseas Investment Response Bill

Increasing the number of transactions subject to review under the Act and rapid implementation of the national interest test and other Phase Two reforms will place additional resourcing pressures on a number of agencies.

Recommendation: We recommend that the costs associated with the implementation of the new powers outlined in this report be met by the Crown, rather than from fees. Subject to the final scope of these powers, we also recommend these costs be met from funding already provided to support the Phase Two reforms and from baselines.

Problem to be resolved

62. The introduction of the new powers proposed in this report will require additional work by affected agencies (particularly the OIO and intelligence community, but also agencies such as MBIE, NZTE, MFAT and Treasury). This is a result of:
- the significant expansion in the number of transactions that must be reviewed under the Act as a result of lowering the Act's screening threshold below \$100 million,¹⁷
 - the national interest test that can be applied to those transactions, which requires expertise from a range of agencies across government.
63. Ordinarily most costs of screening are recovered from investors through fees, reflecting the private benefit they receive through receiving consent to acquire sensitive New Zealand assets.

Recommendation

64. We consider that the Crown should meet costs associated with the emergency notification power. This approach is consistent with the government's Cost Recovery Principles. Protecting our essential security and economic interests is a public good

¹⁷ Or higher threshold that may apply under relevant New Zealand FTAs.
T2020/914 COVID-19 Economic Response: detailed options to amend the Overseas Investment Act

with public benefits. It is effective because it encourages investors to notify the government of transactions and minimises the cost burden on them at a time of economic disruption. It is efficient because a new charging structure would otherwise need to be developed.

[1]

[1,33]

Process consideration 1: Ensuring urgent passage of the COVID-19 Overseas Investment Response Bill

To manage the economic and welfare risks posed by COVID-19, the COVID-19 Overseas Investment Response Bill should be passed as quickly as possible. It is important, however, that these reforms remain subject to Parliamentary scrutiny.

Recommendation: Introduce two Bills to Parliament.

- An 'urgent' Bill including components of the Phase Two Reform Bill that support the Government's response to COVID-19 (such as the national interest test) and the matters detailed in this report, and
- A 'non-urgent' Bill that contains the remaining provisions of the Phase Two Reform Bill (of which there are unlikely to be many).

The 'urgent' Bill would be passed under urgency, while the 'non-urgent' Bill would be referred to Select Committee for its review, with the Committee also having scope to recommend changes to provisions included in the 'urgent' Bill in its report to Parliament.

Problem to be resolved

68. The escalating security and economic risks caused by COVID-19 mean that amendments to the Act are time-sensitive. These are unprecedented times for the New Zealand economy and Government that demand innovative solutions, prepared at pace, and could justify less orthodox parliamentary procedures to ensure that these solutions can be passed and put into effect as quickly as possible.

[1,33]

69. Notwithstanding this urgency, it will be important to ensure that any amendments to the Act are subject to appropriate Parliamentary and public scrutiny. This was true for the Phase Two reform Bill as introduced, given its complexity, the compressed time period available for policy design and legislative drafting, and strong public interest in that Bill. Supplementary amendments that respond to COVID-19 risks only increase this need. It is therefore critical that these reforms be subject to a credible Select Committee process.

Options to resolve the problem

70. We have developed two options to ensure the urgent passage of the COVID-19 Overseas Investment Response Bill, while maintaining appropriate scrutiny.

- Option 1 (the 'dual track' process): The COVID-19 Overseas Investment Response Bill (which would include all elements of the Phase Two Reform Bill plus any matters discussed in this report and agreed to by Cabinet) would be introduced and passed [33]. This Bill would not be referred to Select Committee and would include a sunset clause triggering its expiry after a fixed period.

At the same time as the Response Bill is passed, the Phase Two Reform Bill would undergo its first reading and be referred to the relevant Select Committee for review. It would then be contingent on the Government and the Select Committee to work together to ensure that this Bill can be reported back and passed through Parliament before the COVID-19 Overseas Investment Response Bill expires.

- Option 2 (the 'split bill' process): The Phase Two Reform Bill would be split into 'urgent' and 'non-urgent' components. The urgent components would be combined with new provisions to implement the matters covered in this report into a Bill that was introduced and passed [33]. This Bill would not have a sunset clause (though the emergency screening tool and new regulation making powers would be subject to removal, as described in those sections).

At the same time as the 'urgent' Bill is passed, the remaining provisions of the Phase Two Reform Bill would undergo its first reading and be referred to the relevant Select Committee for review. The Select Committee would have scope (for example, through Ministerial instruction to the Select Committee or a Business Committee determination) to consider that Bill as well as provisions in the Bill passed under urgency and recommend any changes it deems appropriate for Parliament's subsequent consideration.

Appendix 6 provides an overview of how the Phase Two Reform Bill could be split into 'urgent' and 'non-urgent' parts. This analysis indicates that the vast majority of that Bill could be introduced and passed under urgency, with subsequent review through the non-urgent Bill's Select Committee process.

Options analysis

71. Both of these options would deliver on the Government's objectives. They would allow the Phase Two Reform Bill and new emergency provisions to come into effect as soon as possible, with mechanisms in place to ensure that its provisions are subject to credible Parliamentary and public review.
72. PCO believe, however, that Option 1 (the dual track process) could pose meaningful risks.

- It would be an unconventional process that departs from normal Parliamentary practice (though this could potentially be justified given the crisis facing New Zealand).
 - Passing the entire Bill, including provisions unrelated to the COVID-19 response, under urgency may be seen as less adherent to constitutional norms than Option 2 (see T2020/851 for additional detail). There is a risk that this may undermine the COVID-19 Overseas Investment Response Bill's credibility and could raise questions about the Government's commitment to Parliamentary scrutiny.
 - The 'dual track' process may be prohibited under Parliamentary Standing Order 264 (that is, the 'same question rule'), with the need to seek a waiver from the Business Committee increasing the risks of Parliamentary delays.²¹ This is because even though one Bill would sunset and include the emergency power, with the other coming in later on a permanent basis, many of the provisions in both Bills would be identical.
 - It would likely involve more transitional complexity and uncertainty for investors, the regulator, and New Zealanders than would ordinarily be the case.
 - It could establish precedent for future governments to use a similar approach to respond to future events in New Zealand, even if they do not approach the severity of the COVID-19 pandemic. This, if it occurred, could be used to circumvent Parliament (at least for a period).
73. Option 2 would also deliver on the government's objectives, but pose fewer of these risks (in particular it would be more consistent with ordinary Parliamentary practice, likely makes the use of urgency easier to justify, and would be clearly consistent with Standing Orders). By ensuring that the 'non-urgent' Bill is introduced and referred to Select Committee at the same time as the 'urgent' Bill is passed, the Government is able to ensure that all aspects of the Phase Two reform will be considered by the Parliament (that is, there is no risk of aspects of the Phase Two reform not being progressed).
74. The drawbacks of Option 2 that officials are aware of are that there would be a delay in the commencement of certain aspects of the Phase Two reform (for example, changes to farmland advertising requirements). However, it is not clear how material this drawback is because the provisions likely included in any non-urgent Bill would:
- be those most likely to have their implementation delayed under Option 1 to ensure that the measures most critical to the Government's response to COVID-19 can be operationalised as quickly and effectively as possible; and
 - are, in some cases, already being achieved through other means (for example, higher consent thresholds for farmland are achieved through the Government's Ministerial Directive Letter).

Recommendation

75. On the basis of the risks and benefits that we are aware of in respect of both options, we recommend that you adopt the 'split bill' process to pass these reforms through Parliament.

Next steps

²¹ These risks are amplified given that the Business Committee operates on the principle of unanimity or near-unanimity (read as the overwhelming majority of members) (Standing Order 78 refers).

76. Depending on which process option you adopt, officials will work to provide you with advice – at the same time as a draft Cabinet paper – on how any bill passed under urgency should come into effect, relative to the commencement schedule proposed in the Phase Two reform. Changes will be necessary to ensure that the government has the powers and operational capacity it needs to manage economic and security risks posed by the pandemic as quickly as possible, and that the regulator has the resources it needs to prioritise the operationalisation of these powers. Consequently, consideration will be given to:
- bringing forward the introduction of the national interest test under the COVID-19 Overseas Investment Response Bill, to ensure that the Government can block investments that are contrary to New Zealand’s national interest as soon as possible (under the Phase Two reform Bill, this mechanism would not commence until around 6 months after that Bill receives Royal assent), and
 - delaying other provisions of any Bill passed under urgency that are less critical to manage the risks presented by the pandemic but would place significant implementation pressure on the OIO and other affected agencies.

Next Steps

77. Following your decisions on this report, Treasury will prepare a draft Cabinet paper for your review seeking authority for any amendments to the Act. We expect to be able to provide this to you by Friday 24 April.
78. The report covering this Cabinet paper will also include advice on:
- how the acquisition of business assets should be treated under the emergency power,
 - how the Bill’s provisions should be implemented to best ensure that the Government can manage COVID-19 related risks, recognising resource constraints across government that mean that the entire Response Bill will not be able to come into effect at the date of Royal assent,
 - what types of transactions are more likely to trigger national interest concerns and the types of matters that should always be considered when applying that test, and
 - how the emergency notification power should be operated during the election period, to ensure that transactions are not unnecessarily delayed.

79. At this time we also plan to provide you with, subject to PCO resourcing, draft legislation to implement your desired changes. To support this, we seek your agreement, as Attorney General, to the Treasury beginning work with PCO to draft these provisions ahead of Cabinet's agreement to them.
80. Following your feedback on the draft Cabinet paper and legislation, we will finalise this for Cabinet's consideration. We expect that Cabinet would be able to consider this package by end-April 2020. To support any Government announcement of these changes, and investors' understanding of them, we will also provide your office with a range of draft communications materials at this time.
81. As noted earlier in this report, officials consider that there are significant risks with introducing rapidly prepared policy and legislation to implement it under urgency. While the powers discussed under 'Policy consideration 3' would go some way to mitigating these risks, we believe there would also be merit in confidentially sharing draft legislation with a select group of technical experts to ensure that provisions work as intended. This would also have the additional advantage of building expert understanding of the reforms before their commencement. We therefore seek your agreement to consulting on a draft Bill in this way.
82. Finally, given the significance of these proposals, the unconventional Parliamentary process, and the urgency underlying the entire package, we recommend that you refer this report to the following Ministers: the Minister of Foreign Affairs; the Minister for Economic Development; the Minister of Justice and Minister Responsible for the GCSB and NZSIS; all Associate Ministers of Finance; the Minister of Fisheries and Minister for Small Business; the Minister of Agriculture; the Minister of Commerce and Consumer Affairs; and the Minister for Land Information.

Appendix 1: Recap on Phase Two assessment criteria and how we are applying it in this report

83. We have used the same criteria as the Phase Two reform to assess different options for the call in power. See Table 1.

Table 1: Overview of assessment criteria

Criterion	Description
Criterion one: <i>Manages the risk of overseas investment to New Zealanders' wellbeing</i>	<p>This criterion considers whether an option provides decision-makers with the flexibility to effectively manage or protect against current and emerging risks from overseas investment to New Zealanders' wellbeing.</p> <p>This criterion also considers whether risks can be better managed in other ways, such as through different legislation.</p>
Criterion two: <i>Supports overseas investment in productive assets</i>	<p>This criterion considers whether an option supports confidence in New Zealand as an investment destination for productive investment.</p> <p>The call in power is likely to reduce New Zealand's attractiveness as an investment destination (all else equal). However, what we care about is any loss in productive investment (and the size of that loss) as investment that impairs New Zealand's national security and/ or public order is not desirable. Because it is not possible to quantify what is "desirable" versus "undesirable" investment, as a proxy, we have analysed the possible transaction costs on firms and the possible dampening effect for New Zealand as an investment destination.</p>
Criterion three: <i>Encourages more predictable, transparent and timely outcomes</i>	<p>This criterion considers whether an option achieves its objectives in a way that makes the law more certain, predictable and transparent, and encourages timely decision-making. This criterion is important as it considers whether options will support investor and public confidence in the overseas investment regime.</p>

Appendix 2: International approaches to manage COVID-19-related risks from foreign direct investment

84. A number of jurisdictions have taken steps to manage the economic and national security risks posed by the COVID-19-related economic downturn. These are outlined below.

Australia

85. Australia has temporarily reduced the screening threshold for all overseas investments in land and business to \$0, and extended the timeframe for assessing applications from 30 days to six months. Critically, while dropping the threshold to \$0, they have retained the existing threshold for screening at 20 per cent. This means that the acquisition of a 20 per cent or greater interest by an overseas person in a company of any value will be assessed to determine whether it is contrary to Australia's national interest.

[2]

Spain

88. On 18 March, Spain responded to the COVID-19 pandemic by temporarily amending their regime to require ex-ante approval for foreign (non-EU) direct investments, including those by foreign state actors, in strategic sectors in Spain that result in:
- the acquisition of a 10 per cent or greater interest in a Spanish company, or
 - the foreign investor having effective participation in the management or control of a foreign company.

Germany

89. Germany has not yet announced changes to its foreign investment screening regime, in line with those requested by the European Union (see below). However, Germany has announced the establishment of a fund to take stakes in, or buy out, German companies.
90. While this announcement was not directly tied to foreign investment risks, German Cabinet Ministers have warned of the possibility of "economic attack" by predatory foreign buyers and officials, as well as members of the media, are interpreting the 'buy out' fund as a key tool to manage those risks within Germany.

The European Union (EU)

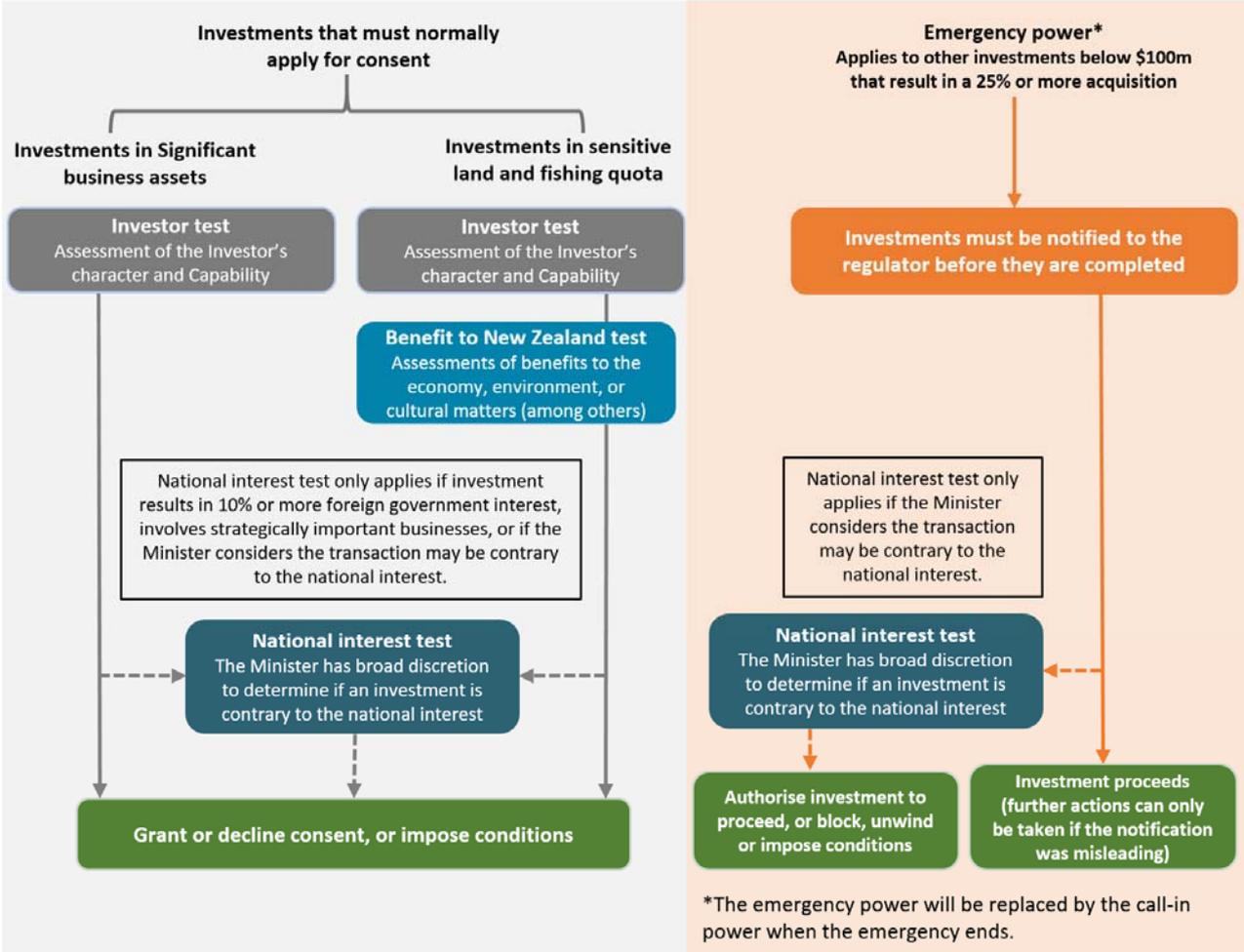
91. On 25 March, the European Commission published guidelines to EU Member States calling on them to adopt or strenuously enforce their foreign investment screening mechanisms to protect sensitive assets from foreign takeover during the crisis. The Commission urged Member States to make full use all powers available to protect Europe's security and public order.

Appendix 3: Enhanced powers to manage risks to New Zealand's national interest

2. The Act currently allows no consideration of whether an investment involving sensitive land, significant business assets, or fishing quota (investments currently screened) poses risks to New Zealand's national security or public order, or other core national interests (such as economic interests). 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).
3. To resolve these issues, Cabinet has agreed to introduce two new powers.
 - For transactions ordinarily subject to screening, a "national interest test" would allow the Minister to decline consent to any transaction that the Minister considers contrary to New Zealand's national interest. This power, based on the test that underpins Australia's foreign investment screening regime, would grant the Minister broad discretion to determine what is contrary to the national interest, while also allowing the Minister to consider the benefits of a transaction.
 - For certain transactions not ordinarily subject to screening, a "national security and public order call in power." This would allow the government to review certain transactions in Strategically Important Businesses²² and impose conditions on, block, or unwind those found to pose, or likely to pose, a significant risk to New Zealand's national security or public order.
92. This report seeks your agreement to the design of a new emergency power, which like the proposed call in power, would not apply to transactions ordinarily screened under the Act, to respond to specific COVID-19 related risks. Unlike the call in power, however, the emergency power could be used to intervene in any investment (that is, not just investments in Strategically Important Businesses, deemed contrary to New Zealand's national interest (rather than the higher 'significant risk to national security or public' threshold).
93. Given the emergency power's wider scope and lower threshold for action relative to the call in power, we do not propose that the call in power would take effect until the emergency power has expired.
94. Figure 1 depicts how the national interest test and new emergency power are proposed to fit within the Act's broader consent framework.

²² In general terms that is critical national infrastructure (such as telecommunications and electricity infrastructure), dual use and military technology, critical direct suppliers to defence or intelligence agencies, firms that hold or have access to sensitive data, and media businesses that have an impact on media plurality in New Zealand.

Figure 1: The consent framework proposed by this report



Appendix 4: Overview of how an emergency screening tool complements other aspects of the Government's business support package

95. This appendix sets out how the recommended introduction of an emergency power to expand the number of transactions subject to review under the Act complements, and provides a backstop to, the Government's broader responses to the economic impacts of COVID-19 on New Zealand firms.

The Government's response to date

96. Economic activity has fallen abruptly as the Government responds to the health and economic risks posed by COVID-19. Fiscal and monetary policy are helping ease the disruption and to provide firm support (collectively, the firm support package). Overall, the firm support package supports liquidity and solvency through:
- broad-based support, which every business can benefit from, including the wage subsidy and tax changes which will help free up cash-flow and reduce costs;
 - credit support interventions for mid-sized businesses, such as the Business Finance Guarantee which will provide loans of up to \$500,000 for businesses with annual revenues between \$250,000 and \$80 million, for up to three years;
 - helping distressed firms remain viable through temporary changes to insolvency law;
 - sectoral policy interventions, including the aviation relief package, which provide more targeted relief for the hardest hit sectors, and
 - bespoke support for some of New Zealand's largest and most economically significant firms, as and when necessary (for example, the \$900m Air New Zealand loan facility).

Foreign investment remains an important tool for businesses

97. Even with these measures, we expect some businesses will need urgent debt and equity injections to remain viable, recover, and grow in the long-term. In some cases, the best source of these injections will be foreign investors. However, as discussed in this report, this can pose risks during ordinary times and more pronounced risks during an economic crisis. On the other hand, the Act also imposes unnecessary barriers to low-risk overseas investment. As such, this report proposes:
- exempting low-risk debt financing transactions from the Act's consent requirements to the flow investment necessary for the economic recovery, and
 - temporarily allowing the review of certain business investments worth less than \$100 million.
98. These changes have been carefully calibrated to complement the Government's broader firm support package.
- Exempting low risk financing transactions supports business' viability, without relying on overseas equity injections (which pose more significant risks). This is consistent with other measures that the Government has taken to support the flow of lending to businesses.
 - The new emergency screening tool recognises that despite all of these changes, equity injections will still be required to support firm viability, but that not all of these will be in New Zealand's national interest and gives the Government a tool to manage these.

[1]

Appendix 5: Overview of relevant Ministerial powers in the Overseas Investment Amendment Bill (No 2)

100. The Overseas Investment Amendment Bill (No 2) contains a range of new powers that would, under our recommended approach, also be available in respect of transactions covered by the new emergency screening tool to manage COVID-19 related risks.

101. These powers, and how they could be used in the context of any new screening tool, are summarised in Table 3. These powers would be in addition to existing and new enforcement tools (including civil penalties, enforceable undertakings and injunction powers), and powers to share personal information to manage national security risks.

Table 3: Overview of new powers to manage national interest risks

Type of power	Level of intervention	Threshold for using the power	Outcome of using the power
Issue a Direction Order	Low	None	The transaction proceeds
Issue a Direction Order with bespoke conditions	Moderate	The Minister considers that a transaction is contrary to the national interest.	Transaction proceeds subject to specific conditions.
Issue a Prohibition Order	Strong	The Minister considers that a transaction is contrary to the national interest and applying conditions would not be sufficient to make the transaction consistent with the national interest.	Transaction blocked.
Issue a Disposal Order	Strong		Investor must sell their interest.
Recommend Statutory Management by Order in Council	Strongest	<ul style="list-style-type: none"> The Minister has <u>reasonable grounds to believe</u> that a transaction gives rise, or is <u>likely</u> 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 by imposing conditions. <p>This differs to the other tools, which can be used to manage national interest concerns, rather than just national security and/or public order risks.</p>	Take steps to manage national security and public order risks arising from investors' actions and remove investor's access to and/or control over sensitive assets.

Appendix 6: How the Phase Two Reform Bill could be split into an 'urgent' and 'non-urgent' Bill

102. This Appendix provides officials initial view on what parts of the Phase Two reform Bill could justifiably be passed under urgency (Table 4) and those that could not (Table 5).
103. Passing provisions under urgency does not mean that they would need to come into effect once the Bill receives Royal assent, merely that they respond to the pressures presented by COVID-19 and therefore should come into effect faster than if they were subject to ordinary Parliamentary processes. As noted in paragraph 76, officials will provide advice on the commencement of any Bill at the same time as a draft Cabinet paper seeking agreement to these changes.

Table 4: Parts of the Phase Two reform Bill that could be passed under urgency

Provision/reform	Justification
National interest test and definitions of strategically important businesses	Necessary to respond to security risks in depressed economic environment.
Call in power and related national security and public order management tools, including information sharing.	Necessary to respond to security risks in depressed economic environment.
Enhanced enforcement powers	Necessary to respond to security risks in depressed economic environment.
New Ministerial delegation provisions	Support operation of the above (and any new screening tool for transactions worth less than \$100 million).
Protection of classified security information.	Support operation of the above (and any new screening tool for transactions worth less than \$100 million).
New investor test and repeat investor process.	Streamlines low risk investments to support resilience and recovery.
Remove Sensitive Adjoining Land	Removes low risk investments from consent requirements to support businesses. Sensitive adjoining land accounts for around 16 per cent of all consent applications and removing these transactions from the Act will support businesses raising capital and the regulator in prioritising its resources.
Clarify periodic leases don't need consent	Removes low risk investments from consent requirements to support businesses.
Change definition of overseas person	Removes low risk investments from consent requirements to support businesses.
Change 'tipping point' for investments in listed entities	Removes low risk investments from consent requirements to support businesses.
Exemption making powers	Critical to ensuring that low risk transactions (such as RMOs) and low risk entities can be exempted to support resilience and recovery. Current exemption making power is broken.

Table 5: Parts of the Phase Two reform Bill that are more difficult to justify under urgency

Provision/reform	Justification
Farmland advertising	More rigorous requirements will likely result in transaction delays. More broadly, these changes do not respond to particular COVID-19 risks.
Heightened consent criteria for farmland	These changes do not respond to particular COVID-19 risks. Also, these provisions are already largely achieved through the Ministerial Directive Letter.
Enhanced tax disclosures with applications to acquire significant business assets	Serves as a potential disincentive to investment in New Zealand. More broadly, these changes do not respond to particular COVID-19 risks.
Special land changes (that is, the Crown's acquisition of fresh and seawater areas)	Serves as a potential disincentive to investment in New Zealand and is likely to delay transactions that include 'special land'. More broadly, these changes do not respond to particular COVID-19 risks.
Minor and technical amendments to provisions relating to consent requirements for residential land	Does not address particular COVID-19 risks.
Benefits test changes (and analogous changes to Fisheries Act)	Does not respond to particular COVID-19 risks.
Remove short term leases	Significant complexity associated with new rules place additional burden on investors and have greater risk of transitional issues.
Timeframes	Due to increased volumes, more difficult to meet during COVID-19. Also not scheduled to come into effect until one year post Royal assent, reducing case for urgency.