

# The Treasury

## Reform of the Overseas Investment Act 2005 Information Release

June 2020

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### Cabinet Document Details

Title: **Cabinet Minute: DEV-20-MIN-0066: COVID-19 Economic Response: Reform of the Overseas Investment Act 2005**

Date: **6 May 2020**

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# Cabinet Economic Development Committee

## Minute of Decision

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### COVID-19 Economic Response: Reform of the Overseas Investment Act 2005

**Portfolio** Associate Finance (Hon David Parker)

On 6 May 2020, the Cabinet Economic Development Committee:

#### **New COVID-19 response tools to manage pandemic-related risks**

- 1 **noted** that the proposals in the paper under DEV-20-SUB-0066 support the government's economic response to COVID-19 by helping to secure and support the business sector and manage foreign investment risks;
- 2 **noted** that the investment screening tools referred to in the paper under DEV-20-SUB-0066 are designed to work in tandem with the range of business support policies that respond to COVID-19, and that the Associate Minister of Finance (Hon David Parker) will continue to ensure they are complementary, as the government's economic response package develops further;

#### **New power to require notification of investments in business ordinarily not subject to review**

- 3 **noted** that the pandemic and related economic downturn will increase the risk that some overseas investment undermines New Zealand's national security, or results in the transfer of ownership and control of economic activity for prices that do not reflect their true value to New Zealand;
- 4 **noted** that the Overseas Investment Act 2005 (the Act) does not enable the government to manage the risks to New Zealand's essential interests posed by such investments where they fall below its monetary screening threshold;

#### **Emergency notification power for all investments in existing businesses and certain business assets not ordinarily requiring consent**

- 5 **agreed** to introduce a temporary emergency notification power that would require an overseas person to notify the government of any investment in an existing business or certain business assets that would not ordinarily require consent;

- 6** **agreed** that the temporary emergency notification power would:
- 6.1** apply to controlling investments of any value by overseas persons in existing businesses (that is, the acquisition of a more than 25 percent interest in the business, or the increase in an existing holding to or beyond a 50, 75 or 100 percent interest);
  - 6.2** apply to investments in business assets of any value that effectively amount to a change in control of the underlying business (this would be defined in regulations as ‘transactions that result in an overseas person acquiring more than 25 percent of the total value of a New Zealand business’ assets (calculated before the acquisition)’);
  - 6.3** require investors to notify the regulator of transactions within scope;
  - 6.4** impose statutory timeframes on the review of notified transactions (according to paragraph 8, below);
  - 6.5** be reviewed every 90 days, and only remain in force while the COVID-19 pandemic, or its economic aftermath, continues to have a significant impact in New Zealand;
- 7** **agreed** that the responsible Minister can impose conditions on, decline, or unwind transactions reviewable under the emergency notification power where they are contrary to New Zealand’s national interest;
- 8** **authorised** the Minister of Foreign Affairs, the Minister of Finance and the Associate Minister of Finance (Hon David Parker) to:
- 8.1** determine the process and criteria for review of the emergency notification power (including its lifetime and withdrawal);
  - 8.2** review the emergency notification power every 90 days to determine whether those criteria continue to be met;
- 9** **noted** that allocating decision making authority in this way could not be achieved through the Act and would require a delegation;
- 10** **agreed** that a similar emergency notification power may be re-established through the Regulations in future, where necessary to respond to a pandemic or other crisis;

#### **Decision making framework for the emergency notification power**

- 11** **agreed** to the following decision making framework for the emergency notification power:
- 11.1** the triage decision about whether a notified transaction could be contrary to the national interest initially rests with the Associate Minister of Finance (Hon David Parker) initially, and be able to be delegated to the regulator in future; and
  - 11.2** the determination under the national interest test about whether a transaction is contrary to the national interest, and whether to impose conditions or block the investment, be with the Minister of Finance (as the Minister responsible for the Act and for the national test more generally), and be unable to be delegated to the regulator;
- 12** **noted** that to allocate decision making responsibilities in this way would require delegation and could not be achieved using the Act;
- 13** **noted** that the national interest test would remain a backstop tool to be used rarely and only where essential to protect New Zealand’s national interest;

- 14** **agreed** that Ministers and the regulator have the same powers available to support the review of transactions as if they were transactions ordinarily screened under the Act;
- 15** **noted** that in accordance with previous Cabinet decisions, all decisions on transactions notified under the emergency notification power would be published, except where grounds exist for withholding under the Official Information Act 1982;

#### **Timeframes for decision making under the emergency notification power**

- 16** **agreed** that decision-making under the emergency notification power be subject to a statutory timeframe of 40 working days (comprising 10 days for initial triage, and 30 days for national interest assessment), plus a 30 day extension period;
- 17** **noted** that the overall timeframe will be set in the Regulations, and that the Associate Minister of Finance (Hon David Parker) intends to publicly commit that the initial triage of notified transactions will occur within 10 working days;

#### **Risks associated with the national interest test**

- 18** **authorised** the Minister of Finance and the Associate Minister of Finance (Hon David Parker) to amend the following, where necessary to respond to changes in foreign investment risks or government priorities:
- 18.1** the proposed risk factors for triaging notified transactions;
- 18.2** the national interest test considerations;

#### **Exemptions for low risk transactions that provide capital flows to firms**

- 19** **noted** that the pandemic has intensified the need for the timely introduction of two exemptions for transactions that enable firms to raise equity, which were agreed to in the Phase Two reform;
- 20** **noted** that the pandemic has revealed issues with longstanding exemptions that limit banks from lending to the economy and managing their own risk portfolios;
- 21** **noted** that the introduction of the emergency notification power would magnify the regulatory burden associated with such transactions, as they would require notification, triage and review in the absence of an exemption;
- 22** **agreed** to augment the government's business support package to better secure firms and address their capital needs, by extending existing exemptions to remove two additional classes of low risk lending and loan portfolio management transactions from the Act's consent requirements, where:
- 22.1** the transaction is the issuance of a loan by a registered bank; and
- 22.2** the transaction is the purchase by an overseas person of a parcel of securitised loans;
- 23** **agreed** to limit the exemptions in paragraph 22 above to prevent them from being used to circumvent the Act, by requiring that the transaction:
- 23.1** must be entered into in the ordinary course of business;
- 23.2** occur in good faith; and

**23.3** cannot be entered into with the intent of acquiring the sensitive New Zealand assets that underlie the relevant loan;

**24** **noted** that these exemptions will be implemented as transitional standing consents under the proposed Overseas Investment (COVID-19 Emergency Measures) Amendment Bill (the Emergency Measures Bill);

**25** **noted** that if passed, the Overseas Investment (Other Measures) Amendment Bill (the Other Measures Bill) will permanently exempt these classes of transactions;

## **New regulation making powers**

### **Transitional issues**

**26** **noted** that the proposals in the paper under DEV-20-SUB-0066 are likely to result in the capture of many transactions that have little to no associated risk;

**27** **noted** that the rapid development and enactment of the Emergency Measures Bill means it may result in unintended transitional issues and errors;

### **Introduce regulation-making powers to rectify transitional issues**

**28** **agreed** to introduce two new regulation-making powers that can be used to rectify over-capture, transitional issues, and potential errors, and which would:

**28.1** allow for the exemption of individual transactions, persons, interests, rights or assets, or classes of the aforementioned, from consent requirements for the purposes of responding to a pandemic in New Zealand;

**28.2** enable the modification of consent requirements for most classes of transactions where necessary to respond to a pandemic in New Zealand;

**28.3** permit the modification of provisions in the Act that have been introduced through the Emergency Measures Bill where necessary or desirable for the orderly implementation of the Act and consistent with the intended purpose of the relevant provisions;

**29** **agreed** that the power referred to in paragraph 28.3 above would be tightly constrained by ordinary public law constraints to ensure any regulation made under this power was consistent with Parliament's intent and no broader than reasonably necessary to rectify the transitional issue;

**30** **agreed** that the new regulation making powers in the Emergency Measures Bill (referred to in paragraph 28 above) would be repealed by the enactment of the non-urgent Other Measures Bill;

## **Process**

### **A 'split Bill' process allows for urgent enactment of critical COVID-19 tools and scrutiny of Phase Two reforms**

**31** **noted** that the Act requires urgent reform to allow the government to manage the escalating economic and security risks associated with foreign investment posed by the COVID-19 pandemic;

**32** **noted** that the condensed timeframes for design and drafting of the Emergency Measures Bill increase the importance of a credible review of the reform package;

- 33** **agreed** to provide the government with the tools it needs to protect New Zealand's essential interests in the current environment, while maintaining an avenue for proper scrutiny of the Phase Two reforms by:
- 33.1** introducing and dealing with under urgency the Emergency Measures Bill (comprising the proposed new response tools and the provisions of the Phase Two Reform Bill critical to the government's COVID-19 response, referred to in Appendix 4 to the paper under DEV-20-SUB-0066), including subjecting it to a one week Select Committee process;
  - 33.2** introducing the non-urgent Other Measures Bill (containing the provisions not critical to the COVID-19 response) and referring it to the Finance and Expenditure Select Committee (referred to in Appendix 5 to the paper under DEV-20-SUB-0066);
  - 33.3** withdrawing the original Phase Two Reform Bill;
  - 33.4** giving the Finance and Expenditure Select Committee the remit to consider and recommend changes to enduring provisions enacted under the urgent Emergency Measures Bill after it has been passed into law, when that Select Committee reports back to Parliament on the Other Measures Bill;

## Operationalising the reforms

### Factors that indicate a transaction could be contrary to New Zealand's national interest

- 34** **noted** that changes to require notification of foreign investments will result in an increased volume of transactions for the regulator to triage and process, and may capture low risk transactions that provide critical capital to firms;
- 35** **noted** that effective triaging is critical to manage these consequences;
- 36** [1,33]

[1,33]

- 37** **authorised** the Minister of Finance and the Associate Minister of Finance (Hon David Parker) to refine the list of risk factors, where necessary over time;

### **Implementation of certain liberalising measures in Emergency Measures Bill as transitional standing consents**

- 38** **agreed** to implement the proposed new exemptions for low risk lending transactions and certain agreed liberalising measures from the Phase Two reform as transitional standing consents under the Emergency Measures Bill;
- 39** **noted** that, if passed, the Other Measures Bill will permanently exempt all of these transactions;

### **Matters always considered under a national interest assessment**

- 40** **noted** that the introduction of the national interest test will create considerable uncertainty for investors and the regulator, which together with concern about processing delays, may deter investors from investing in New Zealand;
- 41** **noted** that on 13 November 2019, the Cabinet Economic Development Committee agreed to a number of changes as part of the Phase Two reform of the Act, including that the Minister would be empowered to publish guidance on the operation of the national interest test to manage the risks referred to in paragraph 40 above [DEV-19-MIN-0306];
- 42** **agreed** that the Minister publish guidance on the types of matters that will always be considered when assessing a transaction's consistency with the national interest;
- 43** **agreed** that these matters will include:
- 43.1** whether the investment poses risks to national security, public order and international relations (the security and intelligence agencies are responsible for providing advice on national security matters to the regulator);
  - 43.2** whether the investment results in the acquisition of a natural monopoly or other business with significant market share;
  - 43.3** the investment's likely economic and social impact;
  - 43.4** the investment's alignment with New Zealand's values and interests and broader policy settings; and
  - 43.5** the character of the investor, including whether it is a foreign government investor;
- 44** **agreed** that the government publicly note that, for the duration that the COVID-19 pandemic and its economic aftermath continue to have a significant impact in New Zealand, it will also always consider whether the target business is in financial distress;
- 45** **agreed** that this guidance be published at the same time as the Emergency Measures Bill is introduced into Parliament;
- 46** **authorised** the Minister of Finance and the Associate Minister of Finance (Hon David Parker) to refine the national interest considerations, where necessary over time;

## Managing transactions during an election period

- 47** **noted** that urgent decisions under the Act will need to continue to be taken during the 2020 General Election period and following the General Election;
- 48** **noted** that following the General Election and before a government is formed, in accordance with the caretaker convention:
- 48.1** Ministers (or the regulator under delegation) can continue to make decisions under the Act; but
- 48.2** significant decisions (for example, decisions to block a transaction on national interest grounds) will be made in consultation with other political parties or on the advice of the incoming government (as relevant);

## International implications

- 49** **noted** that the emergency notification power may reduce New Zealand's attractiveness as an overseas investment destination;

[1,36]

## Financial Implications

**53** [1]

**54** **noted** that there is uncertainty around the volume of transactions that will be notified under the emergency notification power;

**55** [33]

**56**



57 [33]

**Legislative implications**

- 58** **approved** the Overseas Investment (COVID-19 Emergency Measures) Amendment Bill for introduction [PCO 22903/6.0];
- 59** **agreed** that the government propose that the Overseas Investment (COVID-19 Emergency Measures) Amendment Bill:
- 59.1** be introduced to the House on 14 May 2020 and complete its first reading the same day under urgency;
  - 59.2** be referred to the Finance and Expenditure Committee for consideration and report back by 25 May 2020;
  - 59.3** complete its second and third readings under urgency during the week commencing 25 May 2020;
  - 59.4** enter into force two weeks after Royal Assent;
- 60** **approved** the Overseas Investment (Other Measures) Amendment Bill for introduction [PCO 22904/6.0];
- 61** **agreed** that the government propose that the Overseas Investment (Other Measures) Amendment Bill:
- 61.1** be introduced on 14 May 2020, complete its first reading shortly after that and be referred to the Finance and Expenditure Committee for consideration;
  - 61.2** be enacted by within 12 months of introduction;
- 62** **agreed** to give effect to the proposals in this reform package by making amendments to the Act, the Regulations, and any other legislation requiring amendment as a result of the changes referred to in the above paragraphs;
- 63** **authorised** the Associate Minister of Finance (Hon David Parker) to make decisions on any additional policy or drafting issues that arise during the implementation of the Emergency Measures Bill and Other Measures Bill, and the Regulations, including minor technical changes, in consultation with relevant portfolio Ministers as necessary;

**General**

- 64** **invited** the Minister for Economic Development to provide an update to the Cabinet Economic Development Committee as soon as practicable on the Venture Capital Fund and its operation.

Janine Harvey  
Committee Secretary

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**Present: (see over)**

**Present:**

Rt Hon Winston Peters  
Hon Kelvin Davis  
Hon Grant Robertson (Chair)  
Hon Dr Megan Woods  
Hon David Parker  
Hon Nanaia Mahuta  
Hon Stuart Nash  
Hon Iain Lees-Galloway  
Hon Jenny Salesa  
Hon Damien O'Connor  
Hon Kris Faafoi  
Hon Dr David Clark  
Hon Shane Jones  
Hon Willie Jackson  
Hon James Shaw  
Hon Eugenie Sage

**Officials present from:**

Office of the Prime Minister  
Officials Committee for DEV