

The Treasury

Overseas Investment Amendment Regulations (No 2) Information Release

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Cabinet Document Details

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Overseas Investment (Transitional Matters) Amendment Regulations 2020

Proposal

- 1 This paper seeks:
 - 1.1 agreement to a policy decision to clarify the effect of the transitional provisions in the Overseas Investment (Urgent Measures) Amendment Act 2020 (the 'Urgent Measures Act'), via regulations made under clause 26 of Schedule 1AA of that Act; and
 - 1.2 authorisation for submission to the Executive Council of the attached Overseas Investment (Transitional Matters) Amendment Regulations 2020 (the 'Regulations'), which would give effect to this decision.
- 2 Consistent with paragraph 2.39 of the Cabinet Manual, I submit this paper with the knowledge and approval of the Minister of Finance.

Relation to government priorities

- 3 The proposal in this paper provides clarification of the intended effect of the policy decisions reflected in the Urgent Measures Act, which is part of the Government's economic response to COVID-19.

Background

- 4 On 2 June 2020, the Urgent Measures Act received Royal assent. This Act introduces a range of reforms to the Overseas Investment Act 2005, including the introduction of an emergency notification regime. This includes a new, temporary screening tool which allows the Government to scrutinise foreign investment regardless of monetary threshold, to ensure that it is not contrary to New Zealand's national interest during the period of the COVID-19 pandemic.
- 5 Since the Act received Royal assent, officials have identified an issue with the operation of the transitional provisions in clause 15 of Schedule 1AA ('clause 15') of the Urgent Measures Act. I seek approval to make regulations to resolve this issue and ensure that the transitional provisions work as Parliament intended.
- 6 I am seeking approval directly from Cabinet, to ensure that this issue can be resolved in time for the entry into force of the Urgent Measures Act on 16 June 2020, as discussed below.

Application of transitional provisions is unclear in some circumstances

- 7 The issue identified is that the transitional provisions are not clear whether the new provisions of the Urgent Measures Act apply to applications for consent where:
 - 7.1 the application to the Overseas Investment Office ('OIO') was made before the Urgent Measures Act comes into force; but

7.2 the relevant underlying commercial transaction will be entered into after the Urgent Measures Act comes into force.

- 8 The OIO has identified 18 current transactions where this situation may arise. Examples of where this situation could occur include applications made in advance of a takeover offer for listed companies, and most applications to acquire fishing quota.^[36]

9

The Urgent Measures Act includes a regulation making power to manage transitional issues

- 10 The Urgent Measures Act includes a temporary regulation making power intended to resolve technical issues such as these. Clause 26 of Schedule 1AA ('clause 26') allows the Governor General, by Order in Council, to make regulations for the purpose of providing that, subject to any conditions stated in the regulations, specified provisions of the Act do not apply or continue to apply, or apply with modifications or additions, or both, during the whole or any part of the 1-year transitional implementation period.

- 11 In order to recommend the making of regulations under clause 26, I must be satisfied that the regulations:

11.1 are necessary or desirable for the orderly implementation of the Urgent Measures Act, and

11.2 are consistent with the intended purpose of the specified provisions.

Recommendation – clarify the transitional provisions through regulations

- 12 Accordingly, I seek Cabinet's agreement to submit the attached Regulations to the Executive Council and that, if they are endorsed, these come into force tomorrow (16 June 2020), at the same time as the entry into force of clause 15 and other provisions in the Urgent Measures Act.

- 13 The Regulations insert a new clause into Schedule 1AA of the Overseas Investment Regulations 2005, which clarifies that transactions entered into after the Urgent Measures Act comes into force must be assessed against the requirements in that Act, whether or not an application for consent was made before, on, or after commencement of that Act. The clause also clarifies that this does not apply where an application has already received consent before commencement.^[36]

14 The Regulations are made under clause 26. I am satisfied that the statutory requirements outlined in paragraph 11 are met, as clarification of the effect of transitional provisions is desirable for the orderly implementation of the Act, and I consider that the modifications made by the Regulations are consistent with the intended purpose of clause 15. My view of the intended purpose of clause 15 is supported by paragraph 123 of DEV-20-SUB-0066.¹ [36]

Effect of recommended clarification

15 The effect of the transitional provisions as clarified by the Regulations is that:

15.1 The investors caught within this category (which the OIO has indicated could be up to 18 transactions) could face additional, potentially significant, costs and delays for transactions that require further screening under the Urgent Measures Act (especially where a national interest test is required). These include additional OIO fees, likely legal fees and processing time.

15.2 The existing rights and obligations of some investors under the current rules in the Overseas Investment Act 2005 could be impacted.

16 [36]

Financial Implications

17 There are no financial implications arising from this paper.

Legislative Implications

18 The proposal in this paper would be implemented via regulations made under clause 26 of the Urgent Measures Act. These Regulations add a provision into the Overseas Investment Regulations 2005, which clarify the effect of clause 15 of the Urgent Measures Act.

Timing and 28-day rule

19 I am seeking:

19.1 a waiver of the 28-day rule for the Regulations under paragraph 7.97 of the Cabinet Manual, on the basis that they seek to remove ambiguity about the operation of the Urgent Measures Act that, if unresolved, risks Parliament's intended operation of that Act when it enters into force; and

19.2 Cabinet's agreement that the Regulations come into effect tomorrow (16 June) in time for the Urgent Measures Act entering into force.

¹ This paragraph states that "The new measures [in the Urgent Measures Act] would apply to transactions entered into after those dates. The existing principal Act rules will continue to apply to all transactions entered into before the commencement date, including 'conditional agreements' for sale and purchase where conditions precedent are not met yet and the contract is not yet enforceable at the commencement date".

Impact Analysis

- 20 The Treasury has determined that this proposal is a direct Covid-19 response and has suspended the RIA requirements in accordance with Cabinet decision (CAB-20-MIN-0138).
- 21 All available analysis has been included in this paper.

Compliance

- 22 Due to the urgency of introducing these Regulations, a full assessment of the compliance risks has not been carried out. However, on the basis that the Regulations clarify the effect of the existing provisions in the Urgent Measures Act, I consider that the Regulations comply with:
- 22.1 the principles of the Treaty of Waitangi;
 - 22.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;
 - 22.3 the principles and guidelines set out in the Privacy Act 1993 (if the regulations raise privacy issues, indicate whether the Privacy Commissioner agrees that they comply with all relevant principles); and
 - 22.4 relevant international standards and obligations.
- 23 I am satisfied that the Regulations meet the requirements in clause 26, for the reasons set out in paragraph 14.

Legislation Guidelines

- 24 The Regulations modify the primary legislation (the Urgent Measures Act) as provided for by clause 26. Chapter 15 of the Legislation Guidelines (2018 edition) states that “Legislation should empower secondary legislation to amend or override an Act only if there is a strong need or benefit to do so, the empowering provision is as limited as possible to achieve the objective, and the safeguards reflect the significance of the power.”²
- 25 I consider that the Regulations, which are made under new clause 26 of Schedule 1AA, are consistent with these Guidelines, as:
- 25.1 there is a strong need to clarify the effect of the transitional provisions in the Urgent Measures Act to provide certainty to investors and the OIO; and
 - 25.2 the modifications to the Act made by the Regulations clarify the meaning of the relevant provision (clause 15) and do not change its underlying effect.

Population implications

- 26 This paper does not have an impact on population groups.

² Maintained by the Legislation Design and Advisory Committee,

Regulations Review Committee

- 27 I do not consider that there may be grounds for the Regulations Review Committee to draw the regulations to the attention of the House of Representatives under Standing Order 319.

Certification by Parliamentary Counsel

- 28 The draft Regulations have been certified by the Parliamentary Counsel Office ('PCO') as being in order for submission to Cabinet.

Communications and publicity

- 29 The Regulations will be published in the Government Gazette and the OIO website the day following promulgation by the Executive Council.

Proactive release

- 30 I intend to proactively release this paper, subject to redaction as appropriate under the Official Information Act 1982, within 30 business days of its consideration by Cabinet.

Consultation

- 31 The Treasury and the OIO worked jointly to prepare this paper. Crown Law advice was also sought.

Recommendations

I recommend that Cabinet:

- 1 note that officials have identified an issue with the operation of the transitional provisions in clause 15 of Schedule 1AA of the Overseas Investment (Urgent Measures) Amendment Act ('the Urgent Measures Act'), which needs to be resolved before those provisions take effect tomorrow;
- 2 note that the attached Overseas Investment (Transitional Matters) Amendment Regulations 2020 ('the Regulations') will resolve the issue referred to in recommendation 1, by modifying the Overseas Investment Regulations 2005 to clarify the purpose and effect of the transitional provisions in clause 15;
- 3 note that a waiver of the 28-day rule is sought:
 - 3.1 so that the regulations can come into force on 16 June 2020 (tomorrow), in time for the entry into force of the relevant provisions in the Urgent Measures Act; and
 - 3.2 on the grounds that those provisions need to be clarified in time for their entry into force, to remove ambiguity about the operation of the Act, consistent with Parliament's intent;
- 4 agree to waive the 28-day rule so that the regulations can come into force on 16 June 2020;
- 5 note that clause 26 of Schedule 1AA of the Urgent Measures Act requires that before I recommend the making of regulations under that section I must be satisfied that the regulations:
 - 5.1 are necessary or desirable for the orderly implementation of that Act; and
 - 5.2 are consistent with the intended purpose of the specified provisions;
- 6 ^[36]
- 7 authorise the submission to the Executive Council of the Regulations.

Authorised for lodgement

Hon David Parker

Associate Minister of Finance