

The Treasury

Overseas Investment Act Reform Information Release

October 2020

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Treasury Report: Operationalising the Overseas Investment (Urgent Measures) Amendment Act

Date:	4 June 2020	Report No:	T2020/1602
		File Number:	IM-5-3-8-9 (COVID Response Reforms)

Action sought

	Action sought	Deadline
Minister of Finance (Hon Grant Robertson)	<p>Sign the letter in Appendix 1 delegating some low-risk ministerial decisions to the regulator</p> <p>Sign the letter in Appendix 2 providing guidance to the regulator regarding the exercise of certain new powers</p>	8 June 2020
Associate Minister of Finance (Hon David Parker)	<p>Agree to the list of 'critical direct suppliers' to which the national interest test and call-in power will apply</p> <p>Agree to amend the Overseas Investment Regulations to clarify an exemption</p>	

Contact for telephone discussion (if required)

Name	Position	Telephone	1st Contact
Jennie Marjoribanks	Senior Analyst, International	[39]	N/A (mob) ✓
Chris Nees	Principal Advisor, International	[35]	

Minister's Office actions (if required)

Return the signed report to Treasury.

Forward to Treasury the two signed letters to Gaye Searancke, for dispatch to LINZ [Appendices 1 and 2]

Note any feedback on the quality of the report

Enclosure: No

Treasury Report: Operationalising the Overseas Investment (Urgent Measures) Amendment Act

Purpose of Report

1. This report seeks decisions on the following issues in order to operationalise the Overseas Investment (Urgent Measures) Amendment Act:

Decisions for the Minister of Finance

- delegating some low-risk ministerial powers and functions to the regulator, the Overseas Investment Office (OIO)
- providing direction to the OIO regarding the exercise of certain new powers

Decisions for the Associate Minister of Finance

- establishing a list of ‘critical direct suppliers’ to which the national interest test and call-in power will apply, and
- agreeing amendments to the Overseas Investment Regulations 2005 to clarify an exemption.

2. We seek these decisions by 8 June to enable decision-making processes and guidance to be confirmed ahead of the Act coming into force on 16 June.

Decisions required to help operationalise the Urgent Measures Act

Delegations are required to operationalise the Act

3. We recommend the Minister of Finance delegates some low-risk ministerial functions and powers to the regulator, to support speedy decision-making and exercise of administrative powers, outlined in the table below.

Delegated power/function	Rationale
<p>Under new section 20A(2), to determine whether an application for consent involves a transaction of the kind set out in section 20A(1) and notify the applicant</p> <p>(Section 20A deals with the categories of transactions that will always be subject to national interest assessment, because of the characteristics of the transaction).</p>	<p>This will pass a low-risk objective assessment to the OIO, to support speedy decision-making. It will require the OIO to apply objective statutory criteria to determine if an application requires a national interest assessment (eg, if it is an investment by foreign government investors), and to then notify the applicant. The national interest assessment will then be undertaken by the Minister of Finance</p>
<p>Under new section 20B(1), if the Minister decides to advise an applicant that a transaction is a transaction of national interest, to notify the applicant. This is not a delegation of the decision that a transaction is a transaction of national interest.</p> <p>(Section 20B deals with the category of transactions where the Minister exercises discretion to determine whether the transaction should be subject to a national interest assessment).</p>	<p>This will pass a low-risk operational process to the OIO. The decision about whether an application needs a national interest assessment will remain with the Minister.</p>

Delegated power/function	Rationale
<p>Under new section 20D, to identify and notify persons who are critical direct suppliers, publish those persons' names in a list of critical direct suppliers on an Internet site maintained by or for the regulator, or dispense with publication where good reason exists to do so and notify those persons if they are unpublished critical direct suppliers</p>	<p>Separately below, this report seeks the Associate Minister of Finance's agreement to the list of critical direct suppliers. This is appropriate given this is a new regime and designation as a critical direct supplier places significant obligations on these entities. However, the proposed delegation at left will enable the OIO to speedily amend this list and notify critical direct suppliers over time as this list changes. The critical direct suppliers will be identified on advice from the New Zealand Defence Force, the Government Communications Security Bureau, and the New Zealand Security Intelligence Service, consistent with the criteria in the Act.</p>
<p>Under new section 20E to specify the information that must be contained in notices given by unpublished critical direct suppliers.</p> <p>(Section 20E provides that unpublished critical direct suppliers must notify likely investors of their status as an unpublished critical direct supplier, and must notify the regulator once such a notice is given).</p>	<p>This will pass a low-risk operational process to the OIO. The content of the notice will be determined by the regulator after consulting with the New Zealand Defence Force, the Government Communications Security Bureau, or the New Zealand Security Intelligence Service.</p>
<p>Under new section 87(1), to authorise changes to the manner in which the notification under section 85 must be given, in the case of minor and technical changes only.</p>	<p>The OIO, in consultation with the Treasury, is developing the notification form, and it will shortly seek the Associate Minister of Finance's agreement to its content.</p> <p>The proposed delegation would enable the OIO to speedily address any minor or technical issues that emerge with the form, to ensure the form is focused on the information required to efficiently triage applications in a particularly time-sensitive process.</p>
<p>Under new section 129 to publish notice of a decision, or defer or dispense with publication.</p>	<p>This will enable the OIO to speedily publish notice of the relevant decisions. A delegation will allow publication to take place alongside the consent and exemption decisions the OIO already regularly publishes. A delegation will also facilitate the use of the OIO's existing processes for consulting with investors about the content being published.</p> <p>The delegation relates only to the publication step, and not to the decisions on transactions of national interest and risk management actions.</p>
<p>Under regulation 69A inserted by the Overseas Investment Amendment Regulations 2020, to extend the timeframe for taking a risk management action and to give notice of the extension.</p>	<p>This will enable the speedy extension of timeframes. To ensure that extensions are used rarely and not as a response to issues within government (such as a failure to prioritise this work), we propose the directive letter should limit the circumstances in which the OIO may exercise the delegation (see below).</p>
<p>Under section 32, the power to further delegate the above powers and functions delegated by this letter.</p>	<p>This will support the efficient exercise of powers.</p>

4. The attached letter in **Appendix 1** makes these delegations.

The Minister of Finance will need to delegate the assessment of transactions ordinarily subject to the Act

5. Cabinet has agreed that the Minister of Finance will be the minister responsible for deciding whether a transaction is contrary to the national interest under the emergency notification regime [CAB-20-MIN-0212 refers].¹ Under the Overseas Investment Act, the same decision-maker cannot both assess whether a transaction is contrary to the national interest *and* assess whether the same transaction meets any of the other requirements for consent (that is, either the investor test or benefit to New Zealand test). This means the Minister of Finance will be required to delegate his role assessing transactions that are ordinarily subject to the Act. We understand Cabinet Office will be providing advice about the delegation shortly.
6. Consequential amendments to the Associate Minister of Finance's delegation will also be required. Officials will support an update to delegation letters.

Directive letter to support the OIO's decision-making

7. The Overseas Investment Act allows the Minister responsible for the Act to direct the regulator. We recommend that the Minister of Finance issues the directive letter attached in **Appendix 2** to give direction on three matters:
 - providing advice about national interest matters
 - revoking investment conditions, and
 - extending timeframes.

Application of the national interest test

8. The proposed letter directs the regulator on existing Cabinet-agreed guidance on when applications for consent should be escalated to the national interest test, and where the national interest test would not normally apply (for example, because they do not involve critical national infrastructure). It also provides guidance about the matters that should inform its advice as to whether an application could be contrary to the national interest. This guidance contains some minor adjustments to the Cabinet material to reflect the regulator being directed on these matters.
9. The letter also directs that when providing advice to support the Minister of Finance's national interest assessment, the regulator must:
 - be informed by the Guidance Note: Foreign Investment Policy and National Interest Guidance published on The Treasury website, and
 - reflect consultation and input from relevant partner agencies.

Revoking investment conditions

10. The letter also provides guidance to the OIO on its power to revoke existing investment conditions, where they apply to investors who are eligible to access a standing consent for purchases of sensitive New Zealand assets because they are no longer to be treated as 'overseas persons'. It sets the expectation that the OIO should revoke the conditions of those consents, unless good reason exists not to. The reason for this direction is that those eligible for 'standing consents' will eventually no longer be subject to the Act, so there is no rationale for requiring compliance with conditions and ongoing OIO monitoring.

¹ The Associate Minister of Finance will determine whether a transaction that has been notified under the emergency notification regime should be subject to a detailed review against the national interest.

Timeframes for decisions under the emergency notification regime

11. The letter also sets expectations for the timeframes to be met under the emergency notification regime, restating the already agreed timeframes in a formal directive.
12. It also sets out the limited circumstances in which the OIO should extend statutory timeframes under the emergency notification regime. Consistent with the broad intent of the new timeframe provisions, it limits the circumstances to cases involving significant complexity, the applicant is operating in good faith and is unable to meet the regulator's requests in a timely manner, or where there are other exceptional circumstances (for example, the discovery of significant new information late in the assessment process). Relevant circumstances would not include the volume of transactions before the OIO.
13. Officials will be monitoring the operation of the timeframe provisions, and compliance with timeframes will be one of the indicators of whether the provisions are working as we intended. If the timeframes are regularly not being met, it would require an assessment of whether the regime is 'over-capturing' investments and/or the adequacy of resourcing to support the assessment.
14. This new delegation letter adds to, rather than replaces, the existing directive letter.
15. Officials will provide further advice about potential amendments to the existing letter as the Overseas Investment Amendment Bill (No 3) advances, to take account of the bill's reforms and relevant changes in the investment environment as a result of COVID-19.

Establishing a list of 'critical direct suppliers'

16. We recommend the Associate Minister of Finance agrees to the entities in **Appendix 3** being the list of 'critical direct suppliers' under section 20D of the Urgent Measures Act.
17. The list will support the government to ensure investments in these strategically important businesses are in the national interest:
 - Where an overseas investment is proposed in a supplier on this list, and the investment would already have required consent (eg, because it involved a significant business asset), the transaction will automatically be subject to the national interest test
 - Where an overseas investment is proposed in a supplier on this list, and the investment would not already have required consent, the transaction can be 'called in' to determine whether it poses a significant risk to national security or public order. The investor will be required to notify the government of such transactions.
18. The appendix was prepared by the New Zealand Defence Force. They have confirmed that each entity meets the relevant criteria required by Cabinet and outlined in the Act. All of these entities are intended to be listed publicly, in line with the Act's requirements.
19. The NZSIS and GCSB have not identified any critical direct suppliers at this time.
20. If the Minister of Finance agrees to the delegation outlined above, decisions about publication and future amendments to the list will sit with the OIO.

Exemption for single permitted security arrangements

21. We recommend that the Associate Minister of Finance agrees to amend the Overseas Investment Regulations (the Regulations) to clarify that both the origination and transfer of a single permitted security arrangement are exempt from consent requirements. These changes would be included in the second tranche of amendment regulations.

22. Permitted security arrangements are arrangements that provide an interest in a sensitive asset (which would ordinarily require consent under the Act) to secure the performance of an obligation (for example, mortgages) where:
- the sensitive asset must be transferred to the original transferor when the obligation has been performed
 - the transaction has been entered into in good faith and in the ordinary course of business, and
 - is not entered into with the intention of circumventing consent requirements in the Act.
23. Currently, the Regulations clearly exempt acquisitions by overseas persons involving a portfolios or bundles of permitted security arrangements from consent requirements under the Act.
24. There is also an exemption for single permitted security arrangements under regulation 41. During targeted consultation, some law firms indicated that there is ambiguity about whether transactions involving the subsequent transfer of a single permitted security arrangement (for example, the transfer of a mortgage between banks) as opposed to the origination of that arrangement. We did not address this issue in the first tranche of changes because we did not consider it sufficiently urgent to warrant inclusion.

[36]

Recommended Action

We recommend that you:

- a **Note** that the Overseas Investment (Urgent Measures) Amendment Act will come into force on 16 June, and you can support its efficient operation through the decisions sought in this report

Decisions for the Minister of Finance

- b **Sign** the attached letter delegating some low-risk ministerial functions and powers to the regulator, to support speedy decision-making and exercise of administrative powers

Agree/disagree

Hon Grant Robertson

- c **Sign** the attached directive letter providing guidance to the regulator regarding the national interest test, when to waive or alter conditions imposed on investments that no longer require consent, and timeframes for conducting a national interest assessment

Agree/disagree

Hon Grant Robertson

- d **Note** that Cabinet has agreed that the Minister of Finance will have the role of determining whether transactions are contrary to the national interest under the new legislation, and this will require you to delegate your current power to assess transactions ordinarily subject to the Overseas Investment Act, because a single minister cannot undertake both roles. Officials are working to support an update to delegation letters.

Decisions for the Associate Minister of Finance

- e **Agree** that the entities in Appendix 3 are the list of 'critical direct suppliers' under section 20D, to which the national interest test or call-in power will apply

Agree/disagree

Hon David Parker

- f **Agree** to amend regulation 41 of the Overseas Investment Regulations to clarify that both the origination and subsequent transfer of a sensitive asset held under a single permitted security arrangement are exempt from consent requirements.

Agree/disagree

Hon David Parker

Chris Nees
Principal Advisor, International

Hon Grant Robertson
Minister of Finance

Hon David Parker
Associate Minister of Finance

Note:

The Letter to delegate certain powers and functions to the Overseas Investment Office is online and can be found at: <https://www.linz.govt.nz/overseas-investment/about-overseas-investment-office/legislation-ministers-delegated-powers>

The Letter to direct the OIO in the exercise of its powers is online and can be found at: <https://www.linz.govt.nz/overseas-investment/about-overseas-investment-office/legislation-ministers-delegated-powers>

The list of critical direct suppliers is online and can be found at: <https://www.linz.govt.nz/overseas-investment/applying-for-consent-purchase-new-zealand-assets/preparing-your-application-oio/national-interest-assessment>