

The Treasury

Overseas Investment Act Reform Information Release

October 2020

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[34] 9(2)(g)(i) - to maintain the effective conduct of public affairs through the free and frank expression of opinions

[35] 9(2)(g)(ii) - to maintain the effective conduct of public affairs through protecting ministers, members of government organisations, officers and employees from improper pressure or harassment

[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

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Treasury Report: Overseas Investment (Urgent Measures) Amendment Act: Clarifying the effect of transitional provisions

Date:	4 June 2020	Report No:	T2020/1746
		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 briefing	N.A.
Associate Minister of Finance (Hon David Parker)	Agree to make regulations to clarify that transactions entered into after the Urgent Measures Act take effect will be subject to the rules in that Act, even where an application was made prior to that Act taking effect.	8 June 2020 to allow regulations to be made for when the Urgent Measures Act takes effect on 16 June 2020.

Contact for telephone discussion (if required)

Name	Position	Telephone	1st Contact
[35]	Analyst, International	[39]	N/A (mob) ✓
Thomas Parry	Manager, International	[35]	

Minister's Office actions (if required)

Return the signed report to Treasury.

Refer a copy to the Minister for Land Information.

Note any feedback on the quality of the report

Enclosure: No

Treasury Report: Overseas Investment (Urgent Measures) Amendment Act: Clarifying effect of transitional provisions

Purpose of Report

1. This report seeks your agreement to make regulations to clarify how transitional provisions in the Overseas Investment (Urgent Measures) Amendment Act (**Urgent Measures Act**) apply to applications for consent made prior to that Act coming into force, but where the transaction has not yet been entered into.
2. To do this, we recommend lodging regulations with Cabinet next week for approval on 15 June 2020 and entry into force the following day (the date at which the Urgent Measures Act comes into force).

Analysis

Officials have identified an issue with the operation of transitional provisions

3. The Treasury and Overseas Investment Office (**OIO**) have identified an issue with the operation of the transitional provisions in clause 15 of Schedule 1AA of the Urgent Measures Act (the **transitional clause**) (see **Annex 1**). In particular, the clause is not clear whether the new provisions of the Urgent Measures Act apply to applications for consent (**applications**) where:
 - the application to the OIO was made before the Urgent Measures Act comes into force, but
 - the transaction will be entered into after the Urgent Measures Act comes into force.
4. This is not an uncommon situation. Examples where this situation could occur include applications made in advance of a takeover offer for listed companies, and most applications to acquire fishing quota. The OIO has identified 18 current transactions where this situation may arise.

[36]

[36]

7. [36] we recommend that the transitional clause be modified via regulations made under clause 26 of Schedule 1AA of the Urgent Measures Act (the **regulation-making clause**) to clarify and give effect to **Interpretation One**.
8. This regulation making clause enables regulations to be made to modify that Act during the transitional implementation period (ending after one year) (see **Annex 1**). To rely on this clause, you must be satisfied that the regulations:
- are necessary or desirable for the orderly implementation of the Urgent Measures Act, and
 - are consistent with the intended purpose of the specified provisions.

[36]

Effect of our recommendation

10. Clarifying that transactions entered into after the Urgent Measures Bill takes effect are subject to the rules of that Act would have the following effects:
- Investors could face additional, potentially significant, costs and delays for transactions that require further screening under the Urgent Measures Bill (especially where a national interest test is required). These include additional OIO and likely legal fees and processing time.
 - The existing rights and obligations of investors could be impacted, which could be perceived to be contrary to the general principle that legislation should not have retrospective effect
11. However, we consider that the costs of clarifying the effect of the transitional clause are outweighed by the benefit [36]
would be most consistent with materials that informed Parliament's consideration of the Bill.

[36]

Next Steps

13. To ensure that the regulations are in place in time for the entry into force of the transitional clause in the Urgent Measures Act (16 June 2020), we recommend that you urgently seek Cabinet's agreement on 15 June to the presentation of regulations to the Executive Council on the same day. As there is no Cabinet Legislation Committee next week, we recommend that you seek approval to go directly to Cabinet.
14. If you agree to the above, we will prepare a Cabinet paper and will work with Parliamentary Counsel Office to draft the regulations next week. A waiver of the 28-day rule would be required for the regulations and ordinary consultation requirements would not be able to be met.
15. Alternatively, the regulations could be introduced as part of the tranche two regulations. However, these regulations are currently scheduled to come into force in mid-July 2020, which would raise significant operational and legal risks during the period between the entry into force of the Urgent Measures Act and the tranche two regulations. For this reason, we do not recommend this approach.

Recommended Action

We recommend that you:

- a **Note** that the Treasury and the Overseas Investment Office (**OIO**) have identified an issue in the transitional provisions of the Overseas Investment (Urgent Measures) Amendment Act (the **Urgent Measures Act**). In particular, it is not clear how the Urgent Measures Act will apply to transactions where:
 - i. an application for consent was received by the OIO before the Urgent Measures Act comes into force, but
 - ii. the transaction has not been entered into prior to the Urgent Measures Act coming into force.
- b **Note** that clause 26 of Schedule 1AA of the Urgent Measures Act, provides that regulations may be made to modify the Urgent Measures Act, and that in order to rely on this clause you must be satisfied that the regulations:
 - i. are necessary or desirable for the orderly implementation of the Urgent Measures Act, and
 - ii. are consistent with the intended purpose of the specified provisions
- c **Agree** that regulations be made under clause 26 of Schedule 1AA of the Urgent Measures Act, to modify clause 15 of Schedule 1AA (the **transitional clause**), in order to clarify that transactions entered into after the Urgent Measures Act comes into force must be assessed against the requirements in that Act, regardless of when the application for consent was submitted to the OIO.

Agree/disagree.

[36]

- e **Agree** that the regulations be presented to Cabinet on Monday 15 June for referral to the Executive Council on the same day and entry into force the following day, which is when the Urgent Measures Bill enters into force.

Agree/disagree.

f **Refer** this briefing to the Minister for Land Information.

Referred/not referred.

Thomas Parry
Manager, International

Hon David Parker
Associate Minister of Finance

Annex 1: Relevant provisions in Schedule 1AA of the Urgent Measures Bill

15 Existing transactions and applications, etc

- (1) This clause applies for the purposes of applying a provision of this Act that relates to—
 - (a) determining who are overseas persons, what are overseas investments in sensitive assets, and other matters in Part 1 of this Act; and
 - (b) determining when consent is required and the criteria for consent under subpart 1 of Part 2 of this Act; and
 - (c) the making an applications for consent and for granting consent under subpart 2 of Part 2 of this Act.
- (2) Except as provided in this Part, the new Act applies to—
 - (a) transactions entered into on or after commencement;
 - (b) applications received by the regulator on or after commencement, regardless of when the transaction is or was entered into;
 - (c) transactions entered into before commencement in respect of which this Act requires an application to be made on or after commencement (for example, for retrospective consent);
 - (d) any other matters that relate to events or circumstances on or after commencement.
- (3) The requirement for consent does not apply to a transaction that meets all of the following requirements:
 - (a) the transaction has not been given effect to before commencement; and
 - (b) consent has not been granted before commencement; and
 - (c) the transaction would not require consent under the new Act or would be eligible for a standing consent under **Part 4**.
- (4) In other cases, the old Act continues to apply.

26 Transitionals, savings, and orderly implementation of 2020 Urgent Act

- (1) The Governor-General may, by Order in Council, on the recommendation of the Minister, make regulations for the purpose of providing that, subject to any conditions stated in the regulations, specified provisions of this Act do not apply, or continue to apply or apply with modifications or additions, or both, during the whole or any part of the transitional implementation period ending on the 1-year date.
- (2) The Minister must not recommend the making of regulations under this section unless the Minister is satisfied that the regulations—
 - (a) are necessary or desirable for the orderly implementation of the 2020 Urgent Act; and

- (b) are consistent with the intended purpose of the specified provisions.
- (3) This clause is repealed on the close of the 1-year date.
- (4) Any regulations made under this section that are in force on the 1-year date are revoked on the close of that day.
- (5) In this section,—
- 1-year date** means the date that is 1 year after the date on which this clause comes into force
- specified provisions of the Act** means any specified provisions of this Act to the extent that they are inserted, amended, or otherwise affected by the 2020 Urgent Act (including definitions and any transitional provisions in this schedule).
- (6) This clause is repealed on the 42nd day after the date on which the **Overseas Investment Amendment Act (No 3) 2020** receives the Royal assent.