The Treasury

Phase 2 Reform of Overseas Investment Act Information Release

March 2021

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TE TAI ŌHANGA
THE TREASURY

Treasury Report: Overseas Investment (Urgent Measures) Bill - Departmental Report

Date:	19 May 2020	**Report No:**	T2020/1470
		File Number:	IM-5-3-8 (Overseas Investment Act Phase Two)

Action sought

	Action sought	Deadline
Hon Grant Robertson **Minister of Finance**	**Note** the contents of this report.	N/A
Hon David Parker **Associate Minister of Finance**	**Agree** to Treasury's Departmental Report recommending changes to the Overseas Investment (Urgent Measures) Bill as outlined at Appendix A.	6pm 19 May 2020

Contact for telephone discussion (if required)

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

Minister's Office actions (if required)

Return the signed report to Treasury.

Note any feedback on the quality of the report	

Enclosure: No

Treasury Report: Overseas Investment (Urgent Measures) Bill - Departmental Report

Overview

Purpose

This report seeks your agreement to our:

- responses to the key issues raised by submitters on the Overseas Investment (Urgent Measures) Bill (the Urgent Measures Bill); and
- recommended of changes to the Urgent Measures Bill.

Context

The Urgent Measures and Other Measures Bills were introduced to Parliament on 14 May 2020. Collectively these Bills propose amendments to the Overseas Investment Act (the Act) that deliver on the Government's Phase Two Reform of the Act, as well as additional measures necessary to respond to the COVID-19 pandemic.

The Urgent Measures Bill, which contains measures necessary to respond to the pandemic (including the emergency notification regime), was referred to the Committee on 14 May and is due to be reported back on 25 May.

Overview of key issues raised by submitters

The Committee received 17 submissions overall.[1] Six were from law firms, two from industry associations, five from companies, and two from individual submitters.

Submitters generally supported the proposals to reduce regulatory burden, including revisions to the treatment of sensitive adjoining land, the investor test, and to exclude certain New Zealand listed entities and managed investment schemes from consent requirements.

Some submitters expressed concern about the scope of the new emergency notification regime, and the potential for it to delay transactions. A significant proportion of the feedback (particularly that of law firms) focused on technical issues.

Submitters tended to comment on issues that were urgent or significant in relation to this Bill, with some signalling that they intend to make broader, more detailed submissions in relation to the Overseas Investment Amendment Bill (No 3) (No 3 Bill).

A detailed overview of each issue raised by submitters is set out in the annex. Note that this will be subject to editorial and technical changes before it goes to FEC.

[1] Officials also reviewed a submission prepared by the New Zealand Initiative that was not submitted to the Committee.

Key issues raised by submitters or the committee

The scope of the emergency notification power

Issue

The emergency power captures investments by overseas persons of any value in any type of New Zealand businesses or property. Most submitters were concerned that this was too broad and captures many low risk transactions, particularly in business assets and property.

Submitters thought this would discourage productive investment, and have negative impacts on New Zealand's economic recovery, as well as on commercial transactions more generally. Submitters expressed concern that the number of notifications received by the regulator would lead to delays in processing applications, and this could be exacerbated by some investors over-notifying out of caution.

Submitters therefore recommended reducing the number of low-risk transactions captured the emergency power. Alternative options suggested include:

- only screening investments over a certain dollar threshold,
- only screening investments in strategically important businesses assets,
- removing certain low risk/high-volume transactions from scope (eg, leasehold interests in land), or
- as an alternative to the emergency power, the lowering threshold for screening significant business assets from $100m to a lesser figure.

Response

The COVID 19 pandemic has created a period of profound economic disruption and uncertainty. Against this backdrop, the Government has sought to balance the need to flexibly manage risks posed by foreign investment, against the need to support the free flow of capital.

The Government has adopted an initial $0 threshold in recognition of the uncertainty about transaction volumes, the types of risks that may already be present, and the potential for the value of distressed firms to drop precipitously. While this will impose a burden on some lower risk transactions, this is minimised by requiring a short notification form containing only basic information about the transaction. To mitigate this burden further, the Government has adopted strict triaging criteria so that low-risk transactions can proceed within a 10-day triage period.

Finally, a regulation making power is included in the Bill, that allows a threshold to be imposed, or certain transactions to be excluded, if it becomes apparent that certain classes of transaction (such as leaseholds) are routinely being notified that consistently pose little risks. Such transactions can then be removed from the scope of the emergency power.

In light of the strong concerns raised, we recommend you agree to an amendment that would commit to specifically assessing whether the emergency power is over-capturing low-risk transactions, and if so, to consider options available to mitigate any unnecessary regulatory burden. If you did wish to explore this option, we recommend it begin after the emergency power has been in force for 45 days, and, to provide certainty, could be set out in the Bill. We seek your direction on this point.

Defining the national interest, national security, and public order

Issue

Most submitters noted the Bill grants the Minster a very broad discretion to determine whether a transaction is 'contrary to the national interest'. Submitters considered it would be

desirable for there to be some statutory underpinning and/or detailed guidance as how this will be applied to reduce uncertainty.

Response

The Government has already published guidance on what matters will be considered as part of any national interest test assessment, to improve investor certainty and support the regulator's administration of the power.[2]

This provides more flexibility than a rigid legislative test and ensures that the Act is an enduring piece of legislation that can easily respond shifts overtime in the global risk environment, community concerns about foreign investment, and government priorities. This is the same as the approach taken by Australia.

The speed at which the Urgent Measures Bill is progressing, and will be implemented

Issue

Some submitters were concerned about the speed at which the Urgent Measures Bill is progressing and the limited time available to make submissions. They were further concerned that the emergency power's rapid implementation could compromise the OIO's ability to set up the regime effectively, and for investors to understand their new obligations. This could lead to delays in the OIO, and inadvertent breaches of the regime by investors.

Response

The Urgent Measures Bill is only progressing critical measures the Government considers necessary to urgently respond the economic impacts of the COVID-19 pandemic. This includes a mix of liberalising changes to support the free flow of capital, as well as new risk management tools. While these reforms are progressing through parliament quickly, the vast majority of the provisions have been subject to a full policy process through the Phase Two review.

To support rapid implementation, the Government has already set expectations for how the emergency regime should be operationalised by the OIO to reduce the chance of delays. For example, a set of strict triaging criteria have been developed, that will allow low-risk transactions to be identified and proceed within a short 10-day triaging period.

With regard to inadvertent breaches, like all enforcement action, the OIO will take a proportionate response. Initially, education would be an important focus with technical breaches able to be remedied through late notification. Of course, if an investor were to choose not to notify for strategic reasons, stronger enforcement action could be taken.

Finally, we note the Committee also has opportunity to consider and make recommendations regarding the Urgent Measures Bill in more detail when you report back on the Other Measures Bill. This will ensure the enduring provisions of the Urgent Measures Bill can receive full parliamentary scrutiny, and be amended if necessary.

Requests for exemptions from screening

Issue

A number of submitters considered that certain types of overseas persons or transactions should not be subject to any screening under the Act (including where those transactions

[2] Guidance Note: Foreign Investment Policy and National Interest Guidance. May 2020. https://treasury.govt.nz/sites/default/files/2020-05/for-invest-policy-nat-interest-guidance-may20-v2.pdf.

included significant business assets, or sensitive land – not just the emergency notification regime).

For example, some suggested carve-outs included certain types of financing transactions, such as securitisation, as well as widening exemptions for some types of overseas persons from the requirements (eg, Australian firms, firms with widely dispersed foreign ownership).

Response

We recognise some options proposes by submitters would have benefits, and reduce the screening of economically beneficial low-risk transactions. Others, however, would create a significant shift in the scope and nature of the Act itself which explicitly focuses on ownership. Notably some of the proposals could lead to a firm with more than 50% foreign ownership not being classed as an overseas person. This would be a significant departure from the purpose of the Act – that it is a privilege for an overseas person to **own** or **control** sensitive New Zealand assets. In addition these changes would involve a range of complex and technical amendments to the Bill that would need to be carefully crafted in a short time period.

As such, at this stage, we do not recommend progressing the majority of these requests for exemptions in light of those significant changes already being progressed through the Bill. The Committee may, however, wish to seek further submissions, and advice from officials, on the scope of the Act when it considers the Other Measures Bill.

Fire sales (raised by the Committee)

Issue

The Select Committee queried how a ‘fire sale’ would be considered under the national interest assessment.

Response

The risk of a ‘fire sale’ is a key reason why the Government is introducing the emergency notification requirement – that is to ensure there is appropriate review of such transactions to manage risks if necessary. Part of the fire sale concern arises from the fact that some businesses that were subject to screening, would no longer be, because of the loss in their value. The risk of falling firm values across the board increases the chance of foreign investors acting opportunistically to acquire assets at depressed values.

The notification requirement allows the government to consider risks to the national interest from such sales, but whether or not the transaction is a fire sale, does not need to be assessed in the test.

In making the assessment of whether the investment is contrary to the national interest, the Minister will consider a range of factors outlined in the guidance including:

- Impacts on national security and public order
- Economic and social impacts of the investment, for example employment
- Character of the investor
- Whether the New Zealand business is in financial distress

The Minister will then need to make an assessment of whether overseas ownership or control of certain business assets is contrary to New Zealand’s national interest, weighing up these factors. The Minister does not need to determine whether there is a fire sale, rather whether the sale poses risks that would require action to address. If the sale presents risks such as job losses or the transfer of intellectual property, the Minister may impose conditions to manage those risks, or in rare cases decline that investment.

Overview of recommended amendments to the Bill

In response to submissions received through the Committee, and our own consultation with technical experts and the Overseas Investment Office (OIO) prior to the Bill's introduction, we recommend a number of changes to the Urgent Measures Bill.

These are limited to amendments necessary to operationalise the Bill successfully, rather than address any broader policy issues. This recognises that such issues can be better dealt with through the Committee's consideration of the Overseas Investment Amendment Bill (No 3) (the Other Measures Bill).

Our recommended changes are set out in the table below. Please indicate whether you agree or disagree with the change proposed in the right hand column.

#	Proposed change	Minister's view
Transitional arrangements		
1.	Not requiring transactions entered into before the Bill receives Royal asset to notify under the emergency notifications regime (see item 13).	*Agree/disagree*
2.	Not requiring transactions entered into (including those not entered into but not yet completed) before the Bill receives Royal assent to get consent if they no longer would need consent under the new rules. (see items 14, 16 and 20)	*Agree/disagree*
Emergency notification power / Call in / national interest test		
3.	Narrowing the definition of strategically important businesses ('SIB') to exclude businesses that are merely involved in the business of a SIB. This would ensure that businesses providing services to those businesses are not captured, for example, a cleaning contractor for Auckland International Airport Limited. (see item 23)	*Agree/disagree*
4.	Requiring the Minister to notify a person if they cease to be a critical direct supplier and, where relevant remove that person's name from the list referred to in the Bill (see item 28).	*Agree/disagree*
5.	Removing the requirement that a notification is signed and only require a statutory declaration if the regulator accepts one (see item 42)	*Agree/disagree*
6.	Empowering the Minister to authorise (by notice in the Gazette) the manner in which investors must make a notification (instead of having only having core requirements information requirements in regulation). This enables the OIO to run a fully online process, reducing the administrative burden and time taken to assess notification (see item 43)	*Agree/disagree*
7.	Removing the default requirement to publish transactions that are allowed to proceed unfettered under the emergency power and the permanent call-in power (see item 46)	*Agree/disagree*

Exemptions		
8.	Clarifying that the exemption making power for residential mortgage obligations ('RMOs') includes transactions "in relation to" the issuance of management of RMOs (see item 62)	*Agree/disagree*
Standing consent		
9.	Excluding entities with standing consent from the emergency notification regime (see item 69)	*Agree/disagree*
10.	Including a standing consent for listed managed investment schemes using the criteria for the applied for exemption for non-listed managed investment schemes (see item 71)	*Agree/disagree*

Also note that:

- Consistent with your decision in Treasury Report which sought decisions in relation to the treatment of loans [T2020/1399], we have also recommended removing the exemption making power for loans by registered bank and replacing it with an exclusion from screening requirements for loans issued or acquired in the ordinary course of business and good faith.
- References in the standing consent provisions, which previously referred to the Act, now refer to No 3 Bill.

Each change is set out in more detail in annex 1.

Recommended Action

We recommend that you

a **Note** that the Overseas Investment (Urgent Measures) Bill (the Urgent Measures Bill) was referred to the Finance and Expenditure Committee on 14 May 2020, with the Committee due to report back to Parliament by 25 May 2020.

b **Note** that to deliver on this timeframe, Treasury's Departmental Report on the Urgent Measures Bill needs to be provided by 10am Wednesday 20 May 2020, with the Parliamentary Counsel Office to prepare a draft of the Revision Tracked version of the Bill by 22 May 2020.

c **Note** that, given these timing constraints, Treasury's Departmental Report on the Urgent Measures Bill will be focus on amendments necessary to operationalise the Bill successfully, rather than address broader policy issues (which can be considered as part of the Committee's review of the Overseas Investment Amendment Bill (No 3)).

d **Indicate** if you wish officials to recommend in the Departmental Report that an assessment of whether the emergency power is routinely capturing low-risk transactions, and if so, to consider the feasibility of any options available to mitigate any unnecessary regulatory burden.

e Agree that this assessment outlined in recommendation (d) would be undertaken by the Minister responsible for the Act after the power has been in force for 45 days.

Yes/no
Associate Minister of Finance.

f **Agree** to our recommendations for amendments to the Urgent Measures Bill contained in the Treasury Report (in addition to the change you agreed in T2020/1399 in relation to the treatment of loans).

Agree/disagree
Associate Minister of Finance.

Thomas Parry
Manager International

Hon Grant Robertson
Minister of Finance

Hon David Parker
Associate Minister of Finance

Appendix A: Responses to submitters and recommended amendments to the Urgent Measures Bill

The tables below sets out a summary of issues raised by submitters and us (as a result of consultation with the experts and the Overseas Investment Office), and our responses to those issues.

Theme: Investor test

Item	Clause	Section	Raised by	Issue	Officials' comment
1.	15	18A	Retirement Villages Association; Metlife Care; Goodman Property Trust	Supports the changes to the investor test, particularly removing the ability to consider other factors not listed in the Act, and no longer requiring New Zealanders to be screened.	**Noted.** No action.

Item	Clause	Section	Raised by	Issue	Officials' comment
2.	15	18A(4)	Russell McVeagh and BellGully	Considers that there should be a minimum monetary threshold for the fines within scope of 18A(4)(iii). This is in order to be consistent with the thresholds in other investor test factors and to exclude small fines on large corporate investors.	**No change to Bill.** This provision is designed to improve the Government's ability to consider corporate character under the investor test, by including fines imposed on conviction for an offense. This is because it is not possible to impose a sentence of imprisonment on non-natural persons. The Government considers that the conviction of an investor that isn't an individual, regardless of the monetary value of the fine imposed, may be a serious matter and should be able to be considered under the investor test. We note however that like all the factors in the investor test, this factor is not determinative. In making a decision whether an investor passes the investor test, the relevant Minister must be satisfied that any investor test factor or factors that are established do not make that investor unsuitable to own or control any sensitive New Zealand assets.

Item	Clause	Section	Raised by	Issue	Officials' comment
3.	15	18A	BellGully	Considers that there should be a minimum monetary threshold for civil pecuniary penalties within scope of 18A(4)(iv).	**No change to Bill.** Civil pecuniary penalties are court-imposed monetary penalties made during civil proceedings. The Government considers that any such penalty imposed on an investor, regardless of the monetary value, may be a serious matter and should be able to be considered under the investor test. We note however that like all the factors in the investor test, this factor is not determinative. In making a decision whether an investor passes the investor test, the relevant Minister must be satisfied that any investor test factor or factors that are established do not make that investor unsuitable to own or control any sensitive New Zealand assets.

Item	Clause	Section	Raised by	Issue	Officials' comment
4.	15	18A	Simpson Grierson	Suggests that the investor test factors in 18A(4)(c) - (f) should not be limited to matters dealt with under New Zealand legislation, but should be expanded to matters dealt with under equivalent legislation in other jurisdictions. For example, 18A(4)(c) should include a person that is prohibited from being a director under New Zealand legislation or equivalent laws of another jurisdiction.	**No change to Bill**. Subsections 18A(4)(e) and (f) are inclusive of matters dealt with under New Zealand law as well as overseas jurisdictions. Subsections 18A(4)(e)(i) and (ii) refer to "an equivalent enactment in another jurisdiction" and the outstanding unpaid tax threshold in 18A(4)(f) includes "an equivalent amount due and payable in another jurisdiction". The matters considered under subsections 18A(4)(c) and (d) are designed to capture prohibitions and orders made under New Zealand legislation that demonstrate that a person may be unsuitable to own or control in any sensitive New Zealand assets, due to a serious lack of capability. Some of the prohibitions and orders within scope of these provisions are inclusive of matters dealt with under equivalent laws of foreign jurisdictions (see for example the Companies Act 1993 section 151(2)(eb) - (ec) and the Takeovers Act section 44F(c)). However, other prohibitions and orders may not have easily identifiable equivalents in the laws of other jurisdictions. Our recommendation is to rely on the provisions in New Zealand legislation to "look through" to equivalent provisions in the laws of foreign jurisdictions, where appropriate.

Item	Clause	Section	Raised by	Issue	Officials' comment
5.	15	18A	BellGully	Considers that the purpose statement in clause 18A(1) creates a level of subjectivity that takes away from the improvements that this Bill seeks to make to the investor test.	**No change to Bill**. One of the key objectives of the Bill's changes to the investor test is to reduce the level of uncertainty, and associated costs, caused by the wide discretion afforded to the Minister under the existing test. The Bill achieves this by introducing a narrower list of objective factors and removing the ability for the Minister to consider other matters. However, a degree of discretion is necessary to ensure that the investor test is only failed if any factor that are established make an investor unsuitable to own or control any sensitive New Zealand assets. Alternatively, any factor that is established would mean that the investor test is failed, regardless of how material or relevant that factor is. An example of this is where a fine has been imposed on a corporate investor, which would be within scope of 18A(4)(iii), but all the managers of that investor have since been replaced. If no discretion were possible, this investor would not pass the investor test. For this reason, subsection 18A(3) requires the Minister to consider, whether any factors, if established, make an investor unsuitable to own or control any sensitive New Zealand assets. The purpose statement is designed to guide this decision-making.

Item	Clause	Section	Raised by	Issue	Officials' comment
6.	15	18A	BellGully	Queries whether a non-payment of tax by a corporate investor that wasn't at the time an overseas person would be within scope of the investor test, if that investor subsequently becomes an overseas person and/or if there has been a change in its ownership structure.	**Noted**. The situation described by the submitter may be within scope of 18A(4) (f) if the outstanding amount remains above $5 million at the time of application. However, the change in ownership may be relevant to the Minister in determining whether this factor makes the corporate investor unsuitable to own or control any sensitive New Zealand assets (given the Ministerial discretion as discussed above).
7.	15	18A	BellGully	Recommends removing the factor under 18A(4)(e)(i), which considers penalties imposed in the last 10 years for an abusive tax position under section 141D of the Tax Administration Act 1994 or an equivalent enactment in another jurisdiction. This is because section 141D of the Tax Administration Act does not contain any *mens rea* component before it can apply (compared with a penalty for evasion or similar). Instead it is determined objectively by looking at the tax position taken in respect of an arrangement.	**No change to Bill**. The Government is of the view that penalties for an abusive tax position are a serious matter and should be treated in the same way under the investor test as breaches of other legislation. The Bill includes a separate factor considering penalties for an abusive tax position (as well as for evasion or a similar act) because these penalties are imposed by Inland Revenue, rather than the court, and would therefore not be captured under other factors. As referred to above, like all the factors in the investor test this factor is not determinative. In making a decision whether an investor passes the investor test, the relevant Minister must be satisfied that any investor test factor or factors that are established do not make that investor unsuitable to own or control any sensitive New Zealand assets.

Theme: Sensitive adjoining land

Item	Clause	Section	Raised by	Issue	Officials' comment

Item	Clause	Section	Raised by	Issue	Officials' comment
8.	N/A	37	Bell Gully	Submitter has queried why the Section 37 list cannot be repealed now as part of the Urgent Measures Bill (rather than being repealed in the No 3 Bill).	**No change to the Bill.** 'Ratchet' obligations under New Zealand's international obligations have the effect of 'locking in' certain changes to the screening regime so that our ability to reverse them in the future is constrained. This is specifically relevant where transactions are removed from the regime such that they are no longer subject to prior approval by the Government. As a result, in the emergency Bill, liberalising measures are implemented through standing consents. This reflects the Government's view that transactions should not be removed from the screening regime without full Parliamentary scrutiny.
9.	N/A	Schedule 1AA (Urgent Measures Bill), Table 2, Schedule 1 (No 3 Bill)	Simpson Grierson	Submitter has identified a discrepancy in the drafting of in Schedule 1, Part 1 of the No 3 Bill. Row 8 of Table 2 in that Schedule unnecessarily references section 67(4) of the Heritage New Zealand Pouhere Taonga Act (which specifically relates to a historic place or area), despite amendments removing land adjoining a historic place or area from screening.	**No change to the Bill.** This is a minor drafting error, but is non-urgent and can be clarified by the No 3 Bill. It does not lead to any land being unintentionally screened by the Act and has no impact from an operational perspective.

Theme: No3 Bill or out of scope

Item	Clause	Section	Raised by	Issue	Officials' comment

Item	Clause	Section	Raised by	Issue	Officials' comment
10.	NA	NA	D Webster	While supporting the Bill's intent, the submitter considers overseas ownership of land should not be permitted.	**No change to the Bill.** This is inconsistent with the purpose of the Bill, which seeks to facilitate productive investment that can support New Zealand's economic recovery from COVID 19 and support productive investment in the longer term.
11.	NA	NA	Chapman Tripp	Proposes exemptions in Parts 4 and 5 of the Regulations should apply to transactions structured using a New Zealand subsidiary wholly owned by eligible investors.	**No change to the Bill.** The current drafting is necessary to comply with New Zealand's international obligations.

Theme: Transitionals

Item	Clause	Section	Raised by	Issue	Officials' comment
12.	n/a	n/a	Property Council	Urgent changes not currently in No 2 Bill should be subject to a sunset clause.	**No change to the Bill.** Emergency notification regime will be reviewed every 90 days and removed when the effects of the emergency no longer justify it being in place. When it is revoked, the call-in power as originally drafted in the No 2 Bill will be reinstated (see clause 53). The Bill includes a backstop date for reinstatement of the call-in power (2 years following Royal Assent, see clause 2(2)(b)). Other emergency provisions, such as temporary regulation making powers, will sunset with the passage of the No 3 Bill.
13.	Schedule 1AA	n/a	Russel McVeagh, Bell Gully, Buddle Findlay	It is not clear whether the whether transactions not ordinarily screened under the Act and entered into before the Bill takes effect would need to be notified under the emergency notification regime. This raises potential issues of retrospectivity.	**Agree to amend the Bill**. The emergency notification regime, as drafted, does not operate retrospectively. However, to provide additional certainty to investors, the Bill should be amended to make clear that transactions entered into prior to the emergency notification regime taking effect, do not need to be notified.

Item	Clause	Section	Raised by	Issue	Officials' comment
14.	Schedule 1AA	n/a	Russel McVeagh, Retirement Villages Association	The Bill should not require transactions that have been entered into under the current Act (but not given effect to), but would not require consent under the new rules, to get consent.	**Agree to amend the Bill**. Transactions that no longer need consent under the new rules have been judged by the Government to be low risk. Requiring transactions that are in the process of being completed prior to the new rules taking effect to get consent does not increase the risk of foreign investment, but will place unnecessary burden on the Overseas Investment Office and increase costs for investors.
15.	Schedule 1AA	n/a	Buddle Findlay	Applications for consent made after the Bill takes effect, that relate to transactions entered into before the Bill takes effect, should be subject to the Act as it exists currently.	**No change to the Bill**. The Bill significantly simplifies aspects of the consent regime (such as the investor test). The current drafting ensures that transactions entered into prior to the provisions taking effect, but where consent is applied for after, can access these benefits. While this could mean that some transactions are subject to the national interest test this is expected to occur rarely and this does not mean that those transactions would be declined.
16.	Schedule 1AA	n/a	Buddle Findlay, Chapman Tripp, Russel McVeagh, Summerset Holdings, Goodman Property Trust	Persons that will receive a 'standing consent' for transactions under the Act until the passage of the Overseas Investment Amendment Bill (No 3) due to no longer being 'overseas persons' under that Bill, should also not be subject to the emergency notification regime or call in power.	**Agree to amend the Bill**. Investors that will no longer be 'overseas persons' under the Overseas Investment Amendment Bill (No 3) should not have to undergo screening. This reflects the Government's view that such entities are fundamentally New Zealand entities.
17.	Schedule 1AA	n/a	Chapman Tripp	References in the standing consent transitional provisions should refer to sections of the 2020 Amendment Act (that is, the No 3 Bill) rather than this Act.	**Agree to amend the Bill**. This is an error.

Item	Clause	Section	Raised by	Issue	Officials' comment
18.	Schedule 1AA	n/a	Chapman Tripp	Offers for securities on a recognised exchange made prior to commencement of the new provisions, should be subject to the existing rules even if that offer has not yet been accepted.	**No change to the Bill**. While offers of securities on a regulated market are different in some respects to entering other types of transactions, the current drafting ensures that transactions of different types are treated equally under the transitional provisions. Further, there would be significant complexity and potential for unintended consequences in drafting a bespoke transitional provision for a small number of transactions and it is not clear that this is justified given the Government's commitment to process notifications within, in most circumstances, 10 days.
19.	Schedule 1AA	n/a	Duncan Cotterill	Clause 26 enables the Act itself to be amended by Regulation, and should be expressly limited to the emergency measures.	**No change to the Bill.** The regulation making power is limited to enabling changes that are necessary or desirable for the orderly implementation of the Act and consistent with the intended purpose of the relevant provision. The clause is transitional and will be repealed after one year, as will any regulations made under it. It is modelled on similar transitional provisions in other Acts (for example, the Financial Markets Conduct Act).
20.	Schedule 1AA (transitional provisions)	New section	Officials	Transactions in the process of being completed when the Bill passes will still require consent (ie, transactions entered into, but not yet given effect to). Requiring these transactions to get consent does not increase the risk of foreign investment, but will place unnecessary burden on the Overseas Investment Office. It also reduces compliance costs for investors, while improving the flow of capital into the economy.	**Agree to amend the Bill.** We recommend amending the Bill so that transactions in the process of being completed, and would not require consent under the new rules, are exempt from the requirements for consent.

Item	Clause	Section	Raised by	Issue	Officials' comment
21.	17	20C	Buddle Findlay	The national interest test should not be able to be applied to transactions that have received consent but have not yet been completed.	**No change to the Bill**. Once a transaction has received consent the government is unable to re-assess the application unless there are grounds for the consent to be revoked (for example, false and misleading information was provided). This means that the national interest test cannot be applied to transactions that have already received consent but not yet completed.

Theme: Emergency notification power, the national interest test, the permanent call in power and time frames

Item	Clause	Section	Raised by	Issue	Officials' comment
22.	Emergency power generally	NA	Property Law Council New Zealand, Duncan Cotterill, Fletcher Building, Chapman Tripp, Russell McVeagh	The emergency power captures transactions of any value, in any type of New Zealand business. Submitters were concerned that this was too broad and would capture low risk transactions. This could have negative impacts on New Zealand's economic recovery and on commercial transactions generally. It may also lead to delays in processing applications.	**No change to the Bill.** See discussion in key issues section.

Item	Clause	Section	Raised by	Issue	Officials' comment
23.	6 (2)	6 (1), definitions of strategically important businesses (SIBs)	Chapman Tripp	The drafting of the definitions of SIB should be clear that only those businesses or entities prescribed in the regulations are captured (for example, Auckland International Airport Limited) rather than those "involved in" those businesses specified in the regulations (such as Auckland International Airport Limited's cleaning contract).	**Agree to amend the Bill.** Current drafting of s 6 would unintentionally expand the scope of to capture businesses 'involved in' those prescribed classes of SIBs set in regulations.
24.	17	20A(1)	Chapman Tripp	Incorrect section reference. Remove subsection (1) from the references to section 12. There is no subsection (1) until Bill no 3 comes into force.	**Seeking drafting advice from PCO.** This is a technical issue arising from splitting the Phase Two Bill into two Bills. Also applies to the reference in Schedule 3 Clause 2(1).
25.	17	New section 20C (and equivalent in s 81 relating to the emergency power)	Property Council New Zealand, Simpson Grierson, Bell Gully, Russell McVeagh	The Bill grants the Minster a very broad discretion to determine whether a transaction is 'contrary to the national interest'. Submitters considered it would be desirable for there to be some statutory underpinning and/or detailed guidance as to uncertain concepts.	**No change to the Bill**. Refer to discussion above.
26.	NA	National interest test generally	Chapman Tripp	The Bill should explicitly state that there is a general presumption that overseas investment is in the national interest, given the important role it plays in New Zealand's economy.	**No change to the Bill**. This is already set out in the guidance on the national interest test, mentioned above.

Item	Clause	Section	Raised by	Issue	Officials' comment
27.	17	New Section 20B (1) Other transactions may be transactions of national interest if notice given	Russell McVeah, Bell Gully	This provision allows the Minister to subject any investment that requires consent (sensitive land, significant business assets or fishing quota) to the national interest test at their discretion (even if the transaction does not involve a SIB or non-NZ government investor). Some submitters thought this power was too broad creating uncertainty. This could lead to applicants pre-emptively addressing national interest concerns in applications unnecessarily. Submitters suggested a timeframe should require the Minster to exercise this discretion quickly after an application is received, and to notify the applicant they have decided not to apply the national interest test.	**No change to the Bill.** This discretion is designed to be used rarely as a backstop to capture unforeseen, unique risk-scenarios. Guidance on the national interest test has been published to provide certainty about the characteristics of investments that may be considered contrary to the national interest. If in future an additional class of transactions emerge that are routinely being escalated to the test, it is intended that these will be classified as SIBs through regulations (s 127(1)(c), providing certainty to investors. Core information requirements for applications for consent will be set in regulations, and will not require the provision of detailed information regarding the national interest. A timeframe for exercising this discretion could provide additional certainty. However, we do not recommend legislation or regulation should set out detailed procedural matters, and this could be managed operationally (like the 10-day triage period for the emergency power).

Item	Clause	Section	Raised by	Issue	Officials' comment
28.	17	20D	Chapman Tripp	There is no obligation on the Minister in new section 20D of the Act to notify a person if they cease to be a critical direct supplier.	**Accept.** require the Minister to notify a person if they cease to be a critical direct supplier and, where relevant, remove that person's name from the list referred to in subsection (2)(b)(i).
29.	17	20A(1)(c)	Chapman Tripp	This section could capture passive landlords transacting premises leased to SIBs where the landlord has no involvement in the SIB.	**Seeking drafting advice from PCO.** amend new section 20A(1)(c) to read "a transaction of a kind described in section 12(1)(a) in an SIB where the estate or interest in land is used in carrying on an SIB". The submitter's recommendation was to use 'by an SIB' but it should focus on the target entity not the investor.
30.	17	20E(2)	Chapman Tripp	It will not be practicable for a listed issuer to give the notices contemplated by sections 20E(2) and (4) in the event that the listed issuer is an unpublished CDS	**No change to Bill.** Given that the investor will have acquired a significant or controlling interest, it will be possible for the listed issuer to provide the notice when they are made aware of their status. We also note there's a 10% threshold for listed issuers subject to the call in power. This means the investor will become a substantial product holder, which has to publicly report on their status which mitigates this issue.
31.	25	23(4)	Chapman Tripp	Failure to comply with section 23(4) should not be an offence under section 45.	**No change to the Bill.** This is consistent with equivalent provisions in the Act, and we do not propose reviewing all of these through the Urgent Bill.

Item	Clause	Section	Raised by	Issue	Officials' comment
32.	25	37B (and accompanying regulations relating to statutory timeframes)	Property Law Council New Zealand	Delays in assessing notifications under the emergency power could result in a transaction not proceeding or a firm failing, particularly for urgent transactions.	**No change to the Bill.** Refer to the discussion of the key issue above, and note the OIO also has processes in place to fast-track urgent applications, and encourages investors to inform them if their transaction is urgent.
33.	25	37B (and accompanying regulations relating to statutory timeframes)	Fletcher Building	The Bill (or regulations) should make clear that low risk transactions should be cleared within 10 days, and if the OIO does not respond in 10 days, the decision will be deemed "no action" and the transaction can automatically proceed.	**No change to the Bill.** Automatically allowing transactions to proceed as suggested could have negative consequences to national security or the national interest out of proportion to the benefits obtained by investors. This would constrain the Government's ability to manage risks to national security, public order and the national interest.
34.	25	37B	Simpson Grierson	Prefer that timeframes have a statutory basis.	**No change to this Bill.** Under section 37B time frames are statutory and will be set in the Regulations. Officials consider this appropriate because it provides certainty for applicants, whilst allowing for flexibility if time frames require recalibration. Regulations can be made requiring the reporting on these timeframes so the regulator is accountable.
35.	Clause 52	New section 82, What are call-in transactions	Bell Gully	There are many circumstances where a consent is granted for a series of transactions (e.g. increasing shareholding through a series of separate share acquisitions). It is not clear these are excluded from the call in power and emergency power.	**No change to the Bill.** These transactions are excluded by s 88 (2), which excludes transactions that have required consent.

Item	Clause	Section	Raised by	Issue	Officials' comment
36.	52	New Section 82 (2)(a) What are call in transactions	Chapman Tripp	The notification requirement technically applies to offshore share transfers even if the target has no assets in New Zealand. This provision should make it clear that it relates to New Zealand investments only.	**No change to the Bill.** This raises a range of technical issues across the broader consent framework. These low-risk transactions can be triaged our operationally.
37.	Clause 52	New section 82 (2) (a) (ii) , What are call in transactions	Duncan Cotterill	This section defines what are controlling equity investments subject to the emergency power. The submitter considered the drafting of this section was not clear and could lead to uncertainty.	**Seek drafting advice from PCO.** The intent of this section is to capture transactions where an overseas person increases their holdings of a New Zealand business to more than 25%, 50%, 75%, or to 100%. We consider the drafting meets this goal, but PCO may have suggestions for improving clarity.
38.	Clause 52	New section 82 (2) (b), property subject to the emergency power (and associated regulation)	Chapman Trip	It will be difficult for an overseas investor to obtain sufficient information about the vendor's business and remaining assets to confidently determine whether the property to be acquired is worth more than 25% of the vendor's total assets, and therefore whether notification is required.	**No change to the Bill.** This can be managed contractually between the parties. The vendor is best placed to determine whether the risks in disclosing their total value of assets to an overseas investor outweighs (potentially) higher selling price. If not, the vendor should seek an alternative domestic investor.
39.	Clause 52	New section 82 (2) (b), property subject to the emergency power (and associated regulation)	Bell Gully, Chapman Tripp	There is an advantage if a businesses' assets happen to be pooled with others because it will make it less likely an investment exceeds 25% or more of the investors' total assets because a notification will not be made. The opposite is true if they are separated out into different entities.	**Noted**. This is an issue that can be managed through Regulations.

Item	Clause	Section	Raised by	Issue	Officials' comment
40.	Clause 52	New Section 88, Direction orders	Simpson Grierson, Fletcher Building	It is not clear enough that a direction order in most cases will grant an investor clearance to proceed with a transaction. Simpson Grierson recommended a new provision that explicitly states that the Minister may give a direction order that grants the investor a clearance to proceed with the call-in transaction.	**Seek drafting advice from PCO**. We acknowledge this perception, but there is no barrier to transactions proceeding on current drafting. We recommend seeking drafting advice from PCO on whether the drafting could be clearer that a direction order without conditions is, essentially, a 'no action' notice.
41.	17, New Sections 20A to 20G, Transactions of national interest (for transactions already screened) Clause 52, New Part 3 inserted (for transactions subject to the emergency power)	New section 20C (for transactions already screened) New section 84 (for transactions subject to the emergency power)	Property Council New Zealand	There should be two Ministers involved in decisions relating to the national interest to ensure balance and natural justice in the exercise of the test.	**No change to the Bill.** For the emergency power, this will be achieved operationally. The initial decision about whether a notified transaction should be subject to a detailed review against the national interest will rest with the Associate Minister of Finance, Hon David Parker (with the potential for this to be delegated to the regulator in the future). Any subsequent decision on whether a transaction is contrary to the national interest and should be subject to conditions or blocked will rest with the Minister of Finance (as the Minister responsible for the Act). This power will not be able to be delegated to the regulator.

Item	Clause	Section	Raised by	Issue	Officials' comment
42.	52	New section 87: Requirements for notice of call-in transaction	Simpson Grierson, Bell Gully, Chapman Tripp	The Urgent Bill requires a notification made under the emergency power to be signed and be accompanied with a statutory declaration (unless waived by the regulator). This imposes unnecessary regulatory burden on investors, and hinders the online submission of notifications.	**Agree to amend the Bill.** Section 87 should be amended to: • remove the requirement that a notification is signed, and • only require a statutory declaration if the regulator explicitly requests one because it considers a declaration necessary to verify certain information.
43.	52	New section 87: Requirements for notice of call-in transaction	Raised by officials	The Urgent Bill does not allow the Minister to prescribe the detailed contents and form a notification must take under the emergency power. Instead, the Bill only provides that basic information requirements can be set in regulation. Regulations are inflexible, and because this power only extends to 'information,' it does not permit the regulator to require the use of an online portal that will support the efficient administration of the emergency power.	**Agree to amend the Bill.** Officials recommend empowering the Minister to authorise the manner in which a notification is made under the emergency power (which will include both the information required, and method by which this information is provided to the regulator). The Minister must issue an alert in the Gazette when the prescribed form is published. This is similar to a power the regulator has already relating to residential land (refer s 51B).

Item	Clause	Section	Raised by	Issue	Officials' comment
44.	52	New section 88 (2), Direction orders	Simpson Grierson	There should be more specificity around the types of conditions that may be imposed under the emergency power and call-in power. This would reduce uncertainty and provide more confidence to investors.	**No change to the Bill.** The nature of the risks transactions pose to New Zealand's national interest, national security, or public order will vary considerably depending on the nature of the transaction, the investor, and the assets sought. They will also vary over time. It would not be possible to specify these comprehensively in the legislation and any attempt to do so unduly restrict the Government's flexibility to manage risks.
45.	52	New section 88, Direction orders	Buddle Findlay, Fletcher Building	The Government has said it intends that low-risk transactions will be dealt with within a 10-day triage period. This is not set out in the Bill.	**No change to the Bill.** This triage process is intended to be managed operationally. Legislation or regulation is not necessary to give effect to operational policy. This avoids setting detailed and complex procedural steps in legislation or regulation. The Government has committed to the 10-day triage period and has published the Cabinet paper and minute setting out this process in more detail.

Item	Clause	Section	Raised by	Issue	Officials' comment
46.	52	New section 129, Minister must publish decisions on call-in transactions and transactions of national interest.	Officials, Fletcher Building	To promote transparency and encourage the prudent exercise of the national interest test, emergency power, and the permanent call-in power, the Bill requires the Minister to publish decisions. Due to a drafting error, it also requires the publication of direction orders that simply permit transactions to proceed unfettered. This imposes additional burden on the OIO, with little public benefit. Duncan Cotterill raised this a significant change to the standard commercial position for investments. Fletcher Building noted were concerned about 'opportunistic use' of the Official Information Act to obtain sensitive commercial information.	**Agree to amend the Bill.** We recommend amending s 129 so that publication requirements do not apply, by default, to transactions that are allowed to proceed unfettered under the emergency power and the permanent call-in power. We consider the withholding ground in Official Information Act sufficient to protect commercially sensitive information.
47.	53 (4)	Section 82, What is a call-in transaction and overseas investment in SIB assets (for the permanent call in power)	Chapman Tripp	The acquisition of any asset used by a business carrying on a SIB – including non-core or minor assets and assets easily replaceable – is subject to the permanent call-in power. For the call-in power to apply, the asset being acquired should be critical to the carrying on of the SIB and one that cannot readily be replaced.	**Noted**. There are a range of ways assets could be better targeted under the permanent call in power, each with costs and benefits. We recommend the Committee consider this alongside the No3 Bill, as further submissions may be beneficial.

Item	Clause	Section	Raised by	Issue	Officials' comment
48.	53 (13)	6 (1), definitions of SIBs (sensitive information)	Chapman Tripp	While having "access to" some types of sensitive information (e.g. genetic information) is an appropriate threshold, it should not apply to financial information as this would capture a wide range of transactions (eg, a landlord with access to a database of credit scores).	**Noted**. We will consider this when drafting the regulations, which can exclude certain types of data from scope if necessary.
49.	53(4)	82	Summerset Group	New Zealand listed issuers who are majority owned and controlled by New Zealanders will be subject to the call-in power.	**No change to Bill.** When the call-in power is brought into force, the exemptions for applications normally screened under the Act will also be applied to call-in transactions.
50.	53	Part 3	Duncan Cotterill	Given that the provisions relating to the call-in power may not come into force until 12-24 months after the commencement on the new Act, we query their inclusion in the Urgent Measures Bill, which is subject to the condensed legislative timeframes.	**No change to Bill.** The call-in power has been included so that it can be brought into force to manage narrower risks when the emergency power is no longer in force.

Item	Clause	Section	Raised by	Issue	Officials' comment
51.	6(2)	6(1)	Buddle Findlay	Definition of *non-NZ government investor* includes any person acting as an agent or trustee of a foreign government. The manager or trustee of a unit trust or managed investment scheme will meet the definition of non-NZ government investor, even if only one investor in the unit trust or the scheme is a foreign government. This undermines the policy intent that only entities with a more than 25% foreign government shareholding should be deemed a relevant government enterprise (and subject to the national interest test)	**No change to the Bill.** These definitions are existing definitions used in the regulations, and tie into other parts of the regime. Any over-capture should be addressed through the No 3 Bill, following further agency consultation and a full Parliamentary process.
52.	6(2)	6(1)	Chapman Tripp	Definitions of *non-NZ government investor* and *relevant government investor* are circular and require ownership and control interests to be considered on an aggregate basis. This means that the definition of *relevant government enterprise* will capture entities that should not properly be considered government enterprises.	**No change to the Bill.** These definitions are existing definitions used in the regulations, and tie into other parts of the regime. Any over-capture should be addressed through the No 3 Bill, following further agency consultation and a full Parliamentary process.
53.	17	20A	Buddle Findlay	There is a lack of clarity as to whether the non-NZ Government investor referred to in s 20A(1)(b) is the entity making the overseas investment, or whether a "look through" assessment is required.	**No change to the Bill.** The issue of indirect interests should be dealt with operationally by the OIO, as it is in other parts of the regime.

Item	Clause	Section	Raised by	Issue	Officials' comment
54.	53	Part 3	Duncan Cotterill	Suggest moving the (non-emergency) call-in power to No 3 Bill.	**No change to the Bill.** The call-in power will replace the emergency notification regime, which will be reviewed every 90 days and, eventually, revoked. Accordingly, the call-in power must be available to come into force by Order in Council to avoid a significant regulatory gap.

Theme: Exemptions

Item	Clause	Section	Raised by	Issue	Officials' comment
55.	49	61B(c)(viii)	Simpson Grierson, Woolworths	The Act includes an exemption for fundamentally New Zealand entities but the criteria for that exemption is specified in the regulations. The current proposal in the regulations is that only entities that are less than 50% owned by overseas persons, or 25% or less owned by overseas persons holding 10% or more shares are eligible. This means that many companies that have strong connections to New Zealand may not be eligible. Submitters suggested other criteria or providing more flexibility.	**No change to the Bill**. The Government does not consider: (a) that an entity that is majority beneficially owned by overseas persons or where a small number of overseas persons holding a large number of shares can exercise negative control, can be considered a fundamentally New Zealand entity, and (b) that exempting entities from consent requirements is consistent with the purpose of the Act (acknowledging that it is a privilege for overseas persons to invest in NZ assets, that those persons be required to fulfil criteria for consent).
56.	49	61B	Chapman Tripp	The Bill does not make explicitly provide that listed issuers can apply for the exemption for fundamentally New Zealand companies	**No change to the Bill**. The Government does not consider that listed entities that are considered overseas persons under the new definition in the Bill can be considered fundamentally New Zealand entities (which is why the criteria for the exemption for non-listed entities in the regulation exposure document aligns with criteria for listed companies in the Act).

Item	Clause	Section	Raised by	Issue	Officials' comment
57.	49	61B	Chapman Tripp	The entities in Schedule 4, Infratil and Fulton Hogan, are not provided for in the exemption	**No change to the Bill**. We have consulted with Infratil and Fulton Hogan and neither entity have any objection to their standing consent being removed. Neither entity will be considered an overseas person under the changes proposed by the Bill.
58.	49(2)	61B(c)(iva)	Officials	This clause provides that exemptions can be granted under the Act for loans by financial institutions. This exemption making power reflects that loan obligations are a particularly sensitive class of asset, that warrant the time and cost of obtaining consent under the Act, and in fact that time and cost could have a chilling effect on lending, which would otherwise be beneficial to New Zealand's economic recovery. There are, however, two issues with this provision: - It does not capture loans issued or acquired by non-financial institutions that still issue or acquire those loans in the ordinary course of business. - There is ambiguity within the market as to whether loans, particularly the issuance of loans, are currently captured by the Act. Exempting loans would suggest that they were previously covered and create uncertainty about the legality of previous transactions.	**Agree to amend the Bill.** We recommend removing the exemption making power for loans by registered banks and excluding the issuance and acquisition of loan obligations in good faith and in the ordinary course of business from screening requirements. This would confirm and clarify the position without increasing the uncertainty about the legality of previous transactions.

Item	Clause	Section	Raised by	Issue	Officials' comment
59.	49(2)	61B(c)(iva)	Russell McVeagh	The exemption making power does not refer to "debt securities" as defined in the FMCA. This means that financing transactions that take the form of debt securities fall outside the scope of loan obligations and cannot be exempted within this exemption making power.	**No change to the Bill**. We have recommended removing this exemption making power and will instead include an express exclusion for loan obligations from screening requirements in the Act. We do not consider that this exclusion should extend to all debt securities as defined in the FMCA as these go well beyond the right to be repaid money only. Debt security includes, for example, convertible notes and redeemable shares, which can each be equity securities at a given time. Equity securities which grant ownership rights are clearly not within the scope of the exemption.
60.	49(2)	61B(c)(iva)	Russell McVeagh	The exemption making power is restricted to loans by registered banks. There are many other "lenders" that also regularly acquire loan obligations. Accordingly, the exemption should also be expanded to include anyone who may transfer such loans or financial assets.	**No change to the Bill.** We have recommended removing this exemption making power and will instead include an express exclusion for loan obligations from screening requirements in the Act. This exclusion will no longer include reference to registered bank and will instead depend on whether the acquisition is in the ordinary course of business. We consider that this resolves the issue raised by the submitter.
61.	49(2)	61B(c)(iva)	Russell McVeagh	The exemption making power for loan obligations does not include other securities associated with loan assets should also be included in the exemption making power.	**No change to the Bill.** This is a proposed change to the regulations based on the regulation disclosure document. We have recommended removing this exemption making power and will instead include an express exclusion for loan obligations from screening requirements in the Act. We do not consider this should be expanded to security as other provisions within the Act and regulations are designed to exclude securities where appropriate.

Item	Clause	Section	Raised by	Issue	Officials' comment
62.	49(3)	61B(c)(ix)	Russell McVeagh	The exemption making power for residential mortgage obligations (RMO) does not provide for the circumstances where the loan originator repurchases the financial assets from the issuing entity as that would not support the "issuance or management" of an RMO. It would be helpful to include "or related to" to clearly address that circumstance.	**Agree to amend the Bill**. This is consistent with the Government's position. It would be absurd if the entity that initially acquired the mortgage could not repurchase the same mortgages in certain circumstances. The exemption making power should be clarified by the inclusion of "or related to" to ensure such transactions are captured.
63.	49(3)	61B(c)(ix)	Russell McVeagh	The regulations disclosure document refers to transactions that may fall within the RMO exemption, and does not include transactions involving an SPV trust where the trustee is an NZ registered corporate trustee.	**No change to the Bill**. This will be addressed in the regulations.
64.	49(3)	61B(c)(ix)	Russell McVeagh	The exemption making power does not allow for exemptions for securitisation transactions that are not RMOs. The exemption making power for RMOs should be expanded to include all securitisation transactions.	**No change to the Bill**. RMOs are new policy standard specifically designed by the RBNZ to manage liquidity risk, particularly in times of crisis. Including them in the Bill encourages compliance with the new standard. The Government considers that this provides a sound basis to distinguish them from other securitisation transaction in this Bill. We will consider whether this should be addressed in the No 3 Bill.
65.	49(3)	61B(c)(ix)	Russell McVeagh	The exemption making power for residential mortgage obligations do not include covered bonds, which is another type of securitization subject to requirements imposed by the Reserve Bank.	**No change to the Bill**. This matter is not sufficiently urgent to be included in this Bill. As with other securitisation arrangements, officials will consider this should be addressed as part of the No 3 Bill.
66.	48	86	Buddle Findlay	The Act's exemption making powers are in section 61. However, proposed section 86 of the Urgent Measures Bill includes an exemption power relating to the call-in power.	**Noted**. This is a drafting matter for PCO to consider.
67.	52	86	Chapman Tripp, Bell Gully	The notification requirement in the emergency power applies to exempt transactions.	**No change to the Bill**. This will be addressed in the regulations.

Theme: Standing consent

Item	Clause	Section	Raised by	Issue	Officials' comment
68.	Schedule	New Part 4 of Sch 1AA to the Act, cl 31	Retirement Villages Association; Chapman Tripp; Fletcher Building	Standing consent for listed issuers and managed investment schemes should instead be achieved through amending the definition of 'overseas person' in section 7 of the Act now (rather than through No 3 Bill).	**No change to the Bill.** 'Ratchet' obligations under New Zealand's international obligations have the effect of 'locking in' certain changes to the screening regime so that our ability to reverse them in the future is constrained. This is specifically relevant where transactions are removed from the regime such that they are no longer subject to prior approval by the Government. As a result, in the emergency Bill, certain liberalising measures are implemented through standing consents. This reflects the Government's view that transactions should not be removed from the screening regime without full Parliamentary scrutiny.
69.	Schedule	New Part 4 of Sch 1AA to the Act, cl 31	Goodman Property Trust; Russell McVeagh; Summerset Group Holdings Ltd	Entities that have standing consent under cl 31 should also be exempt from the emergency notification regime.	**Agree to amend the Bill.** The Bill should be amended so that entities with standing consent under cl 31 are also exempt from the emergency notification regime.

Theme: Definition of overseas person

Item	Clause	Section	Raised by	Issue	Officials' comment
70.	Clause 5 of the No 3 Bill (via standing consent in clause 31 of Schedule 1AA)	7	Retirement Villages Association, Fletcher Building, Chapman Tripp	Recommends that the definition of overseas persons (for New Zealand listed issuers) set out in clause 5 of the Overseas Investment Amendment Bill (No 3) be amended so that the "ownership test" in subsection 7(3) only applies where overseas persons holding or having a beneficial interest in 10% or more of any class of the entity's shares collectively own 50% or more of any class of the issuer's shares. Chapman Tripp proposes using the concept of "foreign portfolio investor" to define persons holding or having a beneficial interest in 10% or more of any class of the entity's shares.	**No change to the Bill**. The amendment to the definition of overseas persons for New Zealand listed issuers is designed to only include listed entities that are either majority owned by overseas persons (the new "ownership test" in subsection 7(3)(a)), or that have overseas persons with the ability to effectively exercise negative control (the new "control test" in subsection 7(3)(b)). The submitter's proposal to lift the threshold for the "ownership test" could result in a New Zealand listed issuer being 100% owned by overseas persons but not being treated as an overseas person, so long as overseas investors with 10% or more of any class of shares do not collectively own more than 50% of the shares. We also note that non-listed New Zealand incorporated entities will be able to apply for an exemption under new regulations. This exemption will be subject to a similar "ownership test" and "control test", as well as requirements around control by foreign governments (or their associates) and the entity's record of compliance with New Zealand law.
71.	Clause 5 of the No 3 Bill (via standing consent in clause 31 of Schedule	7	Goodman Limited, as manager of Goodman Property; Russell McVeagh	The definition for listed issuers in the No 3 Bill does not apply to listed issuers that are not bodies corporate of which there are three listed in the NZX Top 50 (Goodman Property, Vital Healthcare Property Trust, and Fonterra Shareholders' Fund).	**Agree to amend the Bill**. Non-incorporated listed issuers should fall within the new definition of overseas person for listed issuers. All listed entities (incorporated or not) are subject to a high degree of regulatory oversight under the Financial Markets Conduct Act and the NZX listing rules. The criteria for the exemption for non-listed managed investments schemes could easily be adapted to serve this purpose.

Item	Clause	Section	Raised by	Issue	Officials' comment
	1AA)				We recommend including a standing consent in the Bill for listed managed investment schemes which fulfil the eligibility criteria for the exemption for non-listed managed investment schemes outlined in the regulations disclosure document.
72.	Clause 5 of the No 3 Bill (via standing consent in clause 31 of Schedule 1AA)	7	Chapman Tripp	Proposes that limited partnerships be covered by a separate provision in the definition of overseas person. This appears to be because the Overseas Investment Amendment Bill (No 3) does not explicitly refer to limited partnerships in the definition of overseas persons.	**No change to Bill**. Limited partnerships in New Zealand are bodies corporate and would therefore be captured under subsections 7(2)(c) and (d). We note that submitters expressed some uncertainty about the effect of the general partner's status (as an overseas person or not) on the status of the limited partnership. We will look to provide further clarity on this point as part of the select committee process for the No 3 Bill.
73.	Clause 5 of the No 3 Bill (via standing consent in clause 31 of Schedule 1AA)	7	Bell Gully	Considers that any managed investment scheme where more than 75% of its investors are New Zealanders (regardless of whether the manager or trustee is an overseas person or not) is very low risk and should be excluded from the definition of overseas person.	**No change to Bill**. The proposed definition of overseas person for managed investment schemes is in line with the existing definition for unit trusts. It is designed to modernise the Act and reflect the introduction of managed investment schemes to New Zealand law under the Financial Markets Conduct Act. We consider that screening managed investment schemes with overseas persons as trustees is generally consistent with the purpose of the Act because of the large degree of control trustees exert over a scheme's investments (which is far greater than, for example, a board of directors' control over the investment of a company). We acknowledge that there are exceptions, so (as noted by the submitter) we have created class exemptions for retirement schemes which are subject to additional regulatory and practical controls (for example, members can only withdraw funds in limited circumstances), and an

Item	Clause	Section	Raised by	Issue	Officials' comment
					applied-for exemption for managed investment schemes, which managed investment schemes with overseas persons as trustees are eligible to apply for, provided at least 75% of the value of their units are held by New Zealanders.
74.	Clause 5 of the No 3 Bill (via standing consent in clause 31 of Schedule 1AA)	7	Bell Gully	Recommends that the definition of overseas person for New Zealand listed issuers should only apply where one overseas person (alone or with their associates) owns 25% or more of the entity (an increased threshold for the "control test").	**No change to Bill.** The "control test" definition in the Overseas Investment Amendment Bill (No 3) is designed to address the risk of two or more un-associated overseas persons with substantial holdings working together to exercise negative control over the entity that holds sensitive New Zealand assets (e.g. by blocking a special resolution). The submitter's proposal would not guard against this. Furthermore, only considering under the "control test" overseas persons who alone or together with their associates control 25% or more of voting rights in the entity increases the risk of these persons circumventing the regime, by relying on associates to obtain positive control (as they could be closer to the 50% threshold). While this would be an offence, the risk of it happening would place considerable pressure on the OIO's monitoring and enforcement capabilities and the provisions of the Takeovers Act 1993. To address these issues, under the No 3 Bill a New Zealand listed issuer is treated as an overseas person under the "control test" if it has overseas persons that hold or have a beneficial interest in 10% or more of any class of it securities, and together these persons have the right to control the composition of 50% or more of the entity's governing board, or exercise or control the exercise of more than 25% of voting powers at a meeting of the entity.
75.	Clause 5 of the No	7	Bell Gully	As an alternative to the previous submission, the submitter	**No change to the Bill.** The definition of overseas person in clause 5 of the No 3 Bill is met if either or both of the

Item	Clause	Section	Raised by	Issue	Officials' comment
	3 Bill (via standing consent in clause 31 of Schedule 1AA)			recommends that the definition of overseas person for New Zealand listed issuers should only apply where **both** the "ownership test" and the "control test" are satisfied.	"ownership test" and "control test" are met. This is because these two tests respond to different kinds of risk arising from foreign ownership or control of significant business assets. The "ownership test" responds to the risk of a majority of economic returns flowing out of New Zealand, while the "control test" responds to the risks outlined in the preceding paragraphs. These risks may exist independently of each other. For this reason, under the No 3 Bill the definition of overseas person is met if **either or both** the "ownership test" and "control test" are met.