

The Treasury

Phase 2 Reform of Overseas Investment Act Information Release

March 2021

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- [1] 6(a) - to avoid prejudice to the security or defence of New Zealand or the international relations of the government
- [2] 6(b)(i) - to avoid prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the Government of any other country or any agency of such a Government
- [25] 9(2)(b)(ii) - to protect the commercial position of the person who supplied the information or who is the subject of the information
- [31] 9(2)(f)(ii) - to maintain the current constitutional conventions protecting collective and individual ministerial responsibility
- [33] 9(2)(f)(iv) - to maintain the current constitutional conventions protecting the confidentiality of advice tendered by ministers and officials
- [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
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Treasury Report: Changes to Australia's Foreign Investment Regime

Date:	11 June 2020	Report No:	T2020/1887
		File Number:	IM-5-3-8-9 (COVID Response Reforms)

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	Note the recently announced changes to Australia's foreign investment regime. Sign the attached letter to Senator Birmingham in response to his correspondence of 4 June 2020.	16 June 2020

Contact for telephone discussion (if required)

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

Minister's Office actions (if required)

Return the signed report to Treasury.

Sign the attached letter to be sent in response to Senator Birmingham's letter dated 4 June 2020. The Ministry of Foreign Affairs and Trade will process the transfer of the letter to Senator Birmingham.

Note any feedback on the quality of the report

Enclosure: Yes (attached)

Treasury Report: Changes to Australia's Foreign Investment Regime

Executive Summary

1. On 5 June 2020, the Australian Government announced changes to its foreign investment screening regime. These changes are very similar in intent to those agreed by this Government as part of its Phase Two Reform of the Overseas Investment Act and include a new national security test for transactions not ordinarily subject to review, reductions in red tape, and stronger enforcement powers to encourage compliance.
2. Australia's Minister for Trade, Tourism and Investment Senator Birmingham wrote to you on 4 June giving you early visibility of these changes. Officials have attached a draft letter at **Annex A** for your approval, to be sent in response to Senator Birmingham.
3. In developing the reforms in both jurisdictions, New Zealand Treasury officials have worked closely with their Australian counterparts, including a visit in late-2019 and phone call discussions in 2020. Your letter will build on this relationship, leaving us well placed to continue to cooperate on foreign investment issues.

Recommended Action

We recommend that you:

- a **Note** the changes Australia has made to their foreign investment screening regime and how these align with New Zealand's recent reforms, including the introduction of a new 'national security test' to allow investments not ordinarily subject to screening to be reviewed, and if necessary blocked, on national security grounds.
- b **Note** officials have worked constructively with the Australian Treasury in the development of both New Zealand's and Australia's recently announced reforms, including Senator Birmingham writing to you on 4 June noting the reforms.
- c **Sign** the attached letter to Senator Birmingham in response to his update on changes to Australia's foreign investment regime.

Signed/Not signed.

- d **Note** The Ministry of Foreign Affairs and Trade will process the transfer of the letter to Senator Birmingham's Parliamentary office.

Thomas Parry
Manager, International

Hon David Parker
Associate Minister of Finance

Treasury Report: Changes to Australia's Foreign Investment Regime

Purpose of Report

4. This report updates you on recently announced changes to Australia's foreign investment screening regime (which Senator Birmingham, Australia's Minister for Trade, Tourism and Investment, wrote to you regarding on 4 June 2020).
5. The report also provides a draft letter for your signature in response to Senator Birmingham's update on the changes.

Analysis

6. On 5 June 2020, the Australian Government announced changes to its foreign investment screening regime. These changes are very similar in intent to those agreed by the Government as part of its Phase Two Reform of the Overseas Investment Act.
7. The measures include a new national security test for transactions not ordinarily subject to review, reductions in red tape, and stronger enforcement powers to encourage compliance.

New national security test for sensitive foreign investment

8. The Australian Government is introducing a new national security test for the acquisition of 10 per cent or more¹ of a business that is not ordinarily subject to screening because it falls below relevant monetary thresholds. This test will enable the Treasurer to impose conditions or block any investment, in any sector, on national security grounds regardless of the value. It is similar to New Zealand's national security and public order call in power, although our regime is focused specifically on high risk sectors. Their approach reflects differences in their economy, investment needs,^[1,2]
9. As part of this new regime, it will be mandatory for investors to notify the government of investments in "sensitive national security businesses" (which are generally aligned with "strategically important businesses" in our legislation) before these can proceed.²
10. Investors will be able to voluntarily notify the government of transactions in other businesses for approval, or risk the government 'calling in' that transaction later to manage national security risks (however, this is expected to occur very rarely). This is similar to the 'safe harbour' regime in New Zealand's call in power.
11. The new national security test, and screening regime more broadly, will be supported by a "last resort power" that will allow the Australian government to take action in respect of already approved transactions (for example, by varying conditions or requiring divestment) where national security risks emerge post-consent. [1,2]

¹ The exception to this threshold is if the transaction grants the investor disproportionate access or control, for example, board representation.

² The Australian Government has indicated that [1,2]

[1,2]

12. This [1,2] is similar to the automatic condition³ that New Zealand will impose on national interest and call in transactions, but less constrained. In particular, while investors will need to have an intent to undermine New Zealand's national security or public order before New Zealand's automatic condition is breached, in Australia action could be taken irrespective of whether the national security risk arose due to the investor's actions. [1,2]

Changes to streamline the process

13. The Australian Government has a \$0 threshold for screening investments by foreign government investors. However, foreign government investors are defined broadly and Australia's regime is, in their judgement, capturing many low risk investors (such as pension funds) where the foreign government does not have any influence or control over the asset being acquired.
14. As part of this reform, such entities will no longer be treated as foreign government investors but will still be considered 'foreign persons'. This has the effect of increasing the screening threshold for these investors.

Stronger penalties, compliance and enforcement powers

15. Australia is strengthening their enforcement powers and penalties to ensure investors comply with their foreign investment regime. To achieve this they will obtain standard monitoring and investigative powers, be able to give directions to investors, increase civil and criminal penalties, and enter into enforceable undertakings.
16. These changes align with the reforms contained in the recently passed Overseas Investment (Urgent Measures) Amendment Act 2020.

Implementation

[1,2]

18. The Overseas Investment Office similarly received funding to support the operationalisation of the Phase Two reform as part of Budget 2020.

[2]

Trans-Tasman Cooperation

20. Officials have worked constructively with the Australian Treasury in the development of both New Zealand's and Australia's recently announced reforms. This includes a visit from the Australian Treasury in late 2019, regular phone discussions since 2018, and the letter you received last week.

³ In general terms this condition requires investors not to act in a way that gives rise to national security or public order risks.

21. Recognising the value of this relationship, we have prepared a draft letter for you to reply to Senator Birmingham in your capacity as Assistant Minister of Finance in consultation with the Ministry of Foreign Affairs and Trade (MFAT). This letter is at Annex A.

Next Steps

22. Once you have signed the attached letter to Senator Birmingham MFAT officials will arrange to have this sent to his Parliamentary office via the High Commission in Canberra.
23. Officials will remain engaged with the Australian Treasury in their development of primary legislation and regulations in response to their recent announcement.

Annex A: Draft letter of reply to Senator Birmingham



Senator the Hon Simon Birmingham

Minister for Trade, Tourism and Investment
Deputy Leader of the Government in the Senate
Senator for South Australia
Parliament House of Australia
PARLIAMENT DRIVE ACT AUSTRALIA 2600

Dear Minister Birmingham,

Thank you for your letter of 4 June 2020, informing me of the Australian Commonwealth Government's proposed reforms to your foreign investment regulatory framework. I very much appreciated the early notification of these proposals, which reflects the close cooperation and partnership between our respective Governments.

The New Zealand Parliament has also recently enacted legislation to strengthen our foreign investment regulatory regime. These reforms include new powers to ensure foreign investments are not contrary to our national interest - including national security interests – but also a number of measures to cut unnecessary red tape and support the productive, high quality investment that New Zealand has always welcomed. This, of course, includes Australian investment across our economy, consistent with the shared goals of our Closer Economic Relations Trade Agreement.

In developing these reforms, my officials worked closely with their Australian counterparts, and I want to extend my thanks for the valuable support and advice that Commonwealth Treasury officials, in particular, have provided.

Similarly, as you work to finalise your proposals, I would like to offer any assistance that we can provide. New Zealand government officials, particularly Treasury and Overseas Investment Office officials, are keen to support you as you work through issues that were also at the core of our own reform agenda.

Finally, outside of our critical bilateral relationship, the Government remains committed to working with the Australian Government on foreign investment issues [1]

We recognise that success in this vital area will not come without continued cooperation and thank you for your continued support.

Yours sincerely,

Hon David Parker
Associate Minister of Finance