

The Treasury

Phase 2 Reform of Overseas Investment Act Information Release

March 2021

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- [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
- [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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TE TAI ŌHANGA
THE TREASURY

Treasury Report: 90-day statutory review of the overseas investment emergency notification regime

Date:	24 August 2020	Report No:	T2020/2431
		File Number:	IM-5-3-8-9 (COVID Response Reforms)

Action sought

	Action sought	Deadline
Minister of Foreign Affairs (Rt Hon Winston Peters)	Note that you are required to review the emergency notification regime (the ENR) in the Overseas Investment Act 2005 (the OI Act) at 90-day intervals to determine whether the conditions justify retaining the ENR. Note that the effects of the COVID-19 pandemic have increased potential risks to the national interest posed by foreign investment, which cannot be adequately managed through the permanent tools in the OI Act. Agree to retain the ENR for a further 90 days. Provide feedback on the attached Treasury press release.	7 September 2020, to ensure decisions are made in advance of the statutory deadline.
Minister of Finance (Hon Grant Robertson)		
Associate Minister of Finance (Hon David Parker)		

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)

Refer the signed report to the Minister for Land Information, and the Minister Responsible for the Government Communications Security Bureau and the New Zealand Security Intelligence Service.

Return the signed report to Treasury.

Note any feedback on the quality of the report

Enclosure: Yes (attached)

Treasury Report: 90-day statutory review of the overseas investment emergency notification regime

Executive Summary

Temporary emergency notification regime inserted into Overseas Investment Act

In June 2020, in response to the COVID-19 pandemic and related economic downturn, Parliament introduced a temporary emergency notification regime (the 'ENR') into the Overseas Investment Act 2005 (the 'OI Act'). The ENR broadened the scope of overseas investment transactions screened by the OI Act, strengthening the government's ability to manage the broader and heightened foreign investment risks posed by the pandemic.

[1,36]

The ENR also has broader economic impacts and incurs compliance costs. The OI Act requires you to review the ENR every 90 days to weigh its costs and benefits, and determine whether the effects of the pandemic in New Zealand justify continuing the ENR. Your decision on this 90-day review of the ENR must be made by 14 September 2020.

Effects of the emergency justify continuing the ENR

We consider the effects of the COVID-19 pandemic justify continuing the ENR for the following reasons:

- the forecast deterioration in economic conditions will intensify firm distress,
- in this economic environment, foreign investment poses heightened risks to the national interest, as ongoing national security and economic risks are amplified across a broader range of transactions, and the permanent screening tools in the OI Act are unable to adequately manage those risks,
- while the ENR imposes regulatory costs, there is no evidence that the ENR is having a significant adverse impact on our international relations or investment attractiveness at this time, and

[1,36]

We therefore recommend you **agree to continue the ENR for a further 90 days**.

Next steps

Subject to your agreement to continue the ENR, you would be required to reconsider the effects of the emergency and whether to retain the ENR within 90 days of your decision on this review.

We have prepared a draft press release that we intend to publish on the Treasury's website following your decision (see attached). You may wish to provide feedback on this, or adapt a version for publication on the Beehive website.

You are also statutorily obligated to review the scope of the ENR, to determine whether it is no broader than reasonably necessary. In accordance with the relevant statutory timeframe, work on this review has commenced and the Treasury will provide advice in the post-election period.

Recommended Action

We recommend that you:

- a **Note** that you are required to assess whether the effects of the COVID-19 pandemic justify retaining the emergency notification regime (the 'ENR') in the Overseas Investment Act 2005 (the 'OI Act') for a further 90 days, by 14 September 2020.
- b **Note** that:
 - i. the Treasury's reporting indicates that economic activity in the near term is expected to be stronger than forecast at Budget 2020, although global economic conditions have deteriorated, which will contribute to a slower economic recovery and increase the potential risks that foreign investment poses to New Zealand's national interest, and
 - ii. these risks are not able to be fully managed through the permanent tools in the OI Act.

[1]

[1,36]

- e **Agree** that the effects of the COVID-19 pandemic justify continuing the ENR, and accordingly that it should be retained for a further 90 days.

Agree/disagree. *Agree/disagree.* *Agree/disagree.*

Minister of Foreign Affairs (Rt Hon Peters)	Minister of Finance (Hon Robertson)	Associate Minister of Finance (Hon Parker)
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- f **Note** that if you agree to recommendation (e), you will be required to make a further decision about whether the conditions justify the continuation of the ENR within 90-days of your decision on this review.
- g **Note** that we have prepared the attached draft Treasury press release to communicate your decision on the first 90-day review of the ENR and welcome your feedback on this draft.

h **Refer** this report to the Minister for Land Information, and the Minister Responsible for the GCSB and NZSIS.

Refer/do not refer.

Rt Hon Winston Peters
Minister of Foreign Affairs

Hon Grant Robertson
Minister of Finance

Hon David Parker
Associate Minister of Finance

Thomas Parry
Manager, International

Treasury Report: 90-day statutory review of the overseas investment emergency notification regime

Purpose of Report

1. The Overseas Investment Act 2005 (the 'OI Act') requires you to assess, at 90-day intervals, whether the effects of the COVID-19 pandemic justify the continuation of the emergency notification regime (the 'ENR').¹ This report provides you with an assessment of the current and forecast conditions, and seeks your agreement to retain the ENR for a further 90 days.
2. The Overseas Investment Office (the 'OIO'), Land Information New Zealand ('LINZ'), Ministry of Foreign Affairs and Trade ('MFAT'), the New Zealand Government Communications Security Bureau ('GCSB') and the New Zealand Security Intelligence Service ('NZSIS') contributed to this report and support the recommendation.

Background to the ENR and 90-day review

3. Foreign investment can provide better access to markets, technology, and capital, resulting in a more productive New Zealand economy. However, overseas ownership or control of New Zealand's sensitive assets can pose risks to our national economic and security interests.
4. The OI Act provides a framework for regulating foreign investment in New Zealand's sensitive assets, which are sensitive land, significant business assets (generally those valued at \$100 million or more),² and fishing quota. The OI Act allows the government to screen foreign investment transactions to ensure that they are not contrary New Zealand's national interest.

ENR responds to the heightened and additional foreign investment risks caused by the COVID-19 pandemic

5. The COVID-19 global pandemic and related economic downturn mean that foreign investment poses greater risks to the national interest across a wider range of transactions. In particular:
 - a firms experiencing distress are more likely to seek foreign investment (through equity raising or selling assets) to remain viable, as domestic sources of capital are exhausted and increased debt funding becomes unsustainable,
 - b failing or distressed firms are likely to experience declines in value that put them outside the scope of the enduring screening tools in the OI Act, increasing the risk that overseas investors are able to acquire significant New Zealand businesses or strategically important assets without government scrutiny, or at 'fire sale' prices. This may undermine New Zealand's national security, result in a transfer of knowledge and jobs, the loss of entry points into global value chains, or control of cornerstone businesses in sectors displaced by the COVID-19 pandemic. These would all trigger a corollary reduction in long-term domestic living standards, and

¹ Clause 27, Schedule 1AA, Overseas Investment Act 2005 (the 'OI Act').

² Some of New Zealand's Free Trade Agreements provide for a higher monetary screening threshold. For example, Australian non-government investors do not ordinarily require consent for business investments of less than \$536 million.

- c these factors amplify persistent risks, [1]

[1]

7. The Government reformed the OI Act to improve its ability to manage foreign investment risks in this changing environment. It brought forward measures from the already-agreed Phase Two reforms of the OI Act (for example, the national interest test), and introduced the ENR, which came into force in June 2020.

ENR broadened scope of overseas investment transactions screened by OI Act

8. The ENR requires overseas persons to notify the government of any new controlling investment in an existing New Zealand business or certain business assets that would not ordinarily require consent. In effect, the ENR temporarily reduced the screening threshold for controlling investments in New Zealand businesses from \$100 million to \$0.

[1,36]

ENR must be reviewed at 90-day intervals

10. Recognising that the ENR is imposing a regulatory burden, and that it has the potential to impose broader economic costs, the OI Act requires Joint Ministers to review whether the effects of the emergency justify retaining the ENR, at 90-day intervals, against the three statutory criteria underpinning the ENR.
11. Your decision on whether the effects of the emergency justify continuing the ENR, and whether it therefore should be retained, must be made by 14 September 2020.

Assessment of the effects of the emergency and justification for the ENR

12. Your decision as to whether the effects of the emergency justify retaining the ENR must have regard to:³
- a the economic, social, and other effects of the emergency in New Zealand,
 - b any risks to New Zealand's national interest posed by foreign investment, and
 - c New Zealand's international relations and obligations.

³ Clause 27, Schedule 1AA, the OI Act.

13. The following section assesses the current and forecast conditions against each of the statutory criteria. We have given equal weight to each criteria, and have taken into account the interrelationship between them, in reaching our recommendation that you retain the ENR.
14. Our assessment has been guided by the framework at Annex 1, which is based on the statutory criteria. It is intended to guide your decision on when ENR should be retained or repealed. We will refine this further as we better understand the likely nature of the post-COVID economy. The framework will be an important tool for balancing the economic costs of the ENR against the benefits it is delivering in future 90-day reviews.
15. We note that the following analysis relies on limited data, which reflects the short time for which the ENR has been in place and the degree of uncertainty in the current environment.

Economic, social and other effects of the emergency

Deteriorating economic conditions will amplify foreign investment risks, supporting retention of the ENR

16. We consider that the ongoing and forecast deterioration in economic conditions justifies the continuation of the ENR. This deterioration will increase the likelihood that foreign investment transactions pose a risk to New Zealand's national interest.

Forecast deterioration in economic conditions will intensify firm distress

17. The Treasury reports that economic activity appears to have held up better than expected in the second quarter, largely reflecting pent-up demand, fiscal support, and the shorter than expected time New Zealand spent at higher Alert Levels. For example, firm liquidations are below trend for 2020 (although they are expected to increase in 2021). Nevertheless, the resurgence in community transmission of COVID-19 will limit an expected pick-up in activity in the September quarter. With weaker world demand, the pace of recovery is expected to slow both in New Zealand and abroad. Further, the outlook is highly uncertain with all risks skewed to the downside.
18. Anecdotal data collected by the Treasury indicates that late 2020 and early 2021 could be a period of significant financial distress and risk for many New Zealand firms. These conditions are likely to lead to falls in firm values, and a similar downward pressure on asset prices.
19. More broadly, over the remainder of 2020 and throughout 2021 New Zealand's economic recovery is likely to be hampered by a number of factors, including:
 - a domestically, the pandemic is now expected to have a more persistent negative effect on businesses' balance sheets (in contrast to the previously forecast transitory impact) and on labour market outcomes,
 - b the global outlook has continued to deteriorate as many economies struggle to contain the spread of COVID-19 or have been struck by the resurgence of community transmission,

- c the economic effects of the pandemic will become more apparent as the Government's initial fiscal support schemes are phased out (signalled to occur in September 2020^[34] and

[34]

- 20. An increase in firms reliant on foreign investment is not in itself a risk. Foreign investment has always been a critical source of capital to firm viability and growth in New Zealand, and will be more so in our economic recovery from the pandemic. However, the deterioration in economic conditions coincides with the appearance of heightened risks to the national interest (both national security and economic risks, discussed below), justify retaining the ENR for a further 90 days.

Potential for ENR to incur economic costs

- 21. There are trade-offs to keeping the ENR in place, the most significant being the economic cost it imposes on investors and the regulator. At this point, there is limited evidence that the costs to investors are material, the OIO and other agencies are managing the costs of administering the ENR. For example, to date, the regulator and Ministers have met the statutory timeframes for processing notified transactions in 98% of cases. Beyond this, feedback solicited from Posts does not indicate that the ENR is reducing New Zealand's attractiveness to high quality investment.
- 22. We will continue to monitor the impact of the ENR in terms of its regulatory burden and potential impact on investment flows, including by engagement through the OIO, MFAT, and New Zealand Trade and Enterprise ('NZTE').

Risks to the national interest

- 23. We consider there is an ongoing potential for overseas investment transactions to pose national security or economic risks that the OI Act's permanent screening tools are not able to fully manage. This is a product of the risks to the national interest posed by foreign investment, when considered together with the risk profile of transactions notified under the ENR to date and the limits on that data, and the forecast economic deterioration. We therefore recommend that the ENR is retained for a further 90 days.

COVID-19 has heightened national security and economic foreign investment risks in New Zealand

- 24. At the onset of the COVID-19 pandemic, officials identified that the pandemic and resultant economic conditions (outlined above) could heighten and broaden the range of risks associated with foreign investment. Following that advice, Cabinet agreed to introduce the ENR [CAB-20-MIN-0212 refers].

[34]

[1]

Foreign investment risks to the national interest unable to be adequately managed by the permanent call-in power

30. When the ENR is repealed, it will be replaced with a permanent national security and public order call-in power which retains the \$0 threshold for strategically important businesses (such as critical national infrastructure), and the enduring monetary screening thresholds would resume for all other transactions. However, as discussed above, the COVID-19 pandemic and related economic downturn have created an environment in which a broader range of foreign investment risks exist, not all of which can be managed by the OI Act's enduring screening framework. The ENR was stood up as a temporary measure to bolster the OI Act's risk management framework to enable the government to respond to these extraordinary risks.
31. The risks identified would not be able to be adequately managed if the ENR were repealed, because:
 - a the permanent 'call-in power' is designed to manage certain national security and public order risks, so it cannot be used to manage the current broader economic risks identified, and
 - b the call-in power only applies to specific sectors, such as critical national infrastructure, sensitive data, and military and dual-use technology. [1]
32. The Minister responsible for the OI Act must bring the call-in power into force when the decision is made to repeal the ENR, by recommending to the Governor-General that the relevant provisions of the Overseas Investment (Urgent Measures) Amendment Act 2020 are commenced. Supporting regulations will need to come into force at the same time. We will provide advice on this process in due course.

New Zealand's international relations

33. As stated above, New Zealand's economy is reliant on the flow of productive foreign investment. New Zealand has agreed investment obligations with a number of international partners to support a certain environment for foreign investment.
[1]
34. [1]
35. We also note that the ENR is broadly aligned with the changes other jurisdictions have made to their foreign investment screening regimes to manage the economic and national security foreign investment risks posed by the COVID-19 pandemic and related economic downturn. For example, Australia similarly temporarily reduced its monetary screening threshold to \$0 for all investments in land and business. The UK adopted legislation enabling scrutiny foreign acquisitions that could threaten their ability to combat and mitigate the effects of public health emergencies. Canada, Spain, and Germany have made similar changes. [34]

36. [1] the anecdotal reports that border closures are the most influential factor in investment decisions at present. Coupled with a strong home bias, this is resulting in subdued levels of foreign direct investment globally.

[1,36]

Next steps

39. If you agree with our recommendation that the effects of the COVID-19 pandemic justify the ENR continuing, and that it therefore should be retained for a further 90 days, the next periodic review of the conditions and the ENR must occur within 90 days of your decision on this review.
40. Following discussions with your (Minister Parker's) office, we have prepared a draft press release communicating the decision on the first 90-day review that we intend to publish on the Treasury's website (see Annex 2). You may wish to provide feedback on this press release or publish a version of this on the Beehive website. We will update the press release accordingly if you disagree with the recommendation to continue the ENR.
41. Minister Parker is also required to review the scope of the ENR, to determine whether it is broader than reasonably necessary. In accordance with the statutory timeframes, work on this review has commenced and the Treasury will provide in due course.

ANNEX 1

The Overseas Investment Act (OI Act) requires you to make a decision, at 90-day intervals, about whether to continue or withdraw the emergency notification regime (ENR).¹ The legislative test is: do the effects of the emergency (the COVID-19 pandemic) continue to justify the ENR continuing in place, with regard to three statutory criteria?

We have developed the framework below to ensure the assessment against the criteria is robust and transparent. This framework sets out the metrics by which we will assess each element of the statutory test and provides qualitative thresholds to guide judgment on whether the conditions support the ENR remaining in force, or whether it should be repealed. This aims to provide transparency as to how decisions have been made, and ensure consistency in the standards applied in future decision-making. This framework will continue to be refined through any subsequent 90-day reviews.

In making the overall recommendation as to whether the ENR should continue or be withdrawn, agencies weighted each component equally and took into account the interrelationship between components. Ministers may elect to weigh factors differently when determining whether the ENR should be continued or withdrawn.

Elements of the emergency (statutory criteria)	Relevant metrics or indicators	Threshold at which effects support continuation/withdrawal of the ENR
<p>The economic, social, and other effects of the emergency in New Zealand.</p>	<p>The economic effects of the emergency should be assessed against, among other factors, the following metrics (drawn from the Treasury's Pre-election Economic and Fiscal Update, Weekly Economic Update and other economic analyses):</p> <p><i>Macroeconomic indicators</i></p> <ul style="list-style-type: none"> • International (and state-level) economic outlooks (e.g. Australia/Victoria), • Quarter real production GDP, • Labour force participation, • Unemployment, 	<p>Whether the economic effects support the <i>continuation</i> or <i>withdrawal</i> of the ENR will depend on the presence or absence of an ongoing or anticipated risk of:</p> <ul style="list-style-type: none"> • falling firm values and revenues of ordinarily productive firms to a level below the threshold at which screening requirements would be triggered under the OI Act's enduring screening frameworks, • opportunities to acquire distressed assets at fire sale prices, and/or • increasing numbers of firms requiring urgent access to foreign capital (debt or equity) to remain viable.

¹ Clause 27, Schedule 1AA, Overseas Investment Act 2005.

	<ul style="list-style-type: none"> • New Zealand Activity Index, • Commodity prices, • Aggregate demand, • Exporter and importer incomes, • Export and import volumes, • Household income, • Private consumption, <p><i>Firm health indicators</i></p> <ul style="list-style-type: none"> • Debt distress, • Payment deferrals, • Discretionary expenditure and investment, • Tax debt, • Trends in debt and equity raising, • Trends in mergers and acquisitions, • Bank lending standards, • Business confidence, • Business balance sheets, and • Cash flow deficits. 	<p>The presence or absence of these risks is to be determined by a holistic assessment of the economic metrics that indicate the state of the economic conditions, relative to an adjusted baseline that accounts for the persistent impacts of COVID-19 on the economy. Determining the appropriate baseline will be a key priority for the Treasury ahead of the next 90-day review.</p>
<p>Any risks to New Zealand's national interest associated with transactions by overseas person.</p>	<p>The emergency's effects on the risks to the national interest should be assessed against, among other factors, the following metrics:</p> <ul style="list-style-type: none"> • Intelligence and Security Agency assessment of foreign 	<p>Whether the conditions support the <i>continuation</i> or the <i>withdrawal</i> of the ENR will depend upon:</p> <ul style="list-style-type: none"> • the nature of the present or anticipated foreign

	<p>investment as a risk to New Zealand's national security,</p> <ul style="list-style-type: none"> the risk profile of notified transactions, and the extent to which they pose risks to the national interest, [1] <ul style="list-style-type: none"> any transactions that were required to notify but were not notified, and transactions that are expected in the future. 	<p>investment risks relative to the pre-COVID environment, and</p> <ul style="list-style-type: none"> the sufficiency of the call-in power or other permanent consent frameworks at managing foreign investment risks, to be determined by reference to the risk profile of transactions notified under the ENR.
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<p>New Zealand's international relations</p>	<p>The emergency's effects on New Zealand's international relations should be assessed against the following metrics:</p> <ul style="list-style-type: none"> • reaction of foreign governments, including as informed by foreign investors, and • status of equivalent policy changes to foreign investment screening regimes in other jurisdictions. 	<p>Whether New Zealand's international relations support the continuation or withdrawal of the ENR will depend upon:</p> <ul style="list-style-type: none"> • the nature (positive or negative) and significance of reactions from foreign governments, including as informed by foreign investors, to the ENR, and • the status of equivalent policy changes to other foreign investment screening regimes.
<p>[1,36]</p>		

ANNEX 2

Treasury Press Release: Ministers retain temporary overseas investment screening rules

The Government has decided to retain the Emergency Notification Regime (ENR) in the Overseas Investment Act 2005 (the Act) for a further 90 days to ensure that New Zealand's national interest remains protected.

In June 2020, the Government introduced the ENR to ensure the heightened foreign investment risks caused, and exacerbated, by the COVID-19 pandemic can be managed effectively. The ENR requires overseas persons to notify the government of certain controlling investments in existing New Zealand businesses or business assets, even if it those would not ordinarily require consent under the Act. It also allows the government to impose conditions on transactions, or in cases where no other options are available, to block transactions that are contrary to New Zealand's national interest.

Ministers are required to review the ENR at intervals no more than 90 days apart, to assess whether the effects of the COVID-19 pandemic justify it remaining in force.

Foreign Affairs Minister Winston Peters, Finance Minister Grant Robertson and Associate Finance Minister David Parker completed the review of the regime on [TBC], and concluded that the current effects of the COVID-19 pandemic justify continuing the ENR for a further 90 days.

In making this decision, Ministers were required to consider:

- the economic, social, and other effects of the emergency in New Zealand,
- any risks to New Zealand's national interest associated with transactions by overseas persons, and
- New Zealand's international relations and international obligations.

The next statutory review of the ENR must be completed by [TBC]. A separate review of the ENR is being carried out to assess whether its scope can be amended, to ensure that it remains efficient and effective. This review is expected to be completed after the 2020 General Election.

Once Ministers are satisfied that the ENR should no longer remain in force, it will be replaced by a narrower national security and public order call in power. This will only apply to investments in strategically important business, such as military technology and critical national infrastructure, that do not normally require consent under the Act.