

The Treasury

Overseas Investment Act - Phase Two: Policy Advice December 2020 - April 2021 Information Release

September 2021

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

Date:	19 April 2021	Report No:	T2021/576
		File Number:	IM-5-3-8-9

Action sought

	Action sought	Deadline
Minister of Finance (Hon Grant Robertson)	All Ministers: Agree to replace the emergency notification regime (ENR) with the national security and public order call-in power, effective 7 June 2021 Hon Robertson and Hon Parker: Agree to give effect to the repeal of the ENR by commencing Cabinet approval process, and signing a directive and delegation letter to the regulator	26 April 2021
Minister of Foreign Affairs (Hon Nanaia Mahuta)		
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)

Return the signed report and relevant attachments to Treasury.

Facilitate Ministerial consultation on the draft Cabinet paper, prior to lodging it with LEG on 13 May 2021.

Note any feedback on the quality of the report

Enclosure: Draft Treasury press release, draft Cabinet paper, draft directive and delegation letter.

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

Executive Summary

This is the fourth review of the case for retaining the temporary emergency notification regime (ENR) in the Overseas Investment Act 2005 (the Act). We seek:

- *from the Minister of Finance, the Minister of Foreign Affairs and the Associate Minister of Finance ('joint Ministers')*: confirmation of your decision that the ENR should be replaced with the permanent national security and public order call-in power ('the call-in power') effective as of 7 June and, if so,
- *from the Associate Minister of Finance*: your approval of a draft Cabinet Legislation Committee paper and draft Regulations, and
- *from the Minister of Finance and Associate Minister of Finance*: your approval of a ministerial directive and delegation letter to give effect to the above decision.

Recap on the ENR and earlier reviews

The ENR was designed to manage heightened foreign investment risks that arose during the COVID-19 pandemic and the related economic downturn. [1], [36]

As such, the Act requires you (joint Ministers) to review the ENR every 90-days to determine whether it remains justified. You completed the third review of the ENR in February 2021. In light of positive health and economic developments, you agreed to begin preparations to replace the ENR with the narrower national security and public order call-in power (the call-in power) at this review (subject to there being no significant deterioration in conditions).

You have delegated authority from Cabinet to make this policy decision [DEV-20-MIN-0066], although the change must be brought into effect through an Order in Council.

The broader investment risks the ENR was put in place to manage have diminished

Consistent with your earlier decisions, we recommend you replace the ENR at this review with the call-in power because:

- the effective containment of COVID-19 has minimised the pandemic's economic disruption and led to a faster recovery than forecast (and the recovery is expected to accelerate as borders reopen and vaccines are rolled out);
- improvements in the public health response and the roll out of vaccines means that any future outbreak of COVID-19 is unlikely to cause the same degree of widespread economic disruption because protracted lockdowns will likely be avoided;
- costs of retaining an economy-wide screening tool are increasingly likely to be disproportionate to the residual risks posed. As such, the ENR may be having a negative effect on our ability to attract productive foreign investment, constraining growth; and
- The Act's enduring consent framework (including the national interest test) and the call-in power that will replace the ENR will manage ongoing significant

national security and public order risks related to investments in strategically important businesses;

- [1], [36]

A set of documents are attached to give effect to, and support the replacement of, the ENR

Under delegated authority from Cabinet, Minister Parker has also made policy and design decisions necessary to support the implementation of the call-in power (T2020/3749). These decisions are largely consistent with, or build on, our experience with the ENR to date. We are seeking approval in the LEG paper for the regulations arising from these decisions. They largely relate to timeframes for assessing notifications under the call-in power.

We have also attached, for Minister Robertson's and Minister Parker's approval, a delegation and directive letter to the regulator, which provides more operational detail (annex four). It builds on the regulations and sets out additional detail on the timeframes and process for assessing notifications. It also directs the regulator to develop and report back to you on its approach to compliance monitoring of the new call-in regime.

Next steps for replacing the ENR with the call-in power

Subject to your agreement, the next steps for replacing the ENR with the call-in power are set out below.

<i>Date</i>	<i>Action (Hon Parker)</i>
3 May to 11 May	Ministerial consultation on LEG paper
13 May	Lodge LEG paper with Cabinet office
24 May	Cabinet and Executive Council
25 May	Order in Council, Regulations and press release published
7 June	ENR is repealed, and call-in power commences

Recommended Action

We recommend the Minister of Finance, the Minister of Foreign Affairs, and the Associate Minister of Finance (Hon Parker):

- a **note** 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 every 90 days.
- b **agree** to replace the emergency notification regime (ENR) with the national security and public order call-in power, effective 7 June 2021 (consistent with your decision in the last 90-day review).

Agree/disagree.

Hon Grant Robertson

Agree/disagree

Hon Nanaia Mahuta

Agree/disagree

Hon David Parker

- c **provide any feedback** on the attached Treasury media statement announcing your decision to repeal the ENR (annex two)

We recommend Associate Minister of Finance (Hon David Parker):

- d **provide any feedback** on the Cabinet Legislation Committee (LEG) paper (annex three) and draft Regulations (annex five).
- e **agree** to consult your ministerial colleagues on the LEG paper between 3 May and 11 May 2021.

Agree/disagree

Hon David Parker

- f **agree** to lodge the paper (annex three) with LEG on 13 May for consideration on 20 May, including the attached draft Regulations (subject to minor and technical changes) (annex five) that will give effect to these changes.

Agree/disagree

Hon David Parker

We recommend the Minister of Finance and the Associate Minister of Finance:

- g **agree** to support the implementation of the national security and public order call-in power by signing the attached ministerial directive and delegation letter to the regulator.

Agree/disagree.

Hon Grant Robertson

Agree/disagree

Hon David Parker

Thomas Parry
Manager, International

Hon Grant Robertson
Minister of Finance

Hon Nanaia Mahuta
Minister of Foreign Affairs

Hon David Parker
Associate Minister of Finance

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

Purpose of Report

1. This report assesses the case for retaining the temporary emergency notification regime in the Overseas Investment Act 2005 ('the ENR' and 'the Act'). We recommend that joint Ministers¹ confirm their earlier decision that the ENR should be replaced at this fourth 90-day review. To give effect to the replacement, we also seek approval:
 - *from the Associate Minister of Finance:* of a draft Cabinet Legislation Committee paper, draft Regulations, and
 - *from the Minister of Finance and Associate Minister of Finance:* of a ministerial directive and delegation letter.

Rationale for the ENR and outcome of the last review of the ENR

2. In June 2020, as a response to the heightened foreign investment risks arising from the COVID-19 pandemic and the related economic downturn, the temporary ENR was introduced. The ENR significantly broadened the scope of overseas investment screened by requiring notification of all controlling overseas investments.
3. [1], [36]
4. The Act requires you to review the ENR every 90 days to determine whether the effects of the pandemic in New Zealand justify it remaining in force. When the ENR is removed, it triggers the commencement of the permanent national security and public order call-in power ('the call-in power'), which allows screening of investments in strategically important businesses.
5. Joint Ministers have delegated authority from Cabinet to make this policy decision [DEV-20-MIN-0066]. In making this decision, you must have regard to:
 - the economic, social, and other effects of the emergency in New Zealand;
 - any risks to New Zealand's national interest posed by foreign investment; and
 - New Zealand's international relations and obligations.
6. We developed a framework setting out our approach to assessing these criteria (refer annex one). In accordance with this framework, you completed the third review of the ENR in February 2021.
7. In light of positive economic trends, you agreed to begin preparations to replace the ENR with the call-in power at this review (absent any significant negative change to conditions).

¹ The Minister of Foreign Affairs, the Minister of Finance, and the Associate Minister of Finance (Hon David Parker).

Assessment of the grounds for retaining the ENR

Recommendation: consistent with your decision on the last review and the statutory criteria, we recommend the ENR is repealed, because of:

- the improved public health response to the pandemic and positive economic indicators, which are expected to continue to improve as borders reopen and vaccines are rolled out;
- the reduction of the broader investment risks the ENR was introduced to manage, and the ability to manage investment risks in strategically important businesses through the Act's enduring consent framework. These tools have been designed to manage ongoing significant national security and public order risks posed by investments in strategically important businesses;
- the costs of retaining an economy-wide screening tool are likely to be (or soon to be) disproportionate to the remaining risks posed. The ENR will have a negative effect on our ability to attract productive foreign investment, constraining the recovery; and
- [1], [36]

8. A more detailed assessment of the case for retaining the ENR follows. We have used the best data available in this assessment but there is always a degree of uncertainty in forecasting future conditions.

The economic impacts of the pandemic are subsiding

9. New Zealand's effective containment of COVID-19 has minimised the pandemic's economic disruption and led to a faster recovery than forecast. The International Monetary Fund's recent assessment of the New Zealand economy found that our response "helped avert a much larger decline in economic activity and employment."
10. With the pandemic largely contained, the recovery in the second half of 2020 was strong and above expectations. Small businesses' revenue continues to grow, with year-on-year revenue exceeding pre-crisis levels in all industries except hospitality.²
11. The accelerating recovery in global growth will also support New Zealand's recovery as a small open economy reliant on trade. The IMF has revised up its forecast for global GDP forecast to 6% for 2021, and this will be faster if vaccines are distributed effectively in the second half of 2021.

Some economic risks remain, but these can be managed

12. Economic risks remain and the recovery remains somewhat volatile and uncertain due to the risks of an outbreak or a delay in vaccine rollouts internationally. The negative economic impacts of the pandemic are lingering in sectors particularly reliant on international travel namely, the tourism, hospitality, and international education sectors (and lingers too in the regions reliant on these sectors). The 'travel bubble' with Australia and the accelerating roll out of vaccines will provide some relief as international travel to New Zealand slowly resumes.

² Including manufacturing (+8%), construction (+6%), retail trade (+4%) and professional services (+2%).

13. However, as acknowledged by the Minister of Tourism, ultimately the constraints on this sector reflect a structural change in the tourism market and are unlikely to be completely remediated in the short-to-medium term with borders largely remaining closed. We do not consider that an economy-wide foreign investment screening tool is suited to addressing these remaining sector-specific risks. The additional regulatory burden and uncertainty could negatively impact the recovery in other sectors by reducing access to capital.
14. Finally, there remains a risk of an outbreak of COVID-19. If so, any economic disruption will be much less than that which precipitated the ENR's introduction because of two mitigants: the improved public health response capacity (for example, rapid containment of recent community outbreaks) and the roll out of vaccinations.

The broader investment risks have reduced in tandem with the economic recovery

15. The quick reopening and recovery of the economy has minimised the foreign investment risks the ENR was designed to manage (which, in summary, were risks arising from strategic investment in distressed assets).³

16. [1]

17. [1]

18. We consider that any residual risks can largely be managed by the Act's enduring consent framework (including the national interest test) and the call-in power that will replace the ENR.⁴ These tools have been designed to manage ongoing significant security and public order risks related to strategically important businesses.

The ENR may soon negatively affect investment attractiveness, and have implications for our international relations and obligations

19. The ENR imposes material regulatory costs on previously unregulated foreign investment. For the reasons outlined above, the costs of retaining an economy-wide screening tool are increasingly likely to be disproportionate to the remaining risks posed. This could have a negative impact on New Zealand's investment attractiveness. In particular, the ENR is not seen positively by international investors and domestic firms (as reported by New Zealand Trade and Enterprise). It exacerbates other pandemic-related barriers for domestic firms to seek investment (including border closures, quarantine requirements, and visa restrictions for potential investors).

³ [1]

⁴ Note that the Overseas Investment (No 3) Bill, which is awaiting second reading, will make technical amendments to the call-in power. We do not consider that these amendments need to be made before the call-in power is brought into effect, and the amendments will not significantly affect the ability to manage risks through the call-in power.

20. New Zealand has agreements with international partners to support a transparent and certain foreign investment regulatory system which supports productive investment. Maintaining compliance with these agreements strengthens our international relationships and contributes to New Zealand's attractiveness as an investment destination.

21. [1], [36]

22. [1], [36]

Support for implementing the call-in power

23. In preparation for the call-in power coming into force and under delegated authority from Cabinet, Minister Parker made a set of design decisions to support the call-in power's implementation. These decisions relate primarily to the procedures and associated timeframes for assessing notifications (T2020/3749). These decisions were taken based on lessons from the ENR's operation.

24. Giving effect to these implementation decisions requires:

- regulations – for which the attached draft LEG paper seeks approval; and
- a Ministerial directive letter to the regulator, which provides further guidance on the process for assessing notifications (consistent with Minister Parker's earlier decisions). It directs the regulator to strive to identify low-risk transaction quickly and allow them to proceed promptly. The letter also delegates the powers necessary for the regulator to implement these decisions. A draft is attached in annex four for Minister Robertson's and Minister Parker's approval.

25. Finally, the call-in power is a new regime, with its voluntary component being a new approach for the regulator. As such, the directive letter asks the regulator to report back to you within six months on its monitoring strategy, so you have visibility over the costs, risks, and benefits of particular approaches. In particular, the letter requests that the regulator inform you how it intends to:

- identify non-notified mandatory transactions, and
- scan for non-notified voluntary notifications to identify those that may pose significant risks.

Next steps for the repeal of the ENR

Cabinet legislation committee process

26. If you agree to repeal the ENR and commence the call-in power, Minister Parker will take an Order in Council through the Cabinet Legislation Committee (LEG) process, with the aim to have the Order in Council published on 25 May. The Treasury, or Ministers, could publish a statement announcing the decision on the same day. A draft media statement is attached as annex two for your review.
27. We recommend replacing the ENR with the call-in power on 7 June 2021—10 days after the required regulations are promulgated in the *New Zealand Gazette*. This allows time for investors to prepare for the change, while not retaining the ENR in force any longer than necessary given the statutory criteria and our international obligations.⁵ It will, however, require a waiver of the 28-day rule.
28. A draft LEG paper is attached as annex three for Minister Parker's approval.

Table one: next steps for the repeal of the ENR

Date	Action (Minister Parker)
3 May to 11 May	Ministerial consultation on LEG paper
13 May	Lodge LEG paper with Cabinet office
24 May	Cabinet and Executive Council
25 May	Order in Council, regulations and press release published
7 June	ENR is repealed, and call-in power commences

⁵ Transactions being processed under the ENR when it is replaced will continue to be reviewed by the OIO under the rules of that regime, unless the notification is withdrawn.

Annex one: 90-day review assessment framework

The Emergency Notification Regime (ENR) was introduced into the Overseas Investment Act 2005 (OI Act) in response to concerns that the COVID-19 pandemic and related economic downturn increased the risk of:

- falling firm values and revenues of ordinarily productive firms to a level below the OI Act's screening thresholds,
- opportunities to acquire distressed assets at fire sale prices,
- increasing numbers of firms requiring urgent access to foreign capital (debt or equity) to remain viable,
- as a result of the above, increased likelihood that foreign investment poses a risk to New Zealand's national security where it is occurring for the strategic advantage of other states, and
- [1]

The OI Act requires you to make a decision, at 90-day intervals, about whether to continue or withdraw the ENR.⁶ The legislative test is: do the effects of the emergency (the COVID-19 pandemic) continue to justify the ENR remaining in place, with regard to three statutory criteria. An assessment against each of these criteria will guide this decision, with this framework supporting your overall judgment of the costs and benefits of retaining the ENR.

We have developed the framework below to ensure the assessment against the criteria is robust, consistent and transparent. This framework sets out the metrics by which we will generally 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 assessment will focus on how the conditions relate to the specific policy concerns underpinning the ENR and not broader or unrelated features of the economic environment. Where significant new information becomes available, we may consider it for inclusion in the framework. In making the overall recommendation as to whether the ENR should continue or be withdrawn, our advice will weight each component equally and take into account the interrelationship between components. Ministers may elect to weigh factors differently when determining whether the ENR should be continued or withdrawn.

⁶ Clause 27, Schedule 1AA, Overseas Investment Act 2005.

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:</p> <p><i>Macroeconomic indicators</i></p> <ul style="list-style-type: none"> International (and state-level) and domestic economic forecasts, to the extent these indicate projected levels of economic and firm distress. New Zealand activity index (NZAC): this provides a timely and granular assessment of economic conditions, relative to prior years. As such, we assume the economic effects of the emergency will be subsiding when current activity begins to approach pre-COVID levels as measured by the NZAC. <p><i>Firm health indicators</i></p> <ul style="list-style-type: none"> Presence, absence, and expected timeframes for withdrawal of fiscal support schemes: this provides an indication of the degree of reliance of firms on external stimulus, which is relevant to their value and risk to opportunistic acquisition. Equity market valuations: these signal the value of listed firms according to the stock market, and whether those are falling below the OI Act's permanent screening thresholds. Corporate bond and equity activity: these activity levels indicate how well the market is functioning, and therefore whether firms are likely to be undervalued. Credit conditions: the supply of domestic credit is indicative of how effectively New Zealand's capital markets are functioning. To the extent that markets are performing and there are few constraints on business' access to capital, the risk that businesses are being 'undervalued' by the market is lessened. Bank health, including profitability, non-performing loans, and loan loss provisioning: these are indicators of banks' ability to support lending, which affect businesses' access to capital. Loan loss provisioning can also be an early warning indicator of stressed assets, as banks may report non-performing loans before they reach the point of insolvency. Household and business balance sheets, cashflow pressures, interest cover: these convey the room firms have in their balance sheets to recapitalise, and by extension the extent to which business cashflows are sustainable and resilient or at risk of credit distress. Consideration must be given to whether fiscal support schemes such as payment deferral schemes, which reflect cash flow, are contributing to the creation of 'zombie firms', which are dependent on those schemes for their viability. This can prevent the efficient reallocation of resources within the market. 	<p>Whether the economic effects support the <i>continuation</i> or <i>withdrawal</i> of the ENR will depend on whether there is an ongoing or anticipated risk of:</p> <ul style="list-style-type: none"> firm values falling 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. <p>To assess this risk, the metrics cited will best reveal the state of firm health, while taking into account the broader landscape (e.g. the extent to which the presence or absence of other schemes may be deferring or masking expected changes in firm health and viability). No bright-line threshold can be set to show when these risks have subsided. As such, we will consider the collective weight and overall trend shown by the metrics to assess whether the market is correctly pricing firms and/or has equilibrated to a 'new post-COVID' normal. We will also consider the extent to which the costs associated with the regime are discouraging investment flows into New Zealand, and the regulatory burden on the OIO associated with the processing of notifications.</p>

	<ul style="list-style-type: none"> Insolvency activity: a spike in business insolvencies may indicate that firms are experiencing financial distress and at risk of being undervalued or acquired at fire sale prices. Insolvency activity must be considered in the context of the government fiscal support scheme landscape, and the extent to which insolvency data does or does not account for firms that will cease to be viable once those schemes are withdrawn. Further, higher insolvency activity is not of itself a reason to retain the ENR as it supports the efficient reallocation of resources in the market. <p>The assessment may also take into account any other relevant economic indicator.</p>	
Any risks to New Zealand's national interest associated with transactions by overseas person.	<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 investment as a risk to New Zealand's national security and public order, including intelligence on planned or anticipated transactions, the risk profile of transactions (both those notified and those required to notify but which did not), and the extent to which they pose risks to the national interest, For example: <ul style="list-style-type: none"> the transfer of knowledge and jobs, the loss of entry points into global value chains, control of cornerstone businesses in sectors displaced by the COVID-19 pandemic, and acquisition of strategic assets unable to be screened by the permanent call in power (e.g. logistics, health, certain science system research, and digital solutions), OIO advice on the nature and extent of any transactions that did not comply with notification requirements. 	<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 investment risks relative to the pre-COVID environment, and 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.
New Zealand's international relations	<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"> MFAT and NZTE reporting on the 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 whether other jurisdictions are adopting or retaining similar foreign investment screening policy changes.
[1], [36]		

Annex two: draft media release

Successful management of the pandemic leads to end of emergency screening of overseas investments

On 7 June the temporary emergency notification regime for overseas investments into New Zealand will be repealed.

The regime was introduced to ensure that heightened foreign investment risks caused and exacerbated by the COVID-19 pandemic could be managed effectively. Ministers were required to review the regime every 90 days to assess whether the effects of the COVID-19 pandemic justified it remaining in force.

Finance Minister Grant Robertson, Associate Minister of Finance David Parker and Foreign Affairs Minister Nanaia Mahuta have completed the fourth 90-day review of the regime. They concluded that the risks the regime was designed to manage have reduced as a result of the successful management of COVID-19, which led to the rapid reopening and recovery of the economy.

The repeal of the emergency regime will trigger the commencement of a narrower national security and public order call-in power. This allows screening of investments in strategically important businesses that do not normally require consent under the Overseas Investment Act, such as those involving the acquisition of military technology or critical national infrastructure.

The call-in power is one part of the Government's enduring reforms to our overseas investment rules. The reform aims to strike the right balance between facilitating productive investment and managing risks where they arise.

More information can about the reform can be found on the Overseas Investment Office's website.

Chair

Cabinet Legislation Committee

REPLACEMENT OF THE OVERSEAS INVESTMENT EMERGENCY NOTIFICATION REGIME

Proposal

- 1 This paper seeks your agreement to submit to the Executive Council matters relating to the Overseas Investment Act 2005 (the Act), including:
 - 1.1 an Order in Council that repeals the Act's temporary emergency notification regime (ENR) and commences the permanent national security and public order call-in power (the call-in power); and
 - 1.2 the Overseas Investment (Commencement of Permanent Call-in Regime) Regulations (the Regulations), which support the call-in power's implementation.
- 2 Policy decisions on these matters have been made under delegated authority from Cabinet [DEV-20-MIN-0066]. Consistent with paragraph 2.39 of the Cabinet Manual, I submit this paper with the knowledge and approval of the Minister of Finance.

Policy

The ENR manages novel foreign investment risks in the wake of the pandemic

- 3 The ENR was designed to manage heightened foreign investment risks that arose during the COVID-19 pandemic and the related economic downturn [DEV-SUB-2020-66 refers]. The ENR temporarily broadened the scope of foreign investments that could be screened for national interest risks.
- 4 [1], [36]
- 5 As such, the Act requires the ENR to be reviewed every 90-days to determine whether the effects of the pandemic in New Zealand justify retaining it. Cabinet authorised the Minister of Foreign Affairs, the Minister of Finance and I, as Associate Minister of Finance, to make this decision ('joint Ministers') [DEV-20-MIN-0066].

The broader risks the ENR was put in place to manage have diminished

- 6 In accordance with the statutory criteria, joint Ministers have agreed the effects of the emergency no longer justify the ENR continuing in place much longer, and it should be repealed in early June 2021. I therefore seek your agreement to submit an Order in Council to the Executive Council that would give effect to this decision.
- 7 In making this decision joint Ministers noted:
 - 7.1 the effective containment of COVID-19 has minimised the pandemic's economic disruption and led to a faster recovery than forecast (and the recovery will accelerate as borders progressively reopen and vaccines are rolled out);
 - 7.2 improvements in the public health response and the roll out of the vaccine means that any future outbreak of COVID-19 is unlikely to cause widespread economic disruption as protracted lockdowns can likely be avoided;
 - 7.3 the Act's enduring consent framework (including the national interest test) and the call-in power that will replace the ENR will manage ongoing significant national security and public order risks related to investments in strategically important businesses;
 - 7.4 the ENR imposes material regulatory costs on previously unregulated foreign investment. The costs of retaining an economy-wide screening tool are increasingly likely to be disproportionate to the residual risks posed. As such, the ENR may be having a negative effect on our ability to attract productive foreign investment, constraining growth; and
 - 7.5 [1], [36]
- 8 Once the ENR is repealed, it will be replaced by the enduring national security and public order call-in power ('the call-in power'). This tool was designed as part of our Phase Two reform of the Act and passed as part of the Urgent Measures Act in 2020. It allows the government to permanently screen investments in strategically important businesses to manage significant national security or public order risks.

Regulations to support the implementation of the call-in power

- 9 Cabinet authorised me to make policy decisions necessary to support the implementation of the call-in power. Under this delegation I have made some minor design decisions that require regulations. I therefore also seek your approval to submit Regulations to the Executive Council.
- 10 Many of these Regulations set procedural timeframes for the call-in power. In setting these timeframes, I have been careful to balance the need for investors to receive prompt decisions, while allowing sufficient time to adequately identify risks arising from a transaction. I have also incorporated our experience implementing the ENR. As such, I have decided that:

- 10.1 the government must assess notifications made by investors under the call-in power within 55 days working days. Within this period, the regulator will make an initial assessment within 15 days working days to identify low-risk transactions and allow them to proceed. Only the most complex or risky transactions will take the full 55-day period to assess;
- 10.2 a 30 working day extension to this timeframe is available, but only if the Minister is unable to adequately consider what action should be taken within the initial period. I expect this power to be used rarely, and the Minister of Finance and I will provide direction to the regulator on when an extension would be appropriate; and
- 10.3 if an interim condition is imposed on a transaction that was not notified, the Regulations require that a final action must be taken within 55 days (unless extended). An interim condition might be imposed to protect against an investor accessing sensitive data until a full assessment is completed.
- 11 In some cases, it is voluntary for investors to notify the government and investors can choose to notify before giving effect to a transaction, or within a later period as set in the Regulations. This allows investors to choose whether they want certainty of regulatory outcomes in advance of completing a transaction or if they would prefer the flexibility of additional time to finalise negotiations and to give effect to a transaction.
- 12 I consider voluntary notification should be made within six months after a transaction is given effect to. This strikes a balance between the government's ability to manage risk (which favours a shorter period) and minimising the burden on investors (which favours a longer period).
- 13 The regulations also address some technical issues to ensure the call-in power operates as previously agreed to by Cabinet or by Ministers under delegated authority, including:
- 13.1 a fix to the definition of sensitive data contained in the Regulations, to exclude publicly available and anonymised data from scope as was originally intended; and
- 13.2 Regulations to ensure the Act's existing exemptions carry over from the ENR to the call-in power.

Timing and 28-day rule

- 14 The permanent call-in regime and the associated Regulations should come into force on the same date: 7 June 2021—10 days after the required Regulations are promulgated in the *New Zealand Gazette*. Replacing the ENR 10 days after the Regulations have been promulgated is important because:
- 14.1 this timing appropriately balances the need to provide investors with time to prepare for the change against creating incentives to overly delay important investment activity; and

14.2 [1], [36]

15 As such I request a waiver of the 28-day rule.

Compliance

16 The decision to repeal the ENR and replace it with the call-in power has been made in accordance with the statutory criteria in clause 27 of Schedule 1AA of the Act.

17 The Regulations comply with:

17.1 the principles of the Treaty of Waitangi;

17.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;

17.3 the principles and guidelines set out in the Privacy Act 2020;

17.4 relevant international standards and obligations; and

17.5 the Legislation Guidelines (2018 edition), which are maintained by the Legislation Design and Advisory Committee.

Regulations Review Committee

18 I have not identified any grounds that would prompt the Regulations Review Committee to draw either the Order in Council or the Regulations to the attention of the House of Representatives under Standing Order 327.

Certification by Parliamentary Counsel

19 Parliamentary Counsel Office has certified the Regulations as being in order for submission to Cabinet.

Impact Analysis

20 The Order in Council and the Regulations are consistent with previous impact analysis prepared for when substantive Cabinet policy approval was sought for the permanent call-in power regime (DEV-19-SUB-0306 refers).

Publicity

21 After Cabinet confirms these decisions, the Treasury will publish a press release on its website announcing joint Ministers' decision to replace the ENR with the call-in power. Land Information New Zealand has communications planned to educate stakeholders about the changes.

Proactive release

- 22 At the appropriate time, I intend to proactively release this paper with any redactions consistent as if it were requested under the Official Information Act 1982.

Consultation

- 23 Land Information New Zealand ('LINZ'), the Ministry of Foreign Affairs and Trade ('MFAT'), the New Zealand Government Communications Security Bureau ('GCSB') and the New Zealand Security Intelligence Service ('NZSIS'), the Ministry of Business, Innovation and Employment ('MBIE), and New Zealand Trade and Enterprise ('NZTE') were consulted on this paper.

DRAFT

Recommendations

I recommend that the Cabinet Legislation Committee:

- 1 **note** that on 6 May 2020 Cabinet authorised the Minister of Foreign Affairs, the Minister of Finance and the Associate Minister of Finance ('joint Ministers') to determine when to repeal the emergency notification regime (ENR) in the Overseas Investment Act 2005 [DEV-20-MIN-0066].
- 2 **note** that on 26 April 2021, joint Ministers agreed that ENR should be replaced with the permanent national security and public order call-in power.
- 3 **note** that Cabinet delegated authority to me, as Associate Minister of Finance, to make decisions on additional policy or drafting issues [DEV-20-MIN-0066 refers] and under this authority I have made decisions to support the call-in power's implementation.
- 4 **authorise** the submission to the Executive Council of the Order in Council and Overseas Investment (Commencement of Permanent Call-in Regime) Regulations 2021 that give effect to these decisions.
- 5 **note** that a waiver of the 28-day rule is sought to balance the need to provide investors time to prepare for the change against retaining the ENR any longer than necessary.
- 6 **agree** to waive the 28-day rule so that the Order in Council and Overseas Investment (Commencement of Permanent Call-in Regime) Regulations 2021 can come into force on 7 June 2021.

Authorised for lodgement

Hon David Parker
Associate Minister of Finance

Annex four: Direction and Delegation Letter

Attached as a separate document.

Hon Grant Robertson

MP for Wellington Central

Deputy Prime Minister

Minister of Finance

Minister for Infrastructure

Minister for Sport and Recreation

Minister for Racing



Gaye Searancke
Chief Executive
Land Information
New Zealand
Private Box 5501
WELLINGTON 6145

Dear Ms Searancke

Supplementary Ministerial Directive and Delegation Letter

1. This Ministerial Directive Letter is made pursuant to sections 32 and 34 of the Overseas Investment Act 2005 and directs you, as regulator, on the Government's policy approach to the national security and public order call-in power (the call-in power) and delegates the relevant powers to you to give effect to these policies, including:
 - a. the approach for assessing notifications,
 - b. timeframes for assessing notifications and exemptions for those timeframes, and
 - c. monitoring and scanning for non-notified transactions.
2. This letter supplements the Ministerial Directive Letter of 28 November 2017 and the Supplementary Ministerial Directive Letter of 8 June 2020, which remain in force. For the avoidance of doubt, this letter does not amend any of the powers delegated to you in the Delegations Letter of 8 June 2020.
3. References to the Act and the Regulations in this letter refer to the Overseas Investment Act 2005 and Overseas Investment Regulations 2005, including all amendments as at 7 June 2021.

The national security and public order call-in power

4. The call-in power allows the government to screen certain foreign investments in strategically important businesses (SIBs) and impose conditions on them (or as a last resort, block or unwind) when they give rise to significant national security or public order risks. The Government intends for the call-in power to be a backstop power and that any interventions will be rare and only where necessary.
5. To ensure the call-in power's requirements are proportionate to risk, it is:
 - a. mandatory for investors to notify the regulator before giving effect to investments in SIBs more likely to pose material risks, and
 - b. voluntary for investors to notify the regulator of investments in SIBs and media businesses less likely to pose risks (either before or after the transaction is given effect to).

6. Investors that notify and do not pose significant risks obtain 'safe harbour' from later government intervention (unless, for example, the investor relied upon false or misleading information or breached a condition of their direction order). Those that do not notify can have their transaction scrutinised at any time.

Initial assessments should be carried out quickly to identify significant risks

7. In recognition of the potential impact of the call-in power regime on businesses and investors, low-risk transaction should be identified quickly and allowed to proceed promptly. To facilitate this, I expect you to assess a notification in two steps within the 55-day⁷ statutory timeframe:
 - a. an initial risk assessment within 15 days, where you consider if a transaction could pose a significant risk to New Zealand's national security or public order. Those that could not pose a significant risk will be issued with a direction order allowing them to proceed; and
 - b. a risk and benefit assessment is undertaken for those transactions that could pose a significant risk and this assessment is referred to the Minister. The assessment should be provided promptly so the Minister can make a final decision on what action to take (if any) within the remainder of the 55-day statutory timeframe.
8. When assessing and providing advice on the risks and benefits of a transaction, the regulator must:
 - a. have regard to the *Guidance Note: Foreign Investment Policy and National Interest Guidance* published on The Treasury website, which may be updated from time-to-time; and
 - b. reflect consultation and input from relevant partner agencies.
9. The Regulations allow extensions to be granted to the 55-day timeframe. Extensions should only be granted if a transaction has significant complexity, the applicant operating in good faith is unable to meet the regulator's requests in a timely manner, or there are other exceptional circumstances (for example, the discovery of significant new information late in the assessment process).

Delegations to give effect to the decision-making timeframe policies

10. To give effect to these policies, I delegate to you, as the regulator, the powers and functions of the Minister, including all ancillary powers and functions necessary for, or incidental to, making those decisions, in accordance with section 32 of the Act:
 - a. under section 88, the power to give a direction order to a relevant acquirer, following a review of a call-in transaction, where the direction order is not subject to other conditions under section 88(3).
 - b. under section 84(3), the power to review any other call-in transaction (in addition to transactions which have been notified).
 - c. under regulation 64C(4) of the Regulations, the power to extend the period that an interim direction order is in force and to give notice of the extension to a relevant acquirer.
 - d. under section 32, the power to further delegate the above powers and functions delegated by this letter.

⁷ All periods cited in this letter refer to working days.

Scanning for non-notified transactions that could pose significant risks

11. The Government can investigate any non-notified call-in transactions and impose conditions on, or order disposal of them, where necessary to manage significant national security or public order risks.
12. I recognise the call-in power is a new regulatory function for you to administer and monitor. I expect that over time you will adjust your approach to scanning for non-notified transactions that may pose significant national security or public order risks. You should report back to me within twelve months on your approach for identifying non-notified transactions that could pose significant national security or public order risks.

Date letter takes effect

13. This letter is to take effect from 7 June 2021.

Yours sincerely

Hon Grant Robertson
Minister of Finance

Hon David Parker
Associate Minister of Finance

Annex five: Draft Overseas Investment (Commencement of Permanent Call-in Regime) Amendment Regulations

Attached as a separate document.