

The Treasury

Phase two Overseas Investment Act reform (April - September) Information Release

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Cabinet Document Details

Title: **Cabinet Paper: LEG-21-SUB-0076: Replacement of the Overseas Investment Emergency Notification Regime**

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Office of the Associate Minister of Finance

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 ^[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have agreed the effects of the emergency no longer justify the ENR continuing in place much longer, and it should be repealed in early June 2021.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 ^[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 chose to notify before of 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 ^[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.

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