

The Treasury

Reform of the Overseas Investment Act Information Release

May 2020

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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
- [23] 9(2)(a) - to protect the privacy of natural persons, including deceased people
- [33] 9(2)(f)(iv) - to maintain the current constitutional conventions protecting the confidentiality of advice tendered by ministers and officials
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Treasury Report: COVID-19 Economic Response: Draft Cabinet paper on changes to the Overseas Investment Act

Date:	24 April 2020	Report No:	T2020/1129
		File Number:	IM-5-3-8-9

Action sought

	Action sought	Deadline
Minister of Finance (Hon Grant Robertson)	Note the contents of this report.	None
Associate Minister of Finance (Hon David Parker)	<p>Agree to the final proposed design of COVID-related amendments to the Overseas Investment Act 2005.</p> <p>Agree to support implementation of the Bill by making initial operational decisions on the emergency notification power, and the application of the national interest test.</p> <p>Provide feedback on the draft Cabinet paper and note next steps for seeking Cabinet approval.</p> <p>Refer this report to relevant Ministerial colleagues.</p>	28 April 2020

Contact for telephone discussion (if required)

Name	Position	Telephone	1st Contact
[39]	[39]	[39]	N/A (mob) ✓
Thomas Parry	Manager, International	[39]	[23]

Minister's Office actions (if required)

Return the signed report to Treasury.

Refer the report to the Minister Responsible for the GCSB and NZSIS and the Minister for Land Information.

Note any
feedback on
the quality of
the report

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Enclosure: No

Treasury Report: COVID-19 Economic Response: Draft Cabinet paper on changes to the Overseas Investment Act

Executive Summary

On 17 April 2020, we provided advice on options to amend the Overseas Investment Act (the Act) in response to the heightened foreign investment risks in the wake of the COVID-19 pandemic. These options build on the proposals in the Overseas Investment Amendment Bill (No 2) (the Phase Two Reform Bill), which partially addresses relevant risks. You agreed to further amend the Act to:

- i. introduce an 'emergency notification regime' (the emergency power) that will allow the Government to screen a wider range of transactions during a time-limited period,
- ii. temporarily exempt additional low-risk transactions and bring forward some already agreed exemptions, and
- iii. introduce new regulation making powers to manage risks associated with the rapid development, drafting and implementation of these proposals.

This paper seeks your decisions on outstanding design issues on these matters (as flagged in T2020/914), and on initial implementation issues. We also seek your feedback on a draft Cabinet paper that seeks approval to introduce, [33] the Overseas Investment (COVID-19 Emergency Measures) Amendment Bill (the COVID Bill) that will progress the recommended changes.

In providing this advice, we have considered how these proposals best complement the Government's broader COVID-19 business support policies, and made alignments where appropriate. However, a potential consequence of blocking a transaction under the emergency power may be firm failure if no other capital sources or Crown support is available. This is because we consider the threshold for intervening in an overseas investment transaction to be lower than the threshold for the Crown to provide bespoke support for a business. This possibility should inform decisions made under the emergency power.

This report is provided to the Minister of Finance to ensure his visibility of all Treasury work to respond to the COVID-19 pandemic.

Outstanding design issues

To finalise the design of proposals to respond to the COVID-19 pandemic, we recommend:

- i. extending the emergency power to acquisitions of business assets that effectively grant an overseas person a degree of control over a New Zealand business. That is, transactions in assets that result in an overseas person acquiring more than 25 per cent of the total value of a New Zealand business's assets (calculated before the acquisition).

Including this control threshold aligns the emergency power's coverage of assets with its coverage of controlling equity investments. This alignment fills gaps in the government's ability to manage risks, while reducing potential distortions to investor behaviour. Including a control threshold also largely excludes a range of legitimate business transactions (such as the purchases of stock, raw materials, or exports) that would otherwise be caught by including assets within scope.

- ii. the following statutory timeframes apply to the emergency power:

10 working days to triage each notification to determine whether it warrants a national interest review (and if it doesn't warrant review, then the transaction proceeds)

30 working days to consider whether the investment is counter to the national interest, and the appropriate action (with a further 30-day extension available).

These timeframes will be challenging to meet, and the OIO in particular will be under significant pressure to meet these, especially if volumes are high. They aim to balance the objectives of quickly filtering out low risk investments but provide time to make more fulsome national interest assessments where warranted. Timeframes also reduce uncertainty for businesses and investors.

- iii. clarifying the regulation making powers you agreed in last week's report. That is, the Minister is empowered to recommend regulations that provide that specified provisions of the Act do not apply in certain circumstances, or apply with modifications or additions, or both, only if certain criteria are met.

This ensures that this regulation making power can be used to manage unexpected transitional issues and/or unintended consequences associated with the rapid development and implementation of these reforms, consistent with legislative best practice.

Parliamentary process to implement the reform

To implement the reforms, you have agreed to a 'split bill' process, which will introduce:

- i. the COVID Bill [33] (including the new proposals in the attached Cabinet paper and urgent provisions already agreed as part of the Phase Two reform of the Act), and
- ii. a 'non-urgent' Bill (containing the remaining provisions of the Phase Two reform) to be referred to Select Committee.

We recommend that the non-urgent Bill be introduced at the same time, with the aim of passing it within 12 months, and replace the urgent Bill

Operational decisions to support the rapid implementation of the reform

The emergency power will significantly expand the Act's scope and could, without clear public and operational guidance, mean that Ministers, the Overseas Investment Office (OIO) and other agencies are overwhelmed. We therefore recommend you agree to some initial operational decisions that will ensure the OIO has the procedures in place to process notifications quickly and mitigates the risks of delays. That is:

- i. that all notifications under the emergency power be subject to two decisions:

Decision One: an initial triaging decision that can be made by the Minister responsible for the Act, or delegated to another Minister or the regulator, with transactions that could be contrary to the National Interest identified for more intensive review, and

Decision Two: a final decision on whether the transaction is contrary to the national interest, that is made by the Minister responsible for exercising the national interest test across the broader Act (in practice, the Minister of Finance), and cannot be delegated to the regulator.

- ii. To support Decision One: we further recommend that you agree to a set of non-exhaustive high level risk factors developed across government covering economic and security risks. These will support rapid identification of transactions that could be contrary to our national interest.

We understand from your office that you wish to make the initial triage decision so that there is Ministerial oversight of this triage, particularly while the regime is in its early operation. We understand this position but note that it will make it more challenging to achieve the initial 10-day timeframe if there is a large volume of notifications.

- iii. We also recommend (consistent with Cabinet decisions in November 2019 and the model used in Australia) you agree to publish guidance on what the Government will consider in its application of the national interest test to support public understanding of the reform and operation of the national interest test more broadly. A draft is contained in Appendix 3.
- iv. Neither of these documents referred to above will constrain the Government's ability to consider other matters when determining whether a transaction is, or could be, contrary to the national interest. This is consistent with the broad nature of the test in legislation.

Draft Cabinet paper and next steps

We have prepared a Cabinet paper seeking authority for these changes and your proposed method of taking them through Parliament. We seek your feedback on the draft Cabinet paper (refer appendix 4) by Tuesday morning. This enables you to meet the next steps in the lead up to Cabinet approval.

Date	Task
Wednesday 29 April	We provide an updated version of the paper, alongside the COVID and non-urgent Bill, for consultation with your Ministerial colleagues
Friday 1 May	Comments from your Ministerial colleagues are due
Monday 4 May	We provide you with a revised Cabinet paper and Bill responding to Ministerial feedback. You approve the final paper, and it is lodged, late, with DEV.
Wednesday 6 May	DEV considers the policy and Bill
Monday 11 May	Cabinet approves the policy and Bill for introduction

We are also preparing communications materials, in consultation with your office, to support investor understanding of the reform. This information will be important to support investor understanding of the COVID Bill given we have been unable to consult widely, and the speed at which the Bill will commence.

Recommended Action

We recommend that you:

Part one: Design issues

Design issue one: The treatment of assets under the emergency power

- a **Note** you have agreed to introduce an emergency notification power that empowers the government to screen controlling equity investments in New Zealand businesses
- b **Agree** that the scope of the emergency power also include investments in business assets that amount to an overseas person acquiring a degree of control over a New Zealand business, with regulations to specify that threshold for control.

Agree/Disagree

Associate Minister of Finance

- c **Agree** that, to give effect to recommendation b, regulations should provide that transactions in assets that result in an overseas person acquiring more than 25 per cent of the total value of a New Zealand business's assets (calculated before the acquisition) are within scope of the emergency power.

Agree/Disagree

Associate Minister of Finance

Design issue two: statutory timeframes

- d **Agree** to a statutory timeframe of 40 working days, plus a 30-day extension, for decisions under the new emergency power – operational guidance will set out that this period comprises 10 days for triage (Decision One) and 30 days for national interest assessment (Decision Two).

Agree/Disagree

Associate Minister of Finance

- e **Agree** to publicly signal that the Government intends to make Decision One within 10 working days (as this will not be specified in the regulations).

Agree/Disagree

Associate Minister of Finance

- f **Note** statutory timeframes for ordinary consent transactions will only come into force following the passage of the non-urgent Bill, consistent with the Phase Two reforms.

Design issue three: Power to make regulations that amend the primary Act

- g **Agree** that, with reference to the regulation making power agreed at recommendation s iii in T2020/914, the Minister may recommend regulations providing that specified provisions of the Act do not apply, or apply with modifications or additions, or both, if the Minister is satisfied that the regulations:
- i. are necessary or desirable for the orderly implementation of the Act; and
 - ii. are consistent with the intended purpose of the specified provisions.

Agree/Disagree
Associate Minister of Finance

Part two: Matters to support implementation

Implementation issue one: 'urgent' and 'non-urgent' Bill and commencement timing

- h **Note** you have agreed a 'split bill' process, which will introduce an:
- i. 'urgent' Bill (the COVID-19 Overseas Investment Response Bill – the COVID Bill) [33] (including the new proposals in the attached Cabinet paper and urgent provisions already agreed as part of the Phase Two reform of the Act), and
 - ii. a 'non-urgent' Bill (containing the remaining provisions of the Phase Two reform) to be referred to Select Committee.
- i **Agree** that the 'urgent' COVID Bill will include the COVID-19 response provisions (as above and included in TR2020/914) and those Phase Two reforms critical to support the Government's COVID-19 response work, with the remaining Phase Two reforms to be included in a 'non-urgent' Bill, as set out in Appendix 1.

Agree/Disagree
Associate Minister of Finance

- j **Agree** that the non-urgent Bill be introduced at the same time, with the aim of passing it within 12 months, replacing the urgent COVID Bill.

Agree/Disagree
Associate Minister of Finance

- k **Note** the indicative commencement timing for the COVID Bill set out in Appendix 1.

Implementation issue two: progressing notifications through government

- l **Note** that the introduction of the emergency notification power and national interest test will significantly expand the scope of the Act and could create high levels of uncertainty for investors, their advisors, and the Overseas Investment Office, with costs for the New Zealand economy if valuable transactions are delayed.

m **Note** that Treasury believes that these risks can be mitigated through the introduction of a clear decision making framework as well as guidance on the types of transactions may raise national interest concerns and the matters that the Government considers central to determining whether a transaction is contrary to New Zealand's national interest.

n **Agree** that all notifications under the emergency power be subject to up to two decisions:

- i. Decision One (triage decision): whether the transaction could be contrary to New Zealand's national interest (with transactions that could not be contrary to New Zealand's national interest allowed to proceed);
- ii. Decision Two (national interest test decision): whether the transaction is contrary to New Zealand's national interest and should be subject to conditions or prohibited (that is, the national interest test).

Agree/Disagree

Associate Minister of Finance

o **Agree** that:

- i. Decision One (referred to in recommendation ni) can be made by the Minister or delegated to the regulator and
- ii. Decision Two (referred to in recommendation ni) can be made by the Minister but not delegated to the regulator.

Agree/Disagree

Associate Minister of Finance

p **Note** that if there is a large volume of notifications, Ministerial oversight of the initial triage may place pressure on the 10-day timeframe, which, if sustained, may divert the Overseas Investment Office's resources away from its core business activities.

q **Agree** that the Minister responsible for Decision Two should be the Minister responsible for exercising the national interest test across the Act more broadly (currently expected to be the Minister of Finance), to ensure the national interest test is applied consistently across the Act.

Agree/Disagree

Associate Minister of Finance

Implementation issue 3: Triaging notifications under the emergency power

r **Agree** to the high-level set of risk factors [1,33] that will be used by the Overseas Investment Office to quickly identify and guide advice on notifications to support Decision One.

Agree/Disagree

Associate Minister of Finance

s [33]

Agree/Disagree
Associate Minister of Finance

Implementation issue four: Application of the national interest test

- t **Note** that in November 2019 Cabinet endorsed the publication of guidance on the operation of the national interest test, consistent with the approach taken in Australia.
- u **Agree** to publish guidance on what the Government will consider in its application of the national interest test when the COVID Bill is introduced to Parliament (a draft is provided at Appendix 3).

Agree/Disagree
Associate Minister of Finance

- v **Note** that over time it may be necessary to update the factors referred to at recommendation r and the guidance referred to at recommendation u to respond to the types of transactions and risks that present themselves once the COVID Bill comes into force.
- w **Agree** to seek Cabinet authority for the Minister of Finance and yourself (in your capacity as Associate Minister of Finance) to update the risk factors and guidance that will inform the operation of the emergency notification power and national interest test.

Agree/Disagree
Associate Minister of Finance

Part three: draft cabinet paper and next steps

- x **Provide feedback** on the draft Cabinet paper at Appendix 4 that seeks Cabinet approval to introduce the COVID Bill, [33]
- y **Note** the following next steps in the lead up to Cabinet approval:
- i. Wednesday 29 April: we provide you with an updated version of the paper, alongside the draft COVID and non-urgent Bill, for consultation with your Ministerial colleagues.
 - ii. Friday 1 May: comments from your Ministerial colleagues are due.
 - iii. Monday 4 May: we provide you with a revised Cabinet paper and Bill responding to Ministerial feedback. You approve the final paper, and it is lodged, late, with the Cabinet Economic Development Committee (DEV).
 - iv. 6 May: DEV considers the policy and Bill.
 - v. 11 May: Cabinet approves the policy and Bill for introduction.
- z **Note** officials are preparing communications materials, in consultation with your office, to support investor understanding of the reform given we have been unable to consult widely, and the speed at which the Bill will commence.

aa **Agree** to refer this report to the Minister Responsible for the GCSB and NZSIS and the Minister for Land Information.

Refer/not referred.

Associate Minister of Finance

Thomas Parry
Manager International

Hon David Parker
Associate Minister of Finance

Treasury Report: COVID-19 Economic Response: Draft Cabinet paper on changes to the Overseas Investment Act

Purpose of Report

1. This report seeks your (Minister Parker's) agreement to outstanding design issues relating to proposals to reform the Overseas Investment Act 2005 (the Act) to respond to the COVID-19 pandemic, with these proposals to be included in an Overseas Investment (COVID-19 Emergency Measures) Amendment Bill (the COVID Bill).
2. We also seek your decisions on matters to support the COVID's Bill's implementation, and seek feedback on a draft Cabinet paper that seeks authority to introduce,^[33] the COVID Bill as well as other non-urgent proposals currently included in the Overseas Investment Amendment Bill (No 2) (the Phase Two Reform Bill).

Background and context

3. The economic disruption caused by the COVID-19 pandemic has amplified existing, and revealed additional, problems with the Act including:
 - barriers to productive overseas investment that will be necessary to support New Zealand's economic recovery, and
 - gaps in the government's ability to manage risk posed by certain types of overseas investment.
4. These issues are partially, but not comprehensively, addressed by the proposals in the Phase Two Reform Bill. Consequently, on 20 April you agreed to further amend the Act to:
 - exempt certain additional low-risk debt financing transactions from the Act's consent requirements
 - the design of a temporary emergency notification power for reviewing business transactions not ordinarily reviewed under the Act (the emergency power), and
 - introduce new regulation making powers to manage risks associated with the rapid development and drafting of these proposals.
5. You intend to implement changes via a 'split bill' legislative process under which:
 - the COVID Bill is introduced ^[33] This Bill comprises the new tools described, as well as the provisions of the Phase Two reform Bill deemed most critical to the Government's COVID-19 response, and
 - a non-urgent modified Phase Two Reform Bill is introduced and referred to the Select Committee. This Bill would contain the remaining provisions of the Phase Two reform Bill. The Committee would also be empowered to consider and recommend changes to provisions enacted under the urgent COVID-19 Response Bill. As part of this, the existing Phase Two Reform Bill would be withdrawn.

Consistency with wider Government response to COVID-19

6. As with our earlier advice, we have worked to align these proposals with the Government's broader COVID-19 economic response. In particular:
 - policies such as the wage subsidy, support for SMEs and easing of insolvency requirements (which lower the likelihood of New Zealand businesses needing to rely on foreign investment), and
 - [33]
7. The approach to intervening in the economy should generally be consistent. However, we consider that the threshold for imposing conditions on, or blocking, a foreign investment transaction should be lower than the threshold for providing bespoke Crown funding to a business, given the additional costs and risks that Crown funding places on taxpayers. In practice, this may mean that a proposed transaction could be blocked, with the effect that the business fails, even where the Crown is unlikely to take an equity interest to keep it operating. This possibility should always inform the application of the national interest test.

Part one: Outstanding design issues

8. This section seeks decisions on outstanding policy issues related to the Government's COVID-19 response, so we can finalise the Cabinet paper to reflect your decisions and the drafting of the COVID Bill.

Summary of recommendations

To resolve outstanding design issues for the COVID Bill, we recommend:

- i. the scope of the emergency power be extended to investments in business assets that amount to an investor acquiring more than 25 per cent of the total value of a New Zealand company's assets
- ii. a statutory timeframe of 40 working days, plus a 30 day extension, apply to decisions under the new emergency power (comprising 10 days for triage and 30 days for national interest assessment)
- iii. the Minister is empowered to recommend regulations providing that specified provisions of the Act do not apply, or apply with modifications or additions, or both, if the Minister is satisfied that the regulations:
 - are necessary or desirable for the orderly implementation of the Act; and
 - are consistent with the intended purpose of the specified provisions.

Design issue one: The treatment of assets under the emergency power

9. You have agreed to introduce an emergency power to manage risks associated with foreign investment. Based on your decisions to date, the emergency power will require overseas persons to notify the Overseas Investment Office (the OIO) of controlling equity investments in New Zealand businesses. Investments found contrary to the national interest can have conditions imposed, or as a last resort, be blocked, or unwound.
10. The emergency power will only remain in force while the COVID-19 pandemic or its economic aftermath continue to have a significant impact in New Zealand.

11. We committed to provide further advice on how business assets should be treated under this power. Business assets, generally, are assets located in New Zealand and used to carry on business in New Zealand (for example, acquisitions of machinery or intellectual property).

Problem definition

12. Overseas persons (as defined in the Act) regularly invest and acquire business assets in New Zealand for a range of legitimate and economically beneficial purposes. Currently the emergency power would not capture investments in assets, despite the fact that overseas investment in assets can also:
 - pose the same risks as controlling equity investments by overseas persons (for example, the purchase of intellectual property held by a dual-use firm poses the same national security risks as a controlling equity investment), and
 - be used as an avenue to avoid scrutiny under the emergency power as investors could structure transactions to acquire assets, rather than equity interests in existing companies.
13. In addition to the above, not treating investments in assets and businesses similarly under the Act could create incentives to structure transactions inefficiently (because one would be subject to different regulatory requirements), with associated economic costs.

Preferred option

14. To mitigate these issues, we recommend that the emergency power's scope include certain overseas investments in business assets.
15. Only transactions in assets that effectively grant an overseas person a degree of control over the underlying business would be within scope. This aligns with your previous decision that only controlling equity investments should be within the scope of the emergency power.
16. We considered a number of options to achieve this outcome. We recommend capturing transactions where an overseas person acquires more than 25 per cent of the total value of a New Zealand business' assets, calculated before the acquisition.
17. This option has the following benefits:
 - i. it is easier to understand, because it involves a relatively straightforward calculation and is adapted from the existing concept of a 'major transaction' in the Companies Act
 - ii. it will largely exclude a range of legitimate business transactions (such as the purchases of stock, raw materials, or exports)
 - iii. it will fill a gap in risk coverage, while reducing opportunities for avoidance (or artificially incentivising the purchase of assets over equities), and
 - iv. it will not generate incentives to structure transactions around regulatory requirements.
18. This threshold should be set in regulations so that the government can respond flexibly to changes in the risk environment and carve out additional transactions if we discover that a large number of inappropriate transactions are subject to notification.

19. This option does, however, have some risks. To determine whether a notification is necessary, a vendor will need to disclose to the overseas investor the total value of its assets. Vendors may be reluctant to do so for a variety of commercially sensitive reasons). In particular, determining an asset's value can be complex, particularly in current economic conditions. Nevertheless, we consider that a vendor is best placed assess whether the downsides of selling to an overseas persons (that is, the costs and risks in disclosing the total value of its assets) justify it accepting a (potentially) lower domestic sale price.
20. We considered a range of alternative options, including:
- where only specified assets are in scope, such as strategic assets in specified strategically important industries (for example, critical national infrastructure), and
 - only including investments in assets worth over a de minimis value threshold, say \$5 million.
21. These options were not progressed because they did not provide comprehensive risk coverage, did not fully mitigate risks of avoidance, and were ultimately inconsistent with your decisions on other elements of the emergency power's design.

Design issue two: imposing statutory timeframes on the new emergency power

22. In TR2020/914, you agreed to impose statutory timeframes on decision-making under the new emergency power. We propose the following timeframes:
- Decision One (triage decision): 10 working days¹
 - Decision Two (national interest decision): 30 working days, with a further 30 day extension available²
23. We recommend that the overall timeframe – 40 working days, plus a 30-day extension – be set in regulations, with the triage process to be managed operationally. We also recommend that you publicly state Decision One will be made within 10 days.
24. The timeframe for decisions under the new emergency power will have the same design features agreed as part of the Phase Two reforms (and will use the empowering provision currently in the Phase Two Reform Bill) – for example, breach of the timeframe will not affect the validity of the decision, or give rise to any legal liability.

Design issue three: New regulation making power allowing provisions of the Act to be amended

25. In T2020/914, you agreed to introduce a regulation making power to modify provisions of the Act (but only those introduced through the COVID-19 Bill), where reasonably necessary, to correct obvious errors, to give effect to the intended purpose of a provision, or to resolve ambiguity or inconsistencies (recommendation (s)(iii)).
26. As we previously noted, this provision raises rule of law issues, but is justified in the circumstances, provided the power is subject to appropriate constraints.

¹ 5 days OIO review + 5 days Ministerial review, assuming this decision will be taken by a Minister, rather than delegated to the OIO, in the first instance.

² 20 days OIO assessment (with input from other agencies) + 10 days Ministerial review).

27. Following further discussions with PCO, we consider the power should allow the Minister to recommend regulations providing that specified provisions of the Act do not apply, or apply with modifications or additions, or both, if the Minister is satisfied that the regulations:
- are necessary or desirable for the orderly implementation of the Act; and
 - are consistent with the intended purpose of the specified provisions.
28. The power will also be subject to ordinary public law constraints around the exercise of public powers. This formulation is consistent with transitional powers used in several other legislative regimes, including the Financial Markets Conduct Act (as enacted).³

Part two: Matters to support implementation

29. This part of the report seeks your agreement on matters to support implementation of the Bill.

Summary of recommendations

To support implementation of the COVID Bill, we recommend you agree:

- the ‘urgent’ Bill will include changes outlined in this report, and those Phase Two reforms critical to support the Government’s COVID-19 response work. The remaining Phase Two reforms will be included in a ‘non-urgent’ Bill
- that all notifications under the emergency power be subject to two decisions:
 - Decision One: an initial triaging decision that can be made by the Minister or delegated to the regulator, and
 - Decision two: a final decision on whether the transaction is contrary to the national interest. This decision should be made by the Minister responsible for exercising the national interest test across the broader Act, and not delegated to the regulator
- to a set of high level economic and national security risk factors to support triaging under Decision One
- to support investor understanding and certainty by publishing guidance on what the Government will consider in its application of the national interest test.

Implementation issue one: Matters to be included in ‘urgent’ and ‘non-urgent’ Bill and commencement timing

30. In T2020/914, you agreed to:
- introduce and pass [33] an ‘urgent’ Bill that includes new reforms (such as the emergency power) to respond to the COVID-19 pandemic, as well as the provisions of the Phase Two Reform Bill most critical to the Government’s COVID-19 response; and

³ It achieves a comparable outcome to the Tax Administration Act model referenced in our previous report, in a more streamlined way.

- introduce and refer a 'non-urgent' Bill that includes the remaining provisions of the Phase Two Reform Bill to Select Committee, with that Committee also given scope to consider and recommend changes to provisions considered as part of the 'urgent' Bill.

31. In TR2020/914 (Appendix 6), we provided a breakdown of reforms that could be included in the 'urgent' and 'non-urgent' Bills. We have updated this breakdown to incorporate your recent policy decisions, incorporate additional advice from the OIO based on their operational capacity and potential legal risks. This includes moving the repeat investor process to the 'non-urgent' Bill, and bring certain benefits test changes into the 'urgent' Bill. The revised breakdown is set out in Appendix 1, and includes indicative commencement timing for the 'urgent' Bill.

Implementation issue two: Progressing notifications through government

Problem to be resolved

32. The emergency notification power is a new tool that, while modelled on aspects of the national interest test and call-in power, does not yet have established processes or delegations for decision-making. Resolving these design questions is central to ensuring that the OIO can effectively operationalise the power.

Recommendation

33. We recommend that notifications received under the emergency power be subject to up to two decisions. The recommended decisions to be made in respect of each notification, decision maker, and the consequences of each potential decision, are detailed in Table 1 and are consistent with the existing legislative design of the national interest test and call-in power set out in the existing Bill.

Table 1: Decision making framework for notifications received under the emergency power

Test	Decision maker	Consequences of decision
Decision One: Whether the transaction <u>could be contrary</u> to New Zealand's national interest. <i>(In practice, this facilitates the triage of notifications)</i>	The Minister responsible for the Act, but can be delegated to another Minister or to the OIO.	Transactions that <u>could not</u> be contrary to the national interest will receive a Direction Order (in practice, a 'no action' notice) allowing the transaction to proceed and removing the government's ability to intervene in the transaction in the future (unless the notification was, for example, fraudulent or otherwise misleading). Transactions that <u>could</u> be contrary to the national interest will be subject to more intensive review by the OIO and other agencies.
Decision Two: Whether the transaction <u>is contrary</u> to New Zealand's national interest. <i>(That is, the national interest)</i>	The Minister that is ordinarily responsible for exercising the national interest test (likely the Minister responsible for the Act, currently the Minister of Finance).	Transactions that <u>are not</u> contrary to the national interest will receive a Direction Order and be allowed to proceed. Transactions that <u>are</u> contrary to the national interest will be prohibited, or be subject to conditions wherever possible to ensure that they are not contrary to the national interest.

test).	This power cannot be delegated to the OIO.	
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34. The design reflects the Government’s decision that the national interest test be a backstop tool that should be used rarely and only where necessary to protect New Zealand. We consider that the same approach should be applied in the context of the temporary emergency power.
35. In particular, while the COVID-19 pandemic means that foreign investment will pose greater risks across a wider range of transactions for a period of time (justifying the introduction of the emergency notification tool), it should not:
- lower the threshold for exercising the national interest test; or
 - result in inconsistent use of the test across the Act. That is, the test should be applied in the same way, irrespective of whether a transaction comes through the emergency power or an ordinary consent pathway.
36. For this reason, we consider that the same senior Minister should be responsible for applying the national interest test to any transaction under the Act (you have indicated that this would likely be the Minister of Finance). We also expect that this will provide investors and partner jurisdictions with additional confidence that the emergency screening tool is a proportionate response to the COVID-19 pandemic.

Details on which decision maker should determine whether a transaction could be contrary to the national interest test

We propose that the decision on whether the national interest test should be applied to a transaction notified under the emergency power (that is, the power to ‘triage’ notifications) could be exercised by any Minister or delegated to the OIO. Efficient triaging will be especially critical to the administration of the new power bearing in mind the current environment and likely financial situation of firms that are notifying.

We consider that from an operational perspective it would be best for this triaging power to be delegated to the OIO, consistent with how Significant Business Asset transactions are currently processed. We consider that the vast majority of notifications will not raise national interest concerns and that these transactions should therefore proceed quickly. The OIO, operating in line with the Government’s guidance, would be best placed to do this within the proposed statutory deadlines. Other transactions that did pose potential national interest concerns would be able to be escalated to you for your review, to ensure appropriate government oversight of the OIO’s decision making.

However, from conversations with your office, we understand that, based on your accounting of a broader range of Government priorities, you would like to at least be initially responsible for this triaging role. While this may be manageable if notification volumes are quite low, if volumes reach a level where it becomes difficult to process them within the statutory timeframe we suggest it is worth considering delegating this power to the OIO .

We would not recommend delegating this decision to the Minister that is responsible for the national interest test. We consider that this would place too significant a burden on that Minister and would depart from Cabinet’s general position that the national interest test should not be exercised by a Minister that has responsibility for making decisions on another aspect of the same transaction.

Implementation issue 3: Triaging notifications under the emergency power

Problem to be resolved

37. The emergency notification power will significantly expand the Act's scope and the number of transactions subject to potential review. The resource burden associated with this poses two key risks.
- It slows the flow of low risk debt and equity finance needed to support New Zealand businesses during this period of economic disruption, with potentially significant economic costs.
 - It diverts the OIO's (and other agencies responsible for assessing notification's) resources away from transactions more likely to pose national interest concerns.
38. Statutory timeframes for processing notifications (as agreed in T2020/914, with additional detail in Part One of this report) will help manage these risks. However, these timeframes will be difficult to achieve without clear guidance on what notifications the Government considers most likely to raise national interest concerns. This is particularly the case if Decision One is taken by a Minister, rather than delegated to the OIO, as this will add time and additional complexity into the process.

Recommendation

39. We recommend that you agree to a (non-exhaustive) set of economic and national security risk factors that can be used to identify transactions of potential national interest concern. This will support the OIO both in:
- rapidly developing advice on notifications received under the emergency notification power, and
 - advising Ministers on whether to apply the national interest test to ordinary consent applications.
40. With specific reference to the emergency notification power (where the need for guidance is more pressing given high expected transaction volumes), these risk factors would allow:
- For transactions that do not trigger any risk factors: The OIO to recommend the issuance of a Direction Order (no further action).
 - For transactions that triggered one or more risk factors: The OIO to advise which factors it considers are triggered, the brief rationale and recommend that the Minister agree to escalate the notification to a full national interest assessment. Recommending escalation to a full national interest assessment is expected to be rare given the backstop nature of the national interest test and how quickly conducting national interest assessments on a large number of transactions would overwhelm the regulator and other agencies.

[1,33]

42. We propose that these factors, once agreed, would be subject to further refinement (where necessary) ahead of Cabinet consideration. [33]
43. We further propose that you and the Minister of Finance would have delegated authority to amend these factors once the emergency power is in place, to ensure that it is responsive to the types of transactions received and the risks they present.
44. Given some of the criteria are not 'bright line', the OIO will have to exercise judgment about how to apply them, informed by information on your 'risk tolerance'. In some cases these judgments may need to be tested with other agencies, risking delays to the 10-day triage time. The Treasury, the OIO and other agencies are conducting more detailed design work on the criteria to mitigate this risk.
45. Finally, the nature of the criteria reflects that these are intended to inform whether national interest concerns may be present, not to substitute for the in depth analysis that would be needed to determine whether a transaction is contrary to New Zealand's national interest. They also do not prevent Ministers from accounting for other factors when determining whether the national interest test should be applied.

Implementation issue four: Application of the national interest test

Problem to be resolved

46. The national interest test will fundamentally alter the Act's operation. The test is a new, highly discretionary tool with no established precedent on its use (unlike the existing tests for consent). The test was always expected to create significant uncertainty for investors, which will be amplified by the introduction of the emergency notification tool because this will capture many businesses and investors that have never engaged with the Act before.
47. The uncertainty created by the national interest test could impose costs through three primary channels:
 - foreign investors elect not to invest in New Zealand given a perceived risk that their investment will be found contrary to the national interest (despite being benign)
 - foreign investors, particularly those not familiar with the Act, will contact the OIO, other agencies, and Ministers in significant numbers to understand how the Act works. Responding to these requests on an ad hoc basis will divert significant resources from the more important task of assessing notifications and progressing consent applications, and
 - it will increase the time needed by the OIO and other agencies to determine what advice to seek from investors, to develop triage processes, and to efficiently advise the government on transactions. This would slow the OIO's ability to process transactions, with material economic costs.

Recommendation

48. In November 2019, Cabinet agreed that the Minister responsible for the Act (currently the Minister of Finance) could issue guidance on the matters likely to be considered when determining whether a transaction is contrary to New Zealand's national interest.

49. To resolve the potential risks discussed above, we recommend that the Government publicly issue such guidance at the same time that the COVID Bill is introduced to Parliament. This will increase investor certainty and provide the OIO with a clear framework for operationalising the test. It is consistent with the approach taken by Australia in respect of their national interest test⁴ and supports confidence in their foreign investment regime (even with decades of decisions precedent).
50. A draft of the proposed guidance is at Appendix 3. In general terms, it states that the following matters would always be central to the Government's assessment of whether a transaction is consistent with New Zealand's national interest:
- whether the investment poses risks to New Zealand's national security, public order, or international relations,
 - whether the investment would reduce competition within a sector or across sectors (for example, vertical integration could reduce the supply of goods at current prices to competitor firms),
 - whether the investment would have a negative economic or social impact (for example, the investment would result in significant loss of jobs),
 - whether the investment is aligned with New Zealand's values or is consistent with broader policy settings (for example, the Government's economic plan or environmental policies), and
 - whether the investor is of the right character and capability to invest in New Zealand.
51. The guidance also proposes that, for the period that the COVID-19 pandemic and its associated economic effects continue to have a significant impact on New Zealand, the Government would also consider whether the target business is in financial distress. This reflects that:
- businesses in financial distress will likely be more receptive to foreign investment and more vulnerable to foreign acquisition, even where that may pose national security or other material risks, and
 - the acquisition of such businesses will likely be at a price that does not reflect their fundamental value to New Zealand (that is, value including positive externalities that the business may generate for the community).
52. In respect of foreign government investors, the guidance also prescribes a range of factors that would inform whether foreign government involvement does or does not pose any risks relative to a non-government investor. That is:
- the extent to which the investor operates on an arm's length and commercial basis from the relevant government
 - the investor's governance arrangements and prospective governance arrangements for the relevant investment
 - the existence of any other shareholders or partners in the investment
 - whether the target entity will be, or will remain, listed on a New Zealand financial market

⁴ See: <https://firb.gov.au/guidance-resources/policy-documents>

- the extent to which the investment would grant the relevant government control over, or access to, the underlying asset, and
 - the share of the entity that would remain owned by non-associated investors if the transaction was to proceed.
53. These factors are deliberately set without a high degree of specificity. The national interest test's strength over a more prescriptive test is that it allows transactions to be considered holistically on a case-by-case basis, whereas a rigid test could result in valuable investments being declined. While the formulation of guidance is not as critical to achieving this outcome as the specific legislative drafting, we nevertheless consider that the recommended approach balances the need to provide certainty to investors while preserving Ministers' flexibility.
54. Finally, recognising that this guidance may need to change to respond to the particular types of transactions and risks that present themselves under the emergency power, we recommend that you seek Cabinet agreement to the Minister of Finance and yourself (in your capacity as Associate Minister of Finance) having the ability to update this guidance as necessary.

Implementation issue five: Managing transactions during the election period

Problem to be resolved

55. The 2020 General Election is scheduled to be held on 19 September. From this date there will be a period during which the government is constrained by caretaker conventions. In general terms, during this period:
- if it is not yet clear who will form the next government, the Executive can continue to implement policy determined before the start of the caretaker period, but should consult with other political parties on significant policy decisions, or
 - if it is clear who will form the next government (but they have not yet been appointed), the Executive should act on the advice of the incoming government on matters of significance that cannot be delayed until the new government formally takes office.
56. There is a high likelihood that during this period the Government will be processing, and continue to receive, applications for consent and notifications under the emergency power that relate to urgent transactions necessary to ensure the viability of New Zealand businesses. It is critical that these transactions can continue to be processed during the caretaker period.

Recommendation

57. In accordance with the caretaker convention, Ministers (or the regulator on delegation) can continue to make decisions under the Act, but significant decisions (for example, decisions to block a transaction on national interest grounds) should be made in consultation with other political parties or on the advice of the incoming government (as relevant).
58. In the period leading up to the general election, there is no formal constraint on Ministers continuing to make decisions under the Act.

Part three: Cabinet paper and next steps

59. The decisions you have made relating to the COVID response Bill (including those recommended here) and the non-urgent modified Phase Two reform Bill are reflected in a draft Cabinet paper attached at appendix 4.
60. As previously discussed with your office, the paper seeks policy approvals at the same time as you seek approval to introduce the Bill, given the urgency of the reforms. The Cabinet paper notes that officials have been unable to make a full assessment of the proposals against the normal criteria (eg, the Privacy Act and the Legislation Guidelines). However, given that design of the reform is largely based around the Phase Two changes, previously agreed to by Cabinet, we are confident that the risk of material non-compliance is low.
61. We seek your feedback on the draft Cabinet paper by the morning of Tuesday 28 April. This will enable you to meet the following recommended next steps.
 - i. Wednesday 29 April: we provide you with an updated version of the paper, alongside the COVID Bill, for consultation with your Ministerial colleagues.
 - ii. Friday 1 May: comments from your Ministerial colleagues are due.
 - iii. Monday 4 May: we provide you with a revised Cabinet paper and Bill responding to Ministerial feedback. You approve the final paper, and it is lodged, late, with the Cabinet Economic Development Committee (DEV).
 - iv. 6 May: DEV considers the policy and Bill.
 - v. 11 May: Cabinet approves the policy and Bill for introduction.

[1,36]

Delegations

64. You have agreed that the emergency power operate for an initial period of 90 days from commencement. [1,36]

The Cabinet paper proposes that the Minister of Foreign Affairs, Minister of Finance and you be delegated authority:

- i. to determine the process and criteria for review of the emergency notification power, and
- ii. to review the power every 90 days to determine whether those criteria continue to be met.

Communications materials to support announcement

65. We are preparing communications material to publish on the Treasury website to support the introduction of the COVID Bill. Drafts of this material will be provided to your office for comment. We consider publication of this material important because, these proposals have not been subject to consultation, and the speed at which they will commence.
66. We also plan to publicly release all advice provided by the Treasury to you on the reforms of the Act after the introduction of the Bill (subject to redactions consistent with those allowed under the Official Information Act). We are working with your office on the timeframe and process for this and will consult all relevant agencies on any potential redactions.

Appendix 1: Matters to be included in ‘urgent’ and ‘non-urgent’ Bill and indicative commencement timing

67. This Appendix provides officials’ view on those parts of the Phase Two reform Bill that should be passed [33] (Table 1) and those that should not (Table 2). Table 1 also includes the policy decisions taken in TR2020/914.

68. [33] as these matters respond to the pressures presented by COVID-19 they will need to come into effect faster than envisaged under the Phase Two reform Bill. Table 1 includes indicative commencement timing for those matters included in the urgent COVID Bill.

Table 1: Matters to be included in ‘urgent’ COVID Bill, and indicative commencement timing

Provision/reform	Justification	Commencement
<i>Reforms from Phase Two reform Bill</i>		
National interest test and definitions of strategically important businesses	Necessary to respond to economic and security risks in depressed economic environment.	Two weeks after Royal Assent
Call in power (to the extent necessary to give effect to new emergency notification regime) and related national security and public order management tools, including all information sharing provisions.	Necessary to respond to security risks in depressed economic environment.	Two weeks after Royal Assent
Enhanced enforcement powers	Necessary to respond to economic and security risks in depressed economic environment.	Two weeks after Royal Assent
New Ministerial delegation provisions	Support operation of the above (and new temporary emergency power for transactions worth less than \$100 million).	Two weeks after Royal Assent
Protection of classified security information.	Support operation of the above (and new temporary emergency power for transactions worth less than \$100 million).	Two weeks after Royal Assent
Clarify negative impacts cannot be considered in benefits test	Streamline and clarify existing benefit test. Will clarify that negative impacts can only be considered in respect of investments involving extraction of water for bottling or in bulk for human consumption.	Two weeks after Royal Assent
New investor test (but not repeat investor process)	Streamlines low risk investments to support resilience and recovery.	12 months or by Order in Council

Provision/reform	Justification	Commencement
Remove Sensitive Adjoining Land	Removes low risk investments from consent requirements to support businesses. Sensitive adjoining land accounts for around 16 per cent of all consent applications and removing these transactions from the Act will support businesses raising capital and the regulator in prioritising its resources.	Two weeks after Royal Assent
Clarify periodic leases don't need consent	Removes low risk investments from consent requirements to support businesses.	Two weeks after Royal Assent
Change definition of overseas person	Removes low risk investments from consent requirements to support businesses.	Two weeks after Royal Assent
Change 'tipping point' for investments in listed entities	Removes low risk investments from consent requirements to support businesses.	Two weeks after Royal Assent
Exemption making powers	Critical to ensuring that low risk transactions (such as Residential Mortgage Obligations – a RBNZ regulated securitised asset) and low risk entities can be exempted to support resilience and recovery.	Two weeks after Royal Assent (with new exemptions to be included in Regulations)
<i>New COVID response reforms</i>		
Temporary emergency power	Necessary to respond to economic and security risks in depressed economic environment.	Two weeks after Royal Assent
Timeframes for emergency power	Support implementation and investor confidence in the emergency power	Two weeks after Royal Assent
Exemption making powers for low risk transactions (loans and securitisations)	Necessary to respond to economic and security risks in depressed economic environment.	Two weeks after Royal Assent (with new exemptions to be included in Regulations)
Temporary regulation making powers	Necessary to respond to economic and security risks in depressed economic environment.	Two weeks after Royal Assent

Table 2: Matters to be included in ‘non-urgent’ Bill

Provision/reform	Justification
Farmland advertising	More rigorous requirements will likely result in transaction delays. More broadly, these changes do not respond to particular COVID-19 risks.
Heightened consent criteria for farmland	These changes do not respond to particular COVID-19 risks. Also, these provisions are already largely achieved through the Ministerial Directive Letter.
Enhanced tax disclosures with applications to acquire significant business assets	Serves as a potential disincentive to investment in New Zealand. More broadly, these changes do not respond to particular COVID-19 risks.
Special land changes (that is, the Crown’s acquisition of fresh and seawater areas)	Serves as a potential disincentive to investment in New Zealand and is likely to delay transactions that include ‘special land’. More broadly, these changes do not respond to particular COVID-19 risks.
Minor and technical amendments to provisions relating to consent requirements for residential land	Does not address particular COVID-19 risks.
Benefits test changes (and analogous changes to Fisheries Act)	Does not respond to particular COVID-19 risks.
Repeat investor process	Significant operational change needed to introduce new process. Not required to respond to COVID-19 risks.
Remove short term leases	Significant complexity associated with new rules place additional burden on investors and have greater risk of transitional issues.
Timeframes for ordinary consent applications	Due to increased volumes, more difficult to meet during COVID-19. Also not scheduled to come into effect until one year post Royal assent, reducing case for urgency.

[1,33]

⁵ [1,33]

[1,33]

[1,33]

[1,33]

Appendix 3: New Zealand's foreign investment policy

This appendix sets out proposed public guidance on New Zealand's foreign investment policy, when the national interest test may be applied to transactions subject to the Act (including notifications received under the emergency power), as well as factors that the Government will consider as part of any national interest test assessment.

[1,33] this guidance will support the OIO and investors in their understanding and application of the Act. It will not, however, constrain the government's ability to consider other matters as relevant when determining whether a transaction is contrary to New Zealand's national interest.

The national interest test grants Ministers wide discretion to determine what constitutes the national interest on a case-by-case basis, a critical feature of the test that should not be undermined.

New Zealand's foreign investment policy

The New Zealand government welcomes sustainable, productive, and inclusive overseas investment. Overseas investment supports job creation, the creation and adoption of new technologies, increases human capital, and grants New Zealand more diverse international connections, including access to global distribution networks and markets. Without foreign investment, New Zealanders' living standards would be lower.

At the same time, the Government recognises that foreign investment can pose risks. Foreign investment can take ownership and control of economic activity out of New Zealand and high levels of foreign ownership of sensitive New Zealand assets can conflict with a view that New Zealanders should own or control those assets. It can also, in extreme cases, present opportunities to undermine our national security.

The Overseas Investment Act 2005 (the Act) is New Zealand's principal tool for regulating foreign investment. It seeks to balance the need to support high-quality investment, while ensuring that the government has tools to manage risks. The Act does so by providing an enduring framework for screening foreign investments in sensitive assets to help ensure that they benefit New Zealand and are consistent with New Zealand's national interest.

This information is general in nature and is not a substitute for legal advice. Foreign investors should ensure that they understand New Zealand's foreign investment screening regime and ensure they comply with the law, or risk the imposition of significant penalties.

How the Overseas Investment Act 2005 operates

The Act requires overseas persons⁷ to get consent before acquiring sensitive land,⁸ significant business assets or fishing quota. This requirement reflects the Act's purpose: that it is a privilege for overseas persons to own sensitive New Zealand assets.

The test that the overseas person must satisfy to obtain consent depends on the type of sensitive asset being acquired. In general terms, if:

- *Significant business assets* are being acquired, the overseas person must satisfy the investor test, which focuses on the characteristics of the overseas person.
- *Sensitive land* is being acquired, the overseas person must satisfy the investor test and the benefit to New Zealand test, which requires the overseas person to deliver certain benefits to New Zealand, unless:
 - *Residential land* is being acquired: then there are a number of tests that largely focus on the land's use. For example, a person with a residence class visa can get consent to acquire residential land (that is not sensitive for any reasons other than it being residential) if they commit to becoming a tax resident, spending the majority of each year in New Zealand, and using the property as their primary residence, or
 - *Forestry activities* will occur on the sensitive land: then the overseas person must satisfy the investor test and one of two streamlined benefits tests or the general benefits test.
- *Fishing quota* is being acquired, the overseas person must satisfy the investor test and a national interest test that is similar to the benefits test but has some elements specific to fisheries.

As of May 2020, all investments in sensitive assets (excluding investments in residential but not otherwise sensitive land) are also potentially subject to review under the national interest test. This backstop test ensures that investments are in New Zealand's national interest, with the New Zealand government committed – where possible – to working with investors to ensure that the national interest is protected. It will always apply to investments in *strategically important business assets* and investments with a significant foreign government interest, but may also be applied to other transactions at Minister's discretion. Additional information on this test is provided below.

From May 2021, investments in *strategically important business assets*, where consent would not normally be required (for example, because the business is worth less than \$100 million), may be subject to review under the national security and public order call in power. These are referred to as 'call in transactions'.

⁷ Broadly speaking, non-New Zealand citizens and residents, and bodies corporate, trusts and other unincorporated entities that are more than 25 owned or controlled by overseas persons.

⁸ This includes non-urban land over five hectares, residential land and lifestyle land, and land adjoining sensitive areas such as the foreshore.

The national security and public order call in power – expected to be rarely used – allows the government to block, impose conditions on, or order disposal of call in transactions that pose a significant risk to New Zealand’s national security or public order. Additional information on this power is provided below.

The Overseas Investment Office (‘OIO’) is the Act’s regulator. It makes decisions on some applications and advises decision-making Ministers on others.

The national interest test

The national interest test is a ‘backstop’ tool to manage significant risks associated with transactions reviewed under the Act (except for call in transactions). It will be used rarely and only where necessary to protect New Zealand’s core national interests. The test’s, and the Government’s, starting point is that investment is in New Zealand’s national interest.

Applying the test means that the Minister responsible for the Act (ordinarily the Minister of Finance) can consider the potential risks of a transaction to New Zealand’s national interest when deciding whether to grant consent. If a transaction is determined to be contrary to the national interest, consent may be declined, or conditions imposed to mitigate any risks. This test will always apply to investments that warrant greater scrutiny:

- i. where a foreign government or its associates would hold a 10 per cent or greater interest in the asset,
- ii. investments that are found to present national security risks, and
- iii. investments in certain specified strategically important industries and high-risk critical national infrastructure. That is:
 - iv. significant ports and airports
 - v. electricity generation and distribution businesses
 - vi. water infrastructure (broadly, drinking water, waste water, storm water networks, and irrigation schemes)
 - vii. telecommunications infrastructure
 - viii. media entities that have an impact on New Zealand’s media plurality
 - ix. entities with access to, or control over, dual-use or military technology
 - x. critical direct suppliers to the New Zealand Defence Force, Government Communications Security Bureau and the New Zealand Security Intelligence Service,
 - xi. systemically-important financial institutions and market infrastructure (for example, payments systems), and
 - xii. any other category of strategically important business assets prescribed in the Overseas Investment Regulations.

In rare cases, the Government could apply the national interest test to other investments that pose material risks. This would be at the discretion of the Minister responsible for the Act and, if a decision was taken to apply the test, investors would be notified as soon as possible. Potential factors that could trigger escalation to the national interest test include:

- foreign government or associated involvement that was below the 10 per cent threshold, but granted that government (and/or its associates) disproportionate levels of access or control to sensitive New Zealand assets,⁹
- investments that would grant an investor significant market power within an industry or result in vertical integration of a supply chain, and
- potential inconsistency with Government objectives, for example environmental or economic objectives.

Additional detail on what constitutes strategically important business assets can be found in the Overseas Investment Regulations 2005.

How the national interest test is applied

The national interest, and what would be contrary to it, is not defined in the Act. Instead, the Act grants the Minister responsible for the Act broad discretion to decide on a case-by-case basis whether a prospective investment would be contrary to the national interest. This has significant advantages over a more rigid test, that, for example focussed on investments in certain assets or asset classes. In particular, it:

- allows New Zealand's interests to be protected, without establishing a framework that would likely result in valuable investments being declined; and
- ensures that the Overseas Investment Act is an enduring piece of legislation that can easily respond to changes in the global risk environment, community concerns about foreign investment, and government priorities.

In applying the national interest test, the Government considers a range of factors, the relative importance of which can vary depending on the nature, and likely impact, of the investment. For example:

- Investments in large businesses, businesses that have significant market share, or businesses that hold unique assets or operate in particularly sensitive areas of the economy (for example, dual-use or military technology, the health sector, and other critical national infrastructures) may raise more national interest concerns than investments in other types of businesses.
- Investments that enhance economic prosperity by, for example, increasing New Zealand's productivity, bringing in new technologies, or creating jobs, are less likely to be contrary to New Zealand's national interest.

⁹ Disproportionate access to, or control, can include: access to non-public information, membership or observer rights on the board, the power to control board composition, and any involvement other than through the exercise of ordinary voting rights in the target entity's decision-making.

Across all investments, however, there are a number of factors that are generally considered when determining whether an investment is contrary to New Zealand's national interest:

- *National security, public order and international relations:* The Government considers the extent to which investments pose risks to New Zealand's national security, public order, or international relations. Any assessment of national security risks is informed by advice from the New Zealand Security Intelligence Service, Government Communications Security Bureau, with public order advice coming from a range of agencies where relevant (for example, the Ministry of Culture and Heritage in respect of transactions in the media sector). Advice on international relations is provided by the Ministry of Foreign Affairs and Trade.
- *Competition:* Diverse ownership within and across sectors supports competition and economic growth. In assessing a prospective investment, the Government therefore considers whether an investment may grant the investor market power either within New Zealand (for example, significant market share in one business segment or ownership of a vertical supply chain) or globally (if, for example, an investment may allow an investor to control the global supply of a product or service).

This assessment is entirely separate to any prospective investigation of any transaction by the Commerce Commission, which enforces competition laws and has regulatory responsibilities in a number of specific sectors. This reflects the Act's specific purpose and objectives.

- *Economic and social impact:* The Government considers an investment's likely impact on the New Zealand economy and society, and the extent to which any benefits to New Zealand are commensurate with the sensitivity of the asset being acquired. The benefit to New Zealand test, which provides a formal framework for this kind of assessment in respect of sensitive land, serves as a guide for the types of matters the Government is likely to consider when considering the economic and social impact of investments in business assets.

Additional detail on the benefit to New Zealand test can be found here on the Land Information New Zealand website [link to come once published].

- *Alignment with New Zealand's values and interests, and broader policy settings:* The Government will consider the extent to which an investment supports broader Government priorities and policy settings and New Zealand's values. This includes considering an investment's alignment with the Government's economic plan, such as whether it will support thriving and sustainable regions or New Zealand's transition to a clean, green and carbon neutral economy.
- *Character of the investor:* The investor test is the government's primary tool for determining an overseas person's suitability to invest in New Zealand. However, that test is carefully calibrated to minimise that test's burden on the average investor and therefore is focussed on the types of risks most likely to be relevant to most prospective investors. The national interest test grants the Government broader discretion, where necessary, to assess an investor's character and determine whether they are likely to comply with New Zealand's laws, including the conditions of the Act, or whether they have any characteristics otherwise rendering them unsuitable to invest in New Zealand (for example, are subject to international sanctions).

For the duration that the COVID-19 pandemic and its associated economic effects continue to have a significant impact in New Zealand, in applying the national interest test, the Government would also consider whether the target business is in financial distress. In addition to supporting their shareholders and employees, many New Zealand businesses support New Zealanders' wellbeing more broadly through, for example, their intellectual property, supply-chain linkages, or international connections. The foreign acquisition of such businesses at prices that deviate from their fundamental pre-COVID-19 valuations and risk the loss of these positive externalities may therefore not be consistent with New Zealand's national interest. Wherever possible the Government remains committed to such investments proceeding, with or without conditions, to ensure business viability.

Assessing foreign government investors

[1]

- all investments ordinarily screened under the Act that would result in a foreign government or their associates holding a 10 per cent or greater interest in sensitive New Zealand assets are always subject to the national interest test; and
- foreign government involvement at lower levels, but where that investor has disproportionate access or control to sensitive New Zealand assets, may be a factor that triggers the discretionary application of the national interest test.

[1]

In assessing whether a foreign government investor poses risks to New Zealand's national interest, in addition to the matters described above, the Government will generally consider:

- the extent to which the investor operates on an arm's length and commercial basis from the relevant government (entities operating at arm's length from the relevant foreign government are likely to pose fewer risks),
- the investor's governance arrangements and prospective governance arrangements for the relevant investment,
- the existence of any other shareholders or partners in the investment,
- whether the target entity will be, or will remain, listed on a New Zealand financial market (additional regulations that apply to listed entities mean that investments in listed entities are generally less likely to pose significant risks),
- the extent to which the investment would grant the relevant government control over, or access to, the underlying asset (for example, investments with no control rights are less likely to pose risks than those that grant a foreign government significant control of strategically important business assets), and

- the share of the entity that would remain owned by non-associated investors if the transaction was to proceed (transactions where non-associated investors will retain a significant degree of control are less likely to pose national interest concerns).

Appendix 4: Draft Cabinet paper

Attached.