

The Treasury

Reform of the Overseas Investment Act Information Release

May 2020

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- [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
- [36] 9(2)(h) - to maintain legal professional privilege
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Treasury Report: Overseas Investment (COVID-19 Emergency Measures) Amendment Bill: Additional Details and Parliamentary Schedule

Date:	1 May 2020	Report No:	T2020/1246
		File Number:	IM-5-8-3-9 (COVID Response Reforms)

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 propose a new schedule for parliamentary consideration of the Overseas Investment (COVID-19 Emergency Measures) Amendment Bill, which includes a Select Committee report back by 25 May (see para 5).</p> <p>Agree to either implement certain liberalising changes in the COVID-19 Emergency Measures Bill as standing consents prior to the passage of the non-urgent Other Measures Bill, or as carve outs or exemptions.</p> <p>Note the feedback received from legal experts on the Overseas Investment (COVID-19 Emergency Measures) Amendment Bill.</p> <p>Sign the letters (Annex 1) thanking the legal experts for their feedback.</p>	4 May 2020

Contact for telephone discussion (if required)

Name	Position	Telephone	1st Contact
[39]	[39]	[39]	N/A (mob) ✓
Chris Nees	Principal Advisor, International	[39]	[23]

Minister's Office actions (if required)

Return the signed report to the Treasury by 4 May 2020.

Send the signed letters to the legal experts who provided feedback on the Bill.

Note any
feedback on
the quality of
the report

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Enclosure: Yes, draft letter attached

Treasury Report: Overseas Investment (COVID-19 Emergency Measures) Amendment Bill: Additional details and Parliamentary Schedule

Purpose of Report

- 1. This report is to seek your (Hon David Parker) agreement to the schedule for parliamentary consideration of the Overseas Investment (COVID-19 Emergency Measures) Amendment Bill, including a week-long Select Committee process.
- 2. We also seek your agreement to treat certain liberalising changes as standing consents, rather than carve outs or exemptions.
- 3. Finally, we have provided the feedback from legal experts on certain aspects of the draft Bills and provide you with a draft letter thanking them for their assistance.
- 4. This briefing is provided to the Minister of Finance to support his understanding of the range of measures being taken across government to respond to COVID-19.

Schedule

New schedule for Parliamentary consideration

- 5. From discussions with your office, we understand your preference is that the Overseas Investment (COVID-19 Emergency Measures) Amendment Bill (the Emergency Bill) is subject to a short Select Committee process. This will require a change to the previously noted schedule. We recommend that you propose the following schedule for Parliamentary consideration:

Date	Task
Wednesday 6 May	DEV considers the policy and the Bills
Monday 11 May	Cabinet approves the policy and Bills for introduction
[33]	

Additional time for drafting Regulations

- 6. We propose separating the drafting of the Regulations from the Bill. This will allow us time to address significant feedback from external law firms on the regulations, and focus on ensuring the Bill is in good order.

7. Extending the regulation drafting period will not delay the announcement or implementation of these urgent reforms. Including a Select Committee process in the schedule, means that there is time for the Regulations to be considered while the Legislation passes through the House.
8. The Select Committee would also be provided with a summary of the regulations, for their information, as they consider the primary legislation.

[33]

10. Note that the Cabinet Paper *COVID-19 Economic Response: reform of the Overseas Investment Act* seeks agreement to delegate you authority to make further policy decisions, including those relevant to the Regulation drafting process.

Final policy decisions

Implementing certain liberalising changes as standing consents, rather than carve outs or exemptions

11. You previously agreed to exempt two new classes of transactions from screening and to bring forward certain liberalising changes agreed in the Phase 2 Reforms. This will encourage low risk lending and investment activity and mitigate some of the risks that overseas investors will have a negative perception of New Zealand's investment settings [T2020/1129 refers]. The low risk transactions subject to liberalisation in the COVID-19 Response Bill and Regulations include:
 - a Removing fundamentally New Zealand companies from the regime (Bill),
 - b No longer screening certain types of sensitive adjoining land (Bill),
 - c the issuance of loans by registered banks (Regulations),
 - d the acquisition of parcels of securitised loans by overseas persons (Regulations),
 - e transactions by fundamentally NZ entities and managed investment schemes (Regulations),
 - f narrowing the categories of sensitive adjoining land subject to consent requirements (Regulations), and
 - g improving exemptions for incremental investments (Regulations).
12. In T2020/1129, we noted that we were working with the Ministry of Foreign Affairs and Trade (MFAT) and PCO on whether we should frame these changes as standing consents, rather than exemptions or carve outs, for the purposes of the Emergency Measures Bill.

13. [36]
14. [36] the liberalising changes in the Emergency Measures Bill (that is, changes to remove fundamentally New Zealand entities and certain types of sensitive adjoining land) could be implemented as standing consents, rather than exemptions or carve outs. As a result these transactions will remain within the scope of the screening regime, but will be subject to no or reduced screening requirements on a temporary basis. The non-urgent Other Measures Bill would, if passed, make these exemptions permanent.
15. The main advantage of this approach is that it would allow for fuller parliamentary and public scrutiny and potential change to these provisions, before they become permanent through the non-urgent Other Measures Bill. However, there will be some additional implementation costs involved in the standing consent approach, but the effect will be largely the same for investors (those that would have been carved out of the regime will instead receive an automatic consent, and those that would have had to apply for an exemption will instead apply for a standing consent).
16. We will separately assess whether the liberalising changes made via regulations should be made through a standing consent or permanent exemptions.
17. [36]
18. [36]

Land Information New Zealand Comment

19. LINZ's view is that drafting the liberalising changes in the Emergency Response Bill as standing consents, rather than carve outs or exemptions may significantly increase the cost, time and resource needed to implement and introduce uncertainty and confusion for investors, their advisors, and vendors/business owners.
20. The risk arises from introducing an entirely new concept to the Act, one which will be unfamiliar to the regulator and to investors and their advisors. LINZ considers that the uncertainty created by the approach will result in a significantly greater need to educate investors, lawyers and vendors/business owners, and significantly more queries to LINZ as a result. This will add to the significant implementation costs already to be incurred by the regulator as a result of the emergency power and national interest test.
21. The implementation costs primarily engage the OIO's personnel resources. LINZ anticipates the engagement with investors and their lawyers will require sufficiently senior staff, the same staff who are required to effectively implement the other changes in the COVID-19 Response Bill. It will be challenging to train new personnel to the required standard to effectively and confidently support these changes, if they are

¹ [36]

implemented as standing consents within the already tight implementation timeframe. Without the drafting having been completed, it is challenging for LINZ to accurately evaluate the impact this shift in approach will mean for the implementation programme and ongoing delivery of the regime.

22. LINZ is concerned that there is insufficient time available to effectively draft the changes for a standing consent model and limit the impact of unintended consequences. The 'carve-out and exemption' approach gives more legislative scope to deliver the intended changes. The changes would be drafted in a manner consistent with the rest of the Overseas Investment Act, and Phase 2 Reform Bill significantly reducing the likelihood of unintended consequences. However, the standing consent approach introduces an entirely new concept to the Act, [34]
This introduces much greater risk of unintended consequences, especially as lawyers and investors will not have existing precedent to guide their decisions. Time would be needed at the drafting stage to mitigate these risks and ensure the Bill delivers on its policy objectives.
23. LINZ will do its best to implement the changes regardless of the decision but the standing consent approach will significantly complicate this, and is likely to impact on the implementation of the other changes.

Feedback from legal experts

24. To mitigate the risks of rapidly drafted legislation, you agreed that we could confidentially consult on a draft Bill with technical experts. We engaged with six legal experts and consequently, are improving the Bill's clarity, particularly around the process and likely outcomes when a notification is made under the emergency power.
25. Experts raised other concerns that are already mitigated by your broader policy decisions. In particular, your decision to publish guidance on how the government will apply the national interest test will mitigate concerns about the uncertainty a broad, undefined test creates. Your decision to have a 10-day triage period aligns with experts expectations for the time it should take for a low-risk application to be assessed.
26. Experts were consistently concerned that the emergency power would unnecessarily capture a large number of very small, low risk transactions. Experts were concerned that this would have a chilling effect on productive investment and result in an over-capacity regulator. To mitigate these risks most experts recommended only transactions over a certain value should be captured to mitigate these risks (thresholds of \$10m or \$25m were suggested).
27. The trade-off with such a threshold is reduced risk coverage. As such, you previously decided that the emergency power should have no threshold (T2020/914), and that these risks could be mitigated through strict triaging criteria, statutory timeframes, and public guidance on the application of the national interest test. The thresholds could be changed later on through regulations if appropriate.
28. On the Regulations, the experts raised a number of significant concerns about the unintended consequences of some, and that others are too narrow. This is one factor why we seek agreement to separate the Regulations drafting from the Bill.
29. A draft letter thanking the legal experts for their feedback is provided (Annex 1) for you to sign.

Recommended Action

We recommend that you:

Timing of the Parliamentary process

- a **agree** to the schedule in paragraph 5 for the Parliamentary consideration of the Overseas Investment (COVID-19 Emergency Measures) Amendment Bill, which includes a deadline of 25 May for the Select Committee to report back.

Agree/disagree.

- b **agree** to separate the drafting of the associated regulations from the Bill, to provide more time to finalise details, and to bring them into force alongside the Emergency Bill.

Agree/disagree.

How to implement certain liberalising changes

[36]

- g **note** Land Information New Zealand's advice is that drafting the changes as temporary standing consents, rather than as permanent carve outs or exemptions in the Emergency Measures Bill may significantly increase the cost, time and resource needed to implement and introduce uncertainty and confusion for investors, their advisors, and vendors/business owners.

Either

- h **agree** to implement certain liberalising changes in the Emergency Measures Bill as standing consents, rather than carve outs or exemptions, with these standing consents becoming permanent exemptions with the passage of the non-urgent Other Measures Bill.

Agree/disagree.

OR (Land Information New Zealand recommends)

- i **agree** to draft liberalising changes in the Emergency Measures Bill (that is, changes to remove fundamentally New Zealand entities and certain sensitive adjoining land from the regime) as permanent carve outs or exemptions rather than as standing consents.

Agree/disagree.

- j **Note** that if you agree to recommendation i, either the Cabinet paper provided to your office on 1 May 2020 will need to be updated to reflect this or you could reflect the change at the meeting orally. Treasury will engage with your office on this matter, if required.

Noted.

- k [36]

However,
this would delay the economic benefits that these changes will deliver New Zealand businesses.

Noted.

- l [36]

Feedback from legal experts

m **note** that, with your agreement, we confidentially consulted on aspects of the draft Emergency Measures Bill with six legal experts, and a summary of their feedback is included in this paper. We are using their feedback to improve the Emergency Measures Bill's clarity, particularly around the Regulations and the process and likely outcomes when a notification is made under the emergency power.

Noted.

n **Sign** letters (Annex 1) thanking the legal experts who provided feedback on the draft Emergency Bill.

Signed.

Chris Nees
Principal Advisor, International

Hon David Parker
Associate Minister of Finance

Annex 1: Draft letter

Dear [name of expert]

I write to thank you for your time and work to provide feedback to the Treasury on parts of a draft OIA Bill and Regulations relating to emergency measures responding to the economic effects of COVID-19.

I appreciate you have done this under significant time constraints and made yourself available at short notice. Your input has helped to make the drafting more practical and workable which is essential for ensuring the investor community understands the new provisions.

I look forward to your ongoing engagement on the Government's OIA reform process, both on these emergency powers and the wider reform package.

Yours sincerely,

Hon. David Parker
Associate Minister of Finance