

Urgent changes to the Overseas Investment Act 2005

In response to COVID-19, the Government has announced urgent changes to the Overseas Investment Act (Act).

As part of its 'phase 2' reforms, the Government had been progressing a range of changes to the Act under the Overseas Investment Bill (No. 2) 2020 (**No. 2 Bill**) which was introduced to Parliament on 19 March 2020.

However, given the economic circumstances created by COVID-19, the Government has decided to urgently progress some of the changes proposed in the No.2 Bill, as well introducing a new compulsory (but temporary) notification requirement which is set to apply to a large number of transactions that would not ordinarily be captured by the Act.

The notification requirement will provide the Government with the ability to screen (and potentially impose conditions on or block) transactions that are contrary to New Zealand's national interest. This is designed to prevent predatory foreign investors acquiring New Zealand businesses made vulnerable by current economic conditions – and follows similar actions taken by Governments globally, including in Australia, Spain and Germany.

The No.2 Bill has accordingly been replaced with two new bills:

- the Overseas Investment (Urgent Measures) Amendment Bill (**Urgent Measures Bill**) – to introduce the new temporary notification regime as well as certain other key aspects of the No.2 Bill; and
- the Overseas Investment Amendment Bill (No. 3) (**No. 3 Bill**) – to introduce the remaining provisions in the No. 2 Bill that are not being fast tracked under the Urgent Measures Bill.

The Urgent Measures Bill is expected to pass in mid-June 2020 while the No. 3 Bill will go through the normal legislative process and is expected to pass within 12 months.

Below is a summary of the key changes proposed under the Urgent Measures Bill:

Compulsory notification

The compulsory notification regime will require overseas investors to notify the Overseas Investment Office (**OIO**) of any investment not normally subject to screening under the Act, in circumstances where the transaction results in the overseas investor:

- acquiring a 25% or more interest in a business;
- increasing an existing interest in a business to, or (as the case requires) beyond, 50%, 75% or 100%; or
- acquiring 25% or more of a business' assets, (including goodwill and other intangible assets).

Importantly, the notification requirement will apply **regardless of the dollar value** of a transaction, resulting in a far greater proportion of transactions being subject to screening under the Act.

The notification requirement sits outside the traditional consent process. Any overseas investor who is captured is required to lodge a short form document (2 to 5 pages) with the OIO, outlining details of the transaction. Failure to notify the OIO could lead to the transaction being unwound.

Once notified, the Minister is required to determine whether the transaction gives rise to, or is likely to give rise to, risks associated with national security, public order or New Zealand's national interest generally. The Minister then has the power to impose conditions on, or block, the transaction.

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The Government has indicated that the temporary notification regime is not expected to block a large number of transactions and most transactions are expected to be approved within 10 working days of notification. If a detailed review is required, the Minister will have a further 30 working days to consider the investment, with the ability to extend this timeframe by a further 30 working days.

This new notification requirement will be reviewed every 90 days, and is intended to remain in place only as long as is necessary to protect vulnerable New Zealand businesses under strain due to COVID-19.

These changes will capture a large number of acquisitions and capital raisings that would not normally be screened under the Act, and it will accordingly be very important to be aware of, and to comply with, the new requirements. Specifically, we recommend considering whether agreements entered into in relation to transactions that could be captured be made expressly conditional on the transaction passing the screening test.

National interest test

The "national interest test" originally proposed in the No. 2 Bill will be brought forward. Under this test the Minister may deny consent to an overseas investment if it is considered contrary to New Zealand's national interest.

The test will apply to transactions that already require consent under the Act and are of national significance on the basis that they involve:

- foreign government investment; or
- "strategically important businesses" (**SIB**) - SIB are defined in the Urgent Measures Bill and include certain ports and airports, telecommunications and energy infrastructure, water networks (including large irrigation schemes), critical national infrastructure, certain media entities and other strategically important industries.

The Urgent Measures Bill does not specifically set out what factors would need to be considered by the Minister in deciding whether a transaction is contrary to the national interest. However, the recent Cabinet Paper indicates that the following matters will be considered:

- whether the investment poses risks to national security, public order and international relations;
- whether the investment results in the acquisition of a natural monopoly or other business with significant market share;
- the investment's likely economic and social impact;
- the investment's alignment with New Zealand's values and interests and broader policy settings; and
- the character of the investor, including whether it is a foreign government investor.

It is anticipated that further clarity on how the national interest test will be applied will emerge shortly, however, as it stands, the test provides very broad discretion to reject investments and is likely to lead to greater uncertainty for overseas investors. It is our hope (and expectation) that the test will only be used to block a small number of transactions, however, its application remains to be seen.

Call in power

Once the temporary notification scheme has been removed, it will be replaced by the "call-in" power proposed in the No. 2 Bill. This will allow the Government to "call in" and review certain overseas investments in SIB that do not otherwise require OIO consent, but which potentially pose a significant risk to national security and public order. No guidance is provided in the Bill as to what a significant risk to national security and public order is. Any overseas

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investor making an investment in SIB must notify the OIO before the transaction can be completed.

Once a transaction has been reported, there will be a range of powers available to the Minister. These include the ability to block a transaction, or impose conditions.

Investor Test

In a welcome change, the Urgent Measures Bill simplifies the existing investor test. The existing test (which focuses on, among other things, the 'good character' of investors) will be replaced by a much more targeted assessment of an investor's character and capability. The new test will only consider serious proven matters and allegations of serious matters where proceedings have commenced. These changes should provide greater certainty for investors. The business acumen and financial commitment limbs of the investor test will be removed. Tax positions will also now be formally considered. In our view, this is a far more pragmatic and workable regime.

Adjoining land

Certain categories of sensitive land will be removed under the Urgent Measures Bill. This applies mainly to land that is currently considered sensitive solely because it adjoins other types of sensitive land.

Enforcement

Increased enforcement penalties are to be introduced. The maximum corporate fine for non-compliance will increase from \$300,000 to \$10 million. The maximum fine for non-compliant individuals will increase to \$500,000.

Application

The new requirements under the Urgent Measures Bill will only apply to transactions entered into on or after the commencement of the Urgent Measures Bill (which is 14 days after it is passed).

No. 3 Bill

The No. 3 Bill addresses the remaining provisions in the No. 2 Bill that are not being fast tracked under the Urgent Measures Bill. Some of the key changes are as follows:

- heightened benefit test criteria for farm land, and more stringent farm land advertising requirements;
- simplification of the existing "benefit to New Zealand" test;
- an extension of the definition of "overseas persons", with a particular focus upon fundamentally New Zealand entities;
- removing the screening process for leases of less than 10 years (with the exception of residential leases); and
- granting investors the ability to rely on previous meeting the investor test.

Want to know more?

For more information on these changes, please contact our specialist [Overseas Investment Team](#).

The above is accurate as at 18 May 2020.