Departmental Disclosure Statement

Overseas Investment (Urgent Measures) Amendment Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill; and
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by The Treasury.

The Treasury certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

4 May 2020.

Contents

Part One: General Policy Statement

Overseas Investment (Urgent Measures) Amendment Bill

This Bill (the Bill) amends the Overseas Investment Act 2005 (the Act). The Bill contains measures which the Government considers need to be put in place urgently to mitigate the negative economic effects of COVID-19, and to support the subsequent economic recovery. This Bill is one of two Bills that are being introduced as a package to replace and expand upon the Overseas Investment Amendment Bill (No 2), which was introduced on 19 March 2020.

The Bill's purpose, in conjunction with the Overseas Investment Amendment Bill (No 3), is to ensure that risks posed by foreign investment can be managed effectively, while better supporting productive overseas investment by reducing the regulatory burden of the screening process. These changes are consistent with the Act's purpose that it is a privilege for overseas persons to own or control sensitive New Zealand assets. The Bill is an omnibus Bill, introduced under Standing Order 263(a), which amends a number of Acts to achieve the Bill's single broad purpose.

The Bill strengthens how the Act manages risk by—

- introducing a "national interest test", which allows the Minister responsible for the Act to deny consent to any investment ordinarily screened under the Act that is considered to be contrary to New Zealand's national interest. This power has been modelled on the Australian regime, and gives the Minister a broad discretion to consider what is in the national interest in each case. The test will always apply to certain investments that warrant greater scrutiny, such as those in strategically important businesses or with significant foreign government involvement:
- introducing a temporary emergency notification regime, which broadly allows the Government to review transactions not ordinarily screened if they would result in a more than 25 per cent interest in a business or its assets, or increases an existing interest to, or beyond, 50, 75 or 100 per cent. The emergency notification regime empowers the Minister responsible for the Act to impose conditions on, prohibit, or dispose of investments considered contrary to the national interest. The power must be reviewed every 90 days, and will be removed once the COVID-19 pandemic and its associated economic effects no longer continue to have a significant impact in New Zealand:
- introducing a "call-in power", which will replace the emergency notification regime when it is removed and allow the Government to review certain investments in strategically important businesses not ordinarily screened and to impose conditions on, prohibit, or dispose of those investments that pose a significant risk to national security or public order:
- defining the strategically important businesses that the national interest test or call-in power will apply to. In general terms, strategically important businesses are businesses that develop, produce, or maintain military or dual-use technology, are critical direct suppliers to intelligence or security agencies, provide telecommunications infrastructure or services, generate or distribute electricity, are involved in designated ports and airports, are systemically important financial institutions or financial market infrastructures, or are media businesses that have an impact on New Zealand's media plurality. Further,

investments in certain large irrigation schemes will be considered under the national interest test, and investments in businesses that hold or generate certain types of sensitive data (for example, health or financial data) may be reviewed under the call-in power:

- requiring the Minister responsible for the Act to be the decision-making Minister on these matters, given the significance of these investments to New Zealand's interests:
- strengthening the regulator's enforcement tools, to ensure that the Government can appropriately manage a range of breaches of the Act or actions by overseas persons that pose risks to national security and/or public order or are contrary to the national interest (for example, by placing an entity into statutory management): and
- facilitating greater information sharing between agencies, and ensuring that national security information is appropriately managed during court proceedings.

This Bill makes it simpler to make productive investments in New Zealand by reducing the number of lower-risk transactions that must be screened, such as—

- investments in less sensitive land that are only screened because the land adjoins land that is sensitive in its own right (sensitive adjoining land):
- transactions involving fundamentally New Zealand entities:
- small transactions that do not grant an overseas investor any control of sensitive assets: and
- transactions involving residential mortgage obligations, which support financial stability.

This Bill also makes it simpler to make productive investments in New Zealand by simplifying the screening process for the remaining transactions by—

- undertaking more targeted assessments of an investor's character and capability, by only considering serious proven matters, allegations of serious matters where proceedings have begun, and any enforceable undertakings entered into by the investor: and
- allowing for statutory time frames for decisions by the regulator (once regulations are made). The motivations for this include introducing more rigour into the process and frontloading quality control of applications.

This Bill also establishes temporary regulation making powers to manage any potential transitional complexities associated with the introduction of the emergency notification power and other significant changes, which allow:

- exemptions from consent requirements when necessary or desirable to respond to an epidemic in New Zealand: and
- modification or suspension of specified provisions in the Act during the transitional implementation period, where necessary or desirable for the orderly implementation of the Act.

The Bill follows amendments made by the Overseas Investment Amendment Act 2018 (the **amendment Act**). The amendment Act rationalised the screening regime for forestry assets and certain other *profits-à-prendre*, and added a general requirement for overseas persons to obtain consent to acquire residential land.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	**YES**
The below consultation document was prepared for the Overseas Investment Amendment Bill (No 2) which covers the majority of the proposals in this Bill. Consultation document: Reform of the Overseas Investment Act 2005 - Facilitating productive investment that supports New Zealanders' wellbeing, The Treasury, April 2019. https://treasury.govt.nz/publications/consultation/reform-overseas-investment-act-2005. Some of the amendments that were covered in the Overseas Investment Amendment Bill (No 2) are now included in the Overseas Investment Amendment Bill (No 3).	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	**NO**

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	**YES**
A Regulatory Impact Assessment (RIA) was prepared in accordance with the necessary requirements and was submitted at the time approval was sought for the policy relating to the Overseas Investment Amendment Bill (No 2). "Reform of the Overseas Investment Act 2005 – Phase 2", The Treasury, 6 March 2020, issue date 19 March 2020.http://www.treasury.govt.nz/publications/informationreleases/ria Parts of the regulatory impact statement have been withheld under the grounds set out in the Official Information Act 1982. The particular withholding grounds are noted on the RIA. A further RIA has not been prepared as Cabinet has suspended the Regulatory Impact Assessment requirements for Covid-19 response legislation.	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO

The RIA above for the Overseas Investment Amendment Bill (No 2) did not meet the threshold for needing an independent opinion on the quality of the regulatory impact assessment from the Regulatory Impact Assessment Team in the Treasury. An internal panel at the Treasury assessed both the RIS provided before Cabinet's consideration, as well as the updated RIA which was provided to the Associate Minister of Finance (Hon David Parker), who made a number of decisions following Cabinet's consideration of the reforms in 2019, as authorised by Cabinet. There was no change to the panel's overall assessment following a review of the updated RIA.

Overseas Investment Act RIA Review

Overall assessment: partially meets

The RIA clearly describes the policy problems, objectives, options and the policy process to date. It also clearly identifies where officials' recommendations differ from the options being recommended to Cabinet, and the differing judgements and weightings behind those differing recommendations.

The RIA is clearly written but lengthy, reflecting the complexity and breadth of the issues this policy package addresses.

The review panel assessed the great majority of the RIA as meeting the quality assurance criteria. The key reason for the panel's overall assessment being the RIA "partially meets" the quality assurance criteria is that the proposal to move the rural land directive to primary legislation does not meet the consultation requirements. This proposal has not been consulted on publicly, or with key non-Crown stakeholders, including Māori. The proposals regarding special land acquisition also contain some features that have not been subject to public consultation. Addressing the "partially meets" assessment would require appropriate consultations, and inclusion of the results of that consultation, in the proposals.

We do not plan to conduct further consultation on this Bill, given the pressing need for implementation.

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	YES

The emergency powers in clauses 17 and 52 of this Bill that to respond to the changed foreign investment risk environment.

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	YES

The RIA was updated in March 2020, subsequent to Cabinet's consideration to reflect policy decisions made by the Associate Minister of Finance (Hon David Parker), as authorised by Cabinet, but it has not been updated to reflect the COVID-19 related changes to this Bill. The following update is relevant to this Bill:

- empowering the Overseas Investment Office (OIO) to gather and share information related to national security and public order risks. The OIO will be able to require a person to provide information if it has reasonable grounds to suspect that an investment is a non-notified voluntary call in transaction which may pose national security or public order risks. The OIO will also be able to share information with other agencies (and vice-versa) to aid in assessing national security and public order risks for transactions screened under the national interest test or subject to the call in power.

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	**YES**
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	**YES**
These matters were considered in the RIA for the Overseas Investment Amendment Bill (No 2): http://www.treasury.govt.nz/publications/informationreleases/ria.	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	**YES**
(b) the nature and level of regulator effort put into encouraging or securing compliance?	**YES**
These matters were considered at a high level in the RIA for the Overseas Investment Amendment Bill (No 2). http://www.treasury.govt.nz/publications/informationreleases/ria.	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
The Ministry of Foreign Affairs and Trade has been involved in the development of the changes this Bill gives effect to, to help assess whether the changes are consistent with the policy space preserved in trade agreements for the operation of our overseas investment screening regime.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?
Treasury officials consulted with Te Puni Kōkiri and Te Arawhiti to determine whether the changes in the Overseas Investment Amendment Bill (No 2) were consistent with the principles of the Treaty of Waitangi. Public consultation included hui with representatives from iwi organisations and Māori businesses, and the feedback informed changes to better account for Māori cultural values in aspects of the Overseas Investment Amendment Bill (No 3). The emergency powers in clauses 17 and 52 of this Bill have not been consulted on separately, given time constraints in implementing these powers to respond to the changed foreign investment risk environment.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	**YES**
Advice provided for this Bill, will be accessible on the Ministry of Justice website at: https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/.	

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	**YES**
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	**NO**

The OIO's enforcement tools are being strengthened to enable proportionate responses to breaches of the Act and the Regulations, and to manage significant risks to national security and public order.

Clause 38 differentiates and increases the maximum fixed civil pecuniary penalties available, by:

- increasing the maximum civil pecuniary penalty for individuals to $500,000: and
- introducing a separate maximum civil pecuniary penalty of $10 million in any other case.

Clause 36 creates a new civil pecuniary penalty for breaching an enforceable undertaking, with an upper limit of $50,000 for an individual and $300,000 in any other case.

Clause 42 clarifies that the High Court can grant injunctions to restrain a person from engaging in conduct that constitutes or would constitute a contravention of the Act or Regulations. This clause does not expand the jurisdiction of the High Court.

There is nothing in the Bill that limits the jurisdiction of a Court or Tribunal. The new decision-making powers in the Act will be subject to judicial review.

3.4.1. Was the Ministry of Justice consulted about these provisions?	**YES**

The Ministry of Justice was consulted during both the policy development and the drafting of the Overseas Investment Amendment Bill (No 2), and received draft versions of the Bill for comment. The Ministry's feedback was incorporated in the following provisions of the Overseas Investment Amendment Bill (No 2).

The new civil pecuniary penalty threshold was developed in close consultation with the Ministry of Justice, to ensure that it is aligned with current practice for penalties, as is reflected in the Telecommunications Act 2001 and following the Commerce Act 1986 reform. The Bill incorporates the Ministry of Justice's feedback that "civil" should be inserted into all references to "pecuniary penalties".

The Treasury also tested the proposal to differentiate the maximum thresholds between individuals and all other parties with the Ministry of Justice.

The Ministry of Justice was consulted in the policy development of the powers for managing national security and public order risks, and a draft of this Bill was provided to the Ministry for comment. The emergency powers in clauses 17 and 52 have been consulted with the Ministry under short time frames.

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	**YES**
Clause 29 allows the OIO to require a person to provide information when the Regulator is investigating whether a transaction is an overseas investment transaction or a call-in transaction, and whether a transaction gives rise to, or is likely to give rise to, a significant risk to national security or public order. Clause 52 (new section 126) allows the OIO and the listed agencies to share information relevant to managing national security and public order risks, if sharing that information is necessary or desirable for managing national security and public order risks. Pursuant to new section 126(3), an agency that shares information may impose any conditions it thinks fit for maintaining the confidentiality of the any information provided.	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	**YES**
The Office of the Privacy Commissioner agreed that the Overseas Investment Amendment Bill (No 2) and the new information gathering and disclosure powers complied with the relevant principles and guidelines set out in the Privacy Act 1993. Given time constraints, emergency clauses 17 and 52 have not been consulted on separately with the Privacy Commissioner.	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	**YES**
Consultation on the Overseas Investment Amendment Bill (No 2) was undertaken from late-2018 to late-2019, before the provision of drafting instructions to Parliamentary Counsel Office in November 2019. Officials held meetings with stakeholders and the public (19 meetings with approximately 175 attendees throughout New Zealand and in Sydney). This included meetings open to the public, hui with representatives from iwi organisations and Māori businesses, and meetings with technical audiences and investors. A consultation document was released in April 2019 and 733 written submissions were received. Due to the timing of policy development work, there was no consultation on some aspects of the policy package. Officials have since consulted extensively on these topics with relevant government agencies, legal counsel and stakeholders where appropriate. An exposure draft of the Bill was not released due to time limitations. However, officials met with stakeholders in December 2019 to provide an update on and seek feedback following Cabinet's policy decisions, and the Cabinet Paper including the policy decisions was proactively released in December 2019. The following agencies and entities were consulted on the draft Overseas Investment Amendment Bill (No 2): the Ministry for Primary Industries, the Ministry of Justice, the Depart of Conservation, the Ministry for the Environment, the Inland Revenue Department, the Ministry of Foreign Affairs and Trade, the Ministry of Defence, New Zealand Trade and Enterprise, the Department of the Prime Minister and Cabinet, Land Information New Zealand, Te Puni Kōkiri, the Ministry of Housing and Urban Development, the New Zealand Security Intelligence Service, the Government Communications Security Bureau, the Ministry of Business Innovation and Employment, the Ministry of Culture and Heritage, Te Arawhiti, and the Reserve Bank of New Zealand. Emergency clauses 17 and 52 have been tested with Ministers and key agencies through the Cabinet process, but have not been re-tested with stakeholders. However, we have consulted with a small group of legal experts on the emergency clauses.	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	**YES**
These changes were developed in close consultation with the OIO (the regulator under the Overseas Investment Act) with the aim of ensuring that they are workable.	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	**YES**
Clause 52 (new section 93) allows the Minister to order an overseas person or their associate to dispose of sensitive assets, acquired through a call-in or national interest transaction, where the Minister has determined that there is a significant risk to national security or public order. For national interest and notified call-in transactions, a relevant condition will also need to be breached before a disposal order can be made, and disposal orders cannot be made where the risk can be adequately managed through another power. The overseas person will retain the proceeds of the disposal. Clause 52 (new sections 94 – 111) allows for the Crown to appoint a statutory manager for an organisation which owns sensitive assets, and which an overseas person has acquired an interest in. The purpose of statutory management is to manage national security and public order risks arising from the overseas person's interest and actions. The organisation or assets will be under the control of the statutory manager while those risks are managed. The Crown can claim costs for the process from the overseas person's interest. Clause 52 (new section 99) requires statutory managers to have regard to legitimate interests in the organisation while managing risks to national security and public order. The proceeds of the disposal of the overseas person's interest will go to the overseas person, after providing for the costs of the statutory manager.	

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	**NO**

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	**NO**

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	**NO**
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	**NO**

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	**YES**
Clause 52 (new section 122) creates protection for special advocates from liability.	

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	**YES**

The Bill provides the relevant Ministers with new decision-making powers, including the ability to block, impose conditions on, or unwind transactions that are not currently subject to screening under the Act. The Minister will be unable to exercise these powers unless they are satisfied that certain criteria are satisfied. This is consistent with the approach currently taken in the Act, where the ultimate decision-making rests with the relevant Ministers (such as under section 14 of the Act). The new national interest test is of particular note, as it allows the Minister to consider any transaction ordinarily reviewed under the Act that may be contrary to the national interest, and impose conditions or decline the transaction to preserve the national interest. The Bill also creates a temporary power to review all transactions regardless of value.

The Bill also removes some decision-making powers where low-risk transactions are removed from screening, including fundamentally New Zealand entities and most investments in land adjacent to sensitive land.

Clause 52 introduces a new Part 3 to the Act, which will empower the Minister, in general terms, to impose conditions, block, or unwind certain overseas investments. These powers will affect certain rights, obligations and interests in relation to property.

These decision-making powers may only be exercised on certain grounds, and decisions will be subject to judicial review.

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	**YES**

New regulations will be needed to bring some of the call-in and national interest test powers into effect. The call-in power will apply to investments in strategically important business assets (and entities that hold such assets) as defined in the legislation and Regulations. The national interest test will also apply automatically to those strategically important business assets (and holders of such assets). Regulations are required to bring the full scope of these powers into effect; some assets that are strategically important (that is, their ownership by overseas persons could give rise to national security and public order risks) will be defined in regulations to allow for the appropriate level of detail and flexibility. The scope of these definitions will be constrained by the high-level definitions in the Act and a statutory requirement for these definitions to be no broader than necessary to manage national security and public order risks.

The exemption criteria in the Act will be amended to allow the Minister to exempt certain fundamentally New Zealand entities from the need to obtain consent. Existing exemptions will also be removed for two classes of low risk lending and loan portfolio management transactions.

The Bill also contains three time limited emergency regulation making powers to respond to an epidemic in New Zealand. The powers enable the Minister to recommend the exemption of any transaction, person, interest, right, asset, or class; enable the Minister to recommend amendments to consent requirements for classes of transactions; and a narrow power where the Minister can recommend modification of the provisions in the Act through regulation.

The third power may give rise to rule of law issues, so is appropriately constrained by requirements, such as the Minister be satisfied that the regulations are necessary or desirable for the orderly implementation of the Act.

4.8. Does this Bill create or amend any other powers to make delegated legislation?	**NO**

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	**NO**
Classified security information in civil court proceedings Clause 52 (new sections 113 – 125) sets out provisions for the protection of classified security information in civil court proceedings relating to the administration or enforcement of the Act. It sets out the manner in which classified security information may be used in those court proceedings which differ from normal civil procedure. These provisions are substantially the same as subpart 8 of Part 4 of the Telecommunications (Interception Capability and Security) Act 2013, except that information held by any law enforcement or regulatory agency may be classified security information if certified by the head of the agency or the Attorney-General (see new section 114). Statutory Management Clause 52 (new sections 94 – 111) introduces a statutory management power to manage the risks to national security or public order associated with actions by an overseas person, or an associate of an overseas person, who has an interest in sensitive assets, including (without limitation) removing the overseas person's, or their associate's, access to or control over the sensitive assets. This power is based on the Corporations (Investigation and Management) Act 1989. A notable addition to the powers in that Act is that statutory managers will be able to terminate contracts or arrangements posing significant risk to national security or public order (new section 104).	