
Overseas Investment (Urgent Measures) Amendment Bill

Amongst a menu of urgent changes designed to combat the effect of Covid-19, on 14 May 2020 the Government introduced the Overseas Investment (Urgent Measures) Amendment Bill (*Urgent Measures Bill*) into Parliament. This Bill proposes further changes to the Overseas Investment Act 2005 (*Act*) with the introduction of a temporary notification regime, and fast tracks the national interest test.

The Urgent Measures Bill introduces a number of changes which will reduce the regulatory burden on investors and will also bring in those changes previously detailed in the Overseas Investment Amendment Bill (No 2) that the Government considers are urgently required. These are intended to take effect once the Urgent Measures Bill is in force. The remaining provisions of the Overseas Investment Amendment Bill (No 2) that have not been fast tracked under the Urgent Measures Bill will move into a new bill, the Overseas Investment Amendment Bill (No 3), which will proceed through the usual legislative process, and is expected to pass through Parliament in the next 12 months.

The Covid-19 pandemic and the economic downturn have created new foreign investment risk, and the Urgent Measures Bill is intended to stop vulnerable New Zealand assets being subject to foreign takeover during the economic fallout from Covid-19. Speaking of the Urgent Measures Bill, Associate Finance Minister David Parker has said:

“Hypothetically, with international tourism at a standstill the value of a significant tourism company may have plummeted and could be low or near zero. That value would not reflect the importance of the business, so interim controls are needed to protect our national interest.”

The Urgent Measures Bill had its first reading on 14 May, and it is intended to be passed quickly with a shortened Select Committee process. It is anticipated the Urgent Measures Bill will come into force in the middle of June.

The key changes under the Urgent Measures Bill are:

- The introduction of a temporary emergency notification requirement for key control transactions that would not ordinarily have been covered by the Act.
- The introduction of the national interest test in respect of strategically important businesses.
- Once the temporary emergency notification requirement is no longer required, the introduction of a right for the Government to exercise a call-in power in respect of both investments in businesses not ordinarily screened by the Act but which may pose significant national security and public order risks, and investments in businesses that hold or generate certain types of sensitive data. This right will also apply to the majority of investments captured by the national interest test.
- Simplification of the overseas investment regime by reducing the number of applications that require screening, bringing forward certain measures set out in the Overseas Investment Amendment Bill (No 2).

These changes are discussed in detail below.

Temporary Notification Requirement

The temporary notification regime requires certain transactions to be notified to the Government, even if these transactions would not ordinarily require consent under the Act. Under the regime, overseas investors will be required to notify the Government before they proceed with an investment in a New Zealand business that involves:

- the acquisition of a more than 25% interest in a business;
- an increase an existing interest in that business to, or beyond, certain thresholds (being 50%, 75% or 100%), or the acquisition of more than 25% of the business' assets (by value). This requirement will apply regardless of the dollar value of the investment; or

- the acquisition of property (including goodwill and other intangible assets) in New Zealand used in carrying on business in New Zealand (whether by one transaction or a series of related or linked transactions) of any value that effectively amounts to a change in control of the business.

Once notified, the Minister will then consider whether the investment is contrary to the national interest. The Minister may impose conditions on, or prohibit, certain transactions. It is anticipated that the majority of transactions will proceed without any Government intervention or any conditions imposed.

The Urgent Measures Bill requires the notification to be provided prior to transaction closing, in writing. The exact details of the requirement are yet to be prescribed in regulations, but it is anticipated that the investor will be required to provide certain details on the transaction to the Overseas Investment Office, such as the identity, ownership and control details of the investor, any links to foreign governments, broad transaction details including the nature of the business or property to be acquired and the commercial rationale for the purchase (including as to pricing and valuation). A notification form will apparently be available on the Overseas Investment Office's website.

The Government intends that investors will be notified within 10 days whether a transaction could be contrary to New Zealand's national interest and subject to a further detailed review, which is to be processed within 40 days and may be extended by up to 30 days. The exact details and timeframes will be set out in the regulations. There will be no fee for submitting a notification.

Failure to comply with the notification requirements also means that the Government could later unwind the transaction if it fails the national interest test.

Even if not notified formally, the Minister may exercise his or her own discretion and determine a transaction to be contrary to the national interest, with the same potential unwind consequences.

The temporary notification requirement will be reviewed every 90 days and will only remain in place while the Covid-19 pandemic and its associated economic impacts continue to have a "significant effect in New Zealand" – a matter open to interpretation at the margins but which potentially could be for quite a long time.

Acceleration of the National Interest Test

The national interest test will allow the Minister of Finance to deny consent to any investment ordinarily screened under the Act that is considered to be contrary to New Zealand's national interest (including security, economic and other interests). This power has been modelled on the Australian regime, but with the addition of an express discretionary Ministerial extension of the concept. This power and discretion cannot be delegated to the OIO.

Transactions of national interest are broadly defined as transactions already requiring consent under the Act which result in:

- an investment by a non-New Zealand government investor;
- an investment in a strategically important business (for example, military or dual use technology, security and intelligence, electricity and water, telecommunications, financial market infrastructure, significant airports and ports, or any key supplier to these, all as detailed in regulations yet to be drafted); or
- any other investment that the Minister considers could be contrary to New Zealand's national interest, provided that the Minister has notified the applicant that the transaction is being considered as such.

Please refer to our previous article [here](#) for further details of the national interest test.

“Call-In” Powers

Once the temporary emergency notification requirement is removed, the Government will have replacement “call-in” powers to review certain investments in strategically important businesses which would not ordinarily be captured by the Act. This power would allow the Government to call in certain transactions, place conditions on or prohibit certain transactions from proceeding where they are perceived to pose a risk of harm to New Zealand's national security or public order. The call-in power would apply to those types of business captured under the national interest test (excluding large irrigation schemes), and will extend to investments in businesses that hold or generate certain types of sensitive data (for example health or financial data).

Please refer to our previous article for further details of the “call-in powers” (see above link).

Changes to simplify the Overseas Investment Regime

Certain changes originally introduced under the Overseas Investment Amendment Bill (No 2) are being fast tracked under the Urgent Measures Bill with the purpose of reducing the regulatory burden of the Act. This is in part due to the Covid-19 pandemic, as well as the expected time period for the passage of the Overseas Investment Amendment Bill (No 3) through Parliament.

The Urgent Measures Bill proposes to make it simpler to make productive

investments in New Zealand by:

- introducing a statutory standing consent in respect of certain New Zealand listed issuers and managed investment schemes;
- reducing the number of fundamentally New Zealand entities that must obtain consent under the Act;
- narrowing the definition of overseas person for all other non-natural persons such that a more than 25% interest must be held by overseas persons before the entity can be deemed to be an overseas person;
- introducing streamlined consent criteria for investments in less sensitive New Zealand land that is only screened because it adjoins land that is sensitive in its own right;
- simplifying the investor test by undertaking more targeted assessments of an investor's character; and
- reducing the number of small transactions that do not change control of sensitive assets that must get consent.

Details of these are covered in our earlier article (see above link).

If you would like more information on the Urgent Measures Bill or application of the Overseas Investment Act generally, please contact us. We will provide further details of interest on the Urgent Measures Bill and regulations as they become available.
