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## Overseas Investment - New Temporary Notification Regime: Treatment of Property Transactions and Process

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The Overseas Investment (Urgent Measures) Amendment Act 2020 (*Urgent Measures Act*) came into force on 16 June 2020, bringing into effect the temporary notification regime.

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The manner in which the temporary notification regime applies to property transactions and how a change of control is calculated has now been clarified by the Overseas Investment Amendment Regulations 2020 (*Regulations*). In addition, the Overseas Investment Office (*OIO*) has recently published details of what information is required when making a notification to it and provided some additional guidance.

### **When is notification requirement triggered?**

One of the key things achieved by the Regulations is to clarify when various property transactions require notification to the OIO.

The Urgent Measures Act provides in section 82(2)(b), that, an acquisition of property by an overseas person used in carrying on business in New Zealand that effectively amounts to a change in control of that business, as defined in the Regulations, is subject to the temporary notification regime. The Regulations define what is meant by a change in control of the business, and here take a novel approach. Change in control is to be assessed by reference to what proportion of the counterparty's (i.e. the vendor's or lessor's) total assets are being acquired. A "*change in control in relation to the acquisition of property used in carrying on a business*" is where the value of the property being acquired is more than 25% of the value of all New Zealand property owned by the person from whom the property was acquired, as assessed immediately before the acquisition. If this threshold is exceeded, the transaction must be notified.

This means that both the purchase of land, as well as the entry into a lease (being an acquisition of an interest in land), will be subject to the temporary notification regime and require notification to the OIO if they involve more than 25% of the counterparty's total assets.

The value of property is to be determined by reference to the most recent financial statements, accounting records and all other circumstances which affect the value of the property. Reliance may be placed on valuations that are reasonable in the circumstances.

Further, value is to be determined by reference to the assets of the actual counterparty,

not its related companies. If a particular property asset is held in a special purpose vehicle, as is often the case, regard cannot be had to the total value of group assets.

It is quite possible that a counterparty will resist having to provide its confidential financial information. If so, one solution would be to include a warranty that the threshold is or is not met, and if need be, proceed, or not proceed, to notification accordingly. The OIO has indicated it will be providing further guidance here shortly.

### **Incorporating companies**

One thing to watch out for in relation to the application of the notification regime to business transactions generally is that it covers any acquisition of securities by an overseas person. Strictly speaking, this would have covered even the uncontroversial incorporation of a New Zealand subsidiary of the overseas person, without any business transaction occurring. After we raised this anomaly with the OIO, it has now been clarified by the enactment of the Overseas Investment Amendment Regulations (No 2) 2020 that a mere company incorporation does not require notification to the OIO.

### **A few process comments**

If it is determined that a transaction is subject to the temporary notification regime, notification to the OIO is to be made prior to giving effect to a transaction. A transaction may be entered into before notification, provided the transaction is conditional on receiving a direction order from the Minister. Transactions entered into before 16 June 2020 are not subject to the temporary notification regime at all.

The notification process is completed online via an online form on the OIO's [website](#). The information required includes:

- details of the overseas investor (including an ownership structure diagram);
- copies of the passport identity page for each individual director or trustee of the acquiring entity or individual involved in the transaction;
- details of the transaction;
- details of the business being invested in or the interest being acquired;
- the value of the assets or interest being acquired; and
- financial statements for the previous two financial years.

This information must be submitted with the online form and cannot be sent separately to the OIO. No fee is payable.

Unless the OIO makes appropriate changes to its online form, the process for completing it will remain clunky. All the information needs to be gathered, and ready for upload as required, in advance. No provision has been made for the counterparty to submit its financial information privately, on a confidential basis. There is no ability to provide additional material (for example a statement that the counterparty refuses to provide financial statements, or a letter explaining any necessary departure) and there is a tick-box requirement that the party submitting confirms that all required information has been included in the notification (without which the online submission will not work).

Once a transaction has been notified, the OIO will conduct an initial review and make a recommendation to the Minister of Finance, who will decide whether the transaction is contrary to the national interest. No delegation of this decision-making power has been made, regardless of transaction value, and if all parties comply then it is possible to foresee a bottleneck arising at the ministerial level. This initial review is expected to be completed within 10 working days, although the legislation does actually provide for the initial review to take up to 40 working days, with provision for extension by the Minister for a further 30 working days.

A notified transaction cannot progress until a direction order is issued. The Minister may:

- make a direction order that no conditions are imposed (and therefore the transaction may proceed);
- make a direction order imposing conditions on the transaction; or
- make an order prohibiting the transaction from being given effect.

If it is found that further assessment is necessary, the transaction will be subject to a detailed review against the national interest test. This is a discretionary power, and guidance on this test notes that considerations are to be given to a range of factors and the likely impact of the investment.

The OIO expects the majority of transactions to be able to proceed without any intervention. However, as the notification requirement effectively amounts to a temporary ministerial power of veto over transactions, at the very least resulting in potentially significant delay, the new regime is of concern to business.

Thankfully the new emergency notification regime is only temporary and an assessment of the regime is to commence by the end of July to ensure that classes of transactions subject to the regime are not broader than reasonably necessary. Treasury has advised this review will be completed after the 2020 General Election. Further, the emergency notification regime will be reviewed by the Minister at 90 day intervals to ascertain whether the effects of the pandemic justify the regime remaining in place. Where it is determined, the emergency notification regime is no longer required, this will be replaced by a permanent call-in power (see our previous article [here](#) for details of this). The first 90 day review has now been completed, and on 1 September Treasury issued a statement advising that New Zealand would retain the temporary notification regime for a further 90 days. The next statutory review is due on 28 November 2020. Following the initial review the OIO confirmed it had received 102 notifications, with three being called in by the Associate Minister of Finance for further assessment. Of these three, two transactions have been allowed to proceed, and one is currently being reviewed. We will watch with interest the outcome of this assessment.

Please contact [Brigid McArthur](#) or one of our lawyers in our Property [team](#) if you would like help on interpreting the temporary notification regime and the recent changes to the Overseas Investment Act.

*10 July 2020 (updated September 2020)*

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