

Overseas investment changes: another facet of the COVID-19 response

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4 June 2020

The Overseas Investment (Urgent Measures) Amendment Act 2020 received Royal Assent on 2 June 2020. This alert has been updated since originally published (29 May 2020) to include the commencement date for key changes.

COVID-19 has changed many aspects of life in New Zealand and prompted an extremely wide-ranging legislative response from the Government.

Our [previous update](#) outlined a range of changes to the overseas investment regime as part of the Phase 2 reforms, which were the subject of an Amendment Bill introduced on 19 March 2020. At the time, we said that it remained to be seen whether the perceived risks-versus-benefit assessment of foreign investment would remain the same in light of a significantly different outlook for the New Zealand economy.

As it happens, COVID-19 has prompted the Government to bring forward some of the changes. The Overseas Investment (Urgent Measures) Amendment Act 2020 (Urgent Measures Act) was passed on 28 May 2020 and received Royal Assent on 2 June 2020. The Urgent Measures Act tightens the regime in some respects, and loosens it in others.

The rest of the Phase 2 reforms are now the subject of the Overseas Investment Amendment Bill (No 3) (the No 3 Bill), which will proceed on the ordinary legislative track.

This update outlines the effect of the Urgent Measures Act on transactions that may already be in the overseas investment consent pipeline.

Which changes are being made urgently?

Key changes include:

- A **'national interest'** test, to allow the Government to decline consent for certain transactions ordinarily screened if they are considered contrary to New Zealand's national interest
- A **temporary emergency notification requirement**, that will apply to transactions not ordinarily screened. The Government will be able to review all new controlling investments in New Zealand businesses and assets. This will require a large number of transactions that would not ordinarily be screened to be notified. The Government will be able to impose conditions on, prohibit, or require disposal of those investments if they are contrary to New Zealand's national interest
- A **call-in power**, to take effect once the temporary emergency notification requirement is removed, to enable the Government to review investments in **'strategically important businesses'** that are not ordinarily screened and impose conditions on, prohibit, or require disposal of those investments if there is a significant risk to national security or public order.

The Urgent Measures Act also relaxes some aspects of the regime – for example, the investor test has been simplified to significantly narrow the scope of considerations that can be taken into account when assessing an investor's suitability to invest.

When will the urgent changes take effect?

Key changes made by the Urgent Measures Act will take effect on 16 June 2020 (ie, 14 days after receiving Royal Assent).

The Urgent Measures Act will apply to the following:

- Transactions entered into on or after 16 June 2020
- Applications received by the Overseas Investment Office (OIO) on or after 16 June 2020, regardless of when the transaction is or was entered into
- Transactions entered into before 16 June 2020 in respect of which the Overseas Investment Act requires an application to be made on or after commencement (eg retrospective consent)
- Any other matters that relate to events or circumstances on or after 16 June 2020.

Changes were made during the Select Committee's consideration of the Bill to deal with two categories of transactions already underway.

First, it was recognised that there were classes of transactions underway that, if entered into in a couple of weeks' time, would not need consent. As a result, a new provision was added to provide that the requirement for consent does not apply to a transaction that meets **all** of the following requirements (the **low risk category**):

- The transaction has not been given effect to before commencement
- Consent has not been granted for the transaction before commencement
- The transaction would either:
 - not require consent under the Overseas Investment Act (the Act) immediately after the Urgent Measures Act commences, or
 - be eligible for a 'standing consent' under the Urgent Measures Act. This effectively brings forward changes that were already proposed to narrow the types of land that are 'sensitive', and to narrow the categories of entities that are 'overseas persons', so that transactions with these features do not need to go through the process of applying for consent (more details below).

Second, the Select Committee clarified that the emergency notification regime was not intended to operate retrospectively, and added provisions that expressly state that the emergency notification regime **only** applies to transactions that are entered into on or after 16 June 2020.

The emergency notification regime does not apply to transactions that have a standing consent, and those transactions that would have required consent under the Act before it was amended, but do not require consent as a result of the changes made by the Urgent Measures Act.

It seems that the general intention is that transactions entered into and well progressed before the Urgent Measures Act takes effect should not be impacted by the changes, unless the changes would relieve the regulatory burden. That said, the reference to the Act applying to "any event or circumstance" after commencement is broad and, as we pointed out in our submission to the Select Committee, it could be read as capturing consent applications that have not yet been decided. We expect the position to be clarified shortly by guidance from the OIO, as it gets to grips with the range of new functions and responsibilities that it has.

Is your transaction affected by the urgent changes?

The table below sets out the effect of the Urgent Measures Act on overseas persons that have entered, or will enter, into transactions under which they will acquire interests in New Zealand assets or businesses.

Status of transaction	What effect does the Urgent Measures Bill have?
You have consent for a transaction before 16 June 2020	None. The transaction can be completed on or after 16 June 2020 and the emergency notification regime will not apply
You have entered into a transaction , and have made an application for consent but not yet received a decision before 16 June 2020	<ul style="list-style-type: none"> • Check whether you still need consent. You will not require consent if the transaction meets the low risk category requirements detailed above • If you still need consent and you apply (or intend to apply) on or after 16 June 2020, check with your legal advisor to confirm that the application does not need to be assessed against the national interest test • The emergency notification regime will not apply.
You have entered into a transaction before 16 June 2020.	<ul style="list-style-type: none"> • If the transaction was conditional on OIO consent, check whether you still need consent. You will not require consent if the transaction meets the low risk category requirements detailed above • If you still need to apply for consent, the OIO's assessment will include whether the transaction is a transaction of national interest – and if it is, or the Minister gives notice, the national interest test will apply • The emergency notification regime will not apply.
You enter into a new transaction on or after 16 June 2020	<ul style="list-style-type: none"> • Before signing, check whether you need to apply for consent, for example, whether your transaction is covered by one of the new standing consents • If you are covered by the standing consent, you will not

need to notify your transaction

- If you do not need to apply for consent, you must check whether you are required to notify the transaction under the emergency notification regime.

More details about the Urgent Measures Act changes

Emergency notification regime

The Urgent Measures Act introduces a temporary emergency notification regime that requires overseas persons to notify the OIO before making an overseas investment (regardless of the transaction's dollar value) that is:

- The acquisition of more than a 25% interest in a business
- An increase in an existing more than 25% interest to either a more than 50% or 75% interest or a 100% interest
- The acquisition of more than 25% of a business' assets.

The notification regime only applies to transactions that do not require consent.

Regulations are expected to set out timeframes for the OIO to respond to notified transactions. Based on The Treasury's guidance, within 10 working days of notification the OIO will inform investors whether their investment can proceed or if it will be subject to a more detailed review that considers whether the investment is contrary to New Zealand's national interest. If a more detailed review is required, the Government has up to two further 30 working day periods at its disposal to assess the investment.

On 31 July 2020 (45 days after the changes take effect) the Minister must review the emergency notification regime to ensure that the classes of transactions that are subject to the regime are not broader than necessary.

The emergency notification regime is temporary. The power will be reviewed every 90 days and removed once COVID-19 and its associated economic effects are no longer having a significant impact on New Zealand. Once it is removed, the regime will be replaced with a narrower national security and public order call-in power. This call-in power will allow for the government to review transactions that are not currently subject to screening, but which may affect national security and public order (ie, transactions involving strategically important industries and high-risk critical national infrastructure).

Powers to protect New Zealand's national interest

The Minister will review all transactions that are notified to determine whether they are contrary to New Zealand's national interest. The Minister may:

- Make a direction order that no conditions are imposed (and that the transaction can therefore proceed)
- Make a direction order imposing conditions on the transaction
- Make an order prohibiting the transaction from being given effect
- Order the disposal of sensitive assets that have been acquired
- Recommend that the investor be put into statutory management.

Standing consents

As foreshadowed in connection with the low risk category of transactions that are already underway, the Urgent Measures Act provides for standing consent for certain persons and transactions entered into during the epidemic period (ie the period from 16 June 2020 to the completion of the Government's reform program).

Such transactions will also not be subject to the emergency notification regime.

Standing consents for certain sensitive adjoining land transactions

The changes made by the Urgent Measures Act mean that an investment entered into during the epidemic period that involve sensitive land that would not require consent if new Schedule 1 of the No 3 Bill was enacted are granted unconditional standing consent. New Schedule 1 removes certain categories of sensitive land that were considered sensitive only because they adjoined other types of sensitive land.

Standing consents for transactions connected with certain listed companies

The No 3 Bill would amend the definition of overseas person to exclude listed issuers that are not bodies corporate. The effect of the proposed change to the definition is brought forward by the Urgent Measures Act by way of an unconditional standing consent for transactions entered into during the epidemic period if they would not require consent under the No 3 Bill's new definition of overseas person.

Standing consents for certain listed managed investment schemes

The Urgent Measures Act also grants unconditional standing consent in respect of all transactions entered into during the epidemic period by listed managed investment schemes if:

- 50% or less of the value of the investment products in the scheme has been invested on behalf of overseas persons; and
- 25% or less of the investment products in the scheme that entitle holders to vote are beneficially owned by or on behalf of overseas persons, each of whom beneficially own 10% or more of those products.

Transfer of certain debt securities

Transactions that have the effect of transferring an interest or right to be paid money that has been deposited with or lent to, or is otherwise owing, by any person are also granted unconditional consent (unless a convertible debt security is involved).

Seek advice

The Urgent Measures Act implements a number of changes which are highly technical in nature and need to be interpreted in light of the broader Overseas Investment Act, the upcoming No 3 Bill, and expected guidance from the OIO. It is critical for investors to seek their own specialist advice on the application of the changes to their transactions.

Please contact one of our team if you require advice about how these changes may affect your business.

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