

The Overseas Investment Amendment Bill 2020 was introduced last week. The purpose of the Bill is to give effect to the amendments identified in Phase II of the Government’s OIO reform (Phase I resulting in the 2018 amendments that brought residential land under the scope of the OIO regime, and introduced streamlined test for forestry investments). The Government’s Phase II reforms are designed to achieve a balance between, on the one hand, streamlining the Act to cut red tape and support high-quality overseas investment and, on the other hand, strengthening the Act to provide stronger protections for farmland and the ability for the decision maker to consider broader impacts when screening investments.

The introduction of the Bill last week indicates that the Government still intends to enact the amendments before the end of its current term. This does not allow much time for the Bill to pass through the stages of Parliament, including the Select Committee and public submission stage, before the House rises on 6 August ahead of the 2020 election. To some extent this condensed timeframe will be managed by the amount of detail that will be set by Regulations before the relevant provisions of the new Act come into force. Most of the Act will come into force 42 days after it receives Royal assent, but more comprehensive changes may not come into force until 6 or 12 months after Royal assent.

In the tables below we have summarised how the Bill aims to achieve each of the Government objectives of the Phase II reform:

Streamlining:

New definitions	Increased flexibility	Increased efficiency
<p>Reduce:</p> <ol style="list-style-type: none"> the number of entities screened, so that entities with a significant degree of New Zealand ownership and control are not disproportionately disadvantaged by the regime; and the amount of land and interests in land being screened, so that the regime focusses on those land interests that are the most sensitive <p><u>Key amendments</u></p> <ul style="list-style-type: none"> “Overseas Person”: <ul style="list-style-type: none"> The threshold of overseas ownership has, in all cases, been increased from “25% or more” to “more than 25%”. NZ listed companies will no longer be “overseas persons” if they are at least 50% NZ owned, with a diverse overseas shareholding. However, the entity will be subject to the OIO regime if overseas shareholders who hold 10%+ can collectively (a) control the composition of 50%+ if the governing body or (b) control the exercise of more than 25% of voting power. The Minister can grant exemptions for Non-NZ listed companies that are considered to be “fundamentally New Zealand owned or controlled or to have a strong connection with New Zealand”. However, there are no criteria stated for an overseas person to qualify for this exemption. “Sensitive Land” - The status of adjoining land will only be relevant in limited circumstances, including where the adjoining land is foreshore, lakebed, conservation land, specified regional parks, or land of cultural significance 	<p>Reduce the number of transactions screened, so that minor changes in ownership and control do not trigger compliance requirements</p> <p><u>Key amendments:</u></p> <ul style="list-style-type: none"> Leases of sensitive land are currently subject to screening if they are for a term of 3 years or more (including renewal rights). The Bill increases that minimum term to 10 years (including renewal rights and previous interests), making leases a more practical option in many cases. Listed companies – a nominal shareholding change that results in the relevant company meeting the new “overseas person” definition will <u>not</u> require OIO consent, unless the relevant shareholder acquires at least 10% of the total shares. Amendments to the existing exemptions for corporate restructuring and nominal increases in shareholding are expected to form part of the new Regulations. 	<p>Increase efficiency in the OIO assessment and decision making process, with the intention of increasing investor certainty and addressing issues associated with long processing timeframes.</p> <p><u>Key amendments:</u></p> <ul style="list-style-type: none"> The Investor test is enhanced and streamlined: <ul style="list-style-type: none"> Only considers serious, proven criminal offending or civil contraventions, or allegations that have resulted in formal proceedings No longer applies to New Zealand individuals Assessed at a corporate as well as an individual level Repeat investors do not need to satisfy the test for each investment Benefit test – Whether an investment will benefit NZ is currently assessed against 21 separate factors set out in the Act and Regulations. This will be reduced to 8, although they are ultimately similar in scope: <ul style="list-style-type: none"> Economic benefit Benefits to the natural environment Public access Protection of historic heritage Advancing significant government policies Level of NZ involvement Consequential benefits Negative impacts of water extraction for bottling on water quality or sustainability New benefit factors can no longer be added by Regulation. The rural land directive (currently a Ministerial policy directive) that imposes a higher threshold on investments in farm-land will form part of the legislation, making it more difficult to change. Counterfactual – the benefits will be assessed against the current state of the land, rather than being assessed against a hypothetical alternate purchaser. This provides significant added certainty for investors looking at a change of land use.

- The Bill expressly requires a proportionate assessment of the benefits (reflecting current OIO policy), having regard to the nature of the asset and the nature of the investment.
- The Bill provides for statutory timeframes for assessment of applications to be introduced by Regulation, but failure to comply with those timeframes will not impact the outcome of the application.

Strengthening:

Increased coverage	Increased discretion	Increased enforcement
<p>Currently, the framing of the various tests means that:</p> <ol style="list-style-type: none"> Some transactions that could have a negative impact on NZ’s national interest are not subject to any screening under the OIO regime; Many transactions that are subject to screening must be approved if the investor satisfies the investor test. The wider impacts of the transaction cannot be taken into account. <p><u>Key amendments:</u></p> <ul style="list-style-type: none"> Investments in “significant business assets” (generally all investments over \$100m, although investors from some jurisdictions benefit from a higher threshold) will now be subject to the “national interest test” if they involve: <ul style="list-style-type: none"> A foreign government or its associates holding a 10%+ interest An investment that relates to a “strategically important business” Investments relating to significant irrigation schemes Investments in strategically important industries or that own or control high-risk critical national infrastructure Any other investment that the Minister considers could be contrary to New Zealand’s national interest Any investment in a strategically important business that is not subject to the OIO screening regime will be subject to a new call-in power. Under these provisions the Minister can review any investment to determine whether it is likely to give rise to a significant risk to national security or public order. A table summarising how the call-in power will operate is set out on the next page. A “strategically important business” includes a business involved in: <ul style="list-style-type: none"> The research, development, production or maintenance of military or dual-use technology Critical direct suppliers to an intelligence or security agency Significant ports and airports Electricity generation and distribution Water infrastructure Telecommunications infrastructure Financial institutions or financial market infrastructure Media entities with an impact on NZ’s media plurality The development, production or maintenance of sensitive information (e.g. genetic, biometric, health or financial information) (call-in power only) Specific detail on the classes of businesses that will fall in or out of the “strategically important business” definition will be contained in Regulation. 	<p>The new National Interest Test and Call-in Power will be exercised by a senior Minister, and subject to their discretion. The factors to be considered by the Minister are wide in scope. The issue of Ministerial guidance as to how the new powers will be applied will be crucial for investor certainty.</p> <p><u>National Interest Test:</u></p> <ul style="list-style-type: none"> The test is intended to consider New Zealand’s economic, security and other interests The OIO estimates that the national interest test would apply to approximately 20 transactions per year. <p><u>Call-in Power:</u></p> <ul style="list-style-type: none"> The call-in power considers risks to national security and public order The Minister can make an order permitting the transaction (with or without conditions), prohibiting the transaction, or (if it has already taken place) requiring disposal of the investment Treasury Papers indicate that the number of businesses that could fall within the call-in power’s scope could be significant. <p><u>Mitigating risks:</u></p> <p>The intention is that these new tests are reserve powers, to be exercised rarely to mitigate material risks that cannot be managed in other ways. It is proposed that this will be supported by the following:</p> <ul style="list-style-type: none"> Exercise of the Ministerial discretion will be subject to judicial review Decisions must be publically notified The Minister must give reasons for their decision (subject to any national security issues) The call-in power will be Government funded (i.e. there will not be an associated application fee) Statutory review of the call-in power after 3 years, and other reforms after 5 years 	<p>The OIO will be granted new enforcement powers to assist with effective enforcement of the regime, and better equip the OIO to respond to mid-level breaches.</p> <p><u>Key Amendments:</u></p> <ul style="list-style-type: none"> The maximum penalties for a breach of the Act will be increased from \$300,000 to: <ul style="list-style-type: none"> \$500,000 for an individual; and \$10 million for a body corporate The OIO will be able to accept enforceable undertakings (directly enforceable in court) as part of its enforcement measures, The OIO will have statutory authority to apply for injunctive relief The OIO will have greater powers when it comes to ordering divestment of property for investments subject to the national interest test or the call-in power, including the power to appoint a statutory manager to manage the divestment process

The changes being introduced by the Bill will require additional resourcing from the OIO, which is currently not meeting its “ost-recovery” objectives. The OIO is currently undertaking an internal fee review process. We can expect higher application fees to be announced in the near future.

Call-in Power - A Summary

Assets <i>within</i> scope	Military and dual-use technology	Critical direct suppliers	Sensitive data	Critical national infrastructure	Media
Definition	Businesses that research, develop, produce or maintain military or dual-use technology. To be further refined in Regulations	A business that is a direct supplier of goods or services to an intelligence or security agency, where the goods or services are integral to the functioning of the agency and their supply cannot be readily replaced. The Minister must notify a person if they are a critical direct supplier.	Businesses that develop, produce or maintain, or otherwise have access to sensitive information (e.g. genetic, biometric, health or financial information) To be further defined in Regulations	<ul style="list-style-type: none"> Significant ports and airports; Electricity generation and distribution businesses; Water infrastructure; Telecommunications infrastructure; and Systemically important financial institutions and market infrastructure, In all cases of a class to be set out in Regulations	Businesses that publish content or cause content to be published if <ul style="list-style-type: none"> All or a significant part of the business is the generation and/or aggregation of content; and The business has a significant impact on the plurality of content available to the public or a particular section of the public
Notification mechanism	Compulsory	Compulsory	Voluntary	Voluntary	Voluntary
Trigger level (excluding the acquisition of listed equity securities, unless they grant the investor a disproportionate level of control over, or access to, that entity)	0%	0%	0%	0%	25%
Trigger level for the acquisition of listed equity securities	10%	10%	10%	10%	25%
Estimated scale of captured transactions (Treasury estimates)	300	Not released	27,500	270	300
Decision making framework	The decision maker must consider New Zealand's international obligations and the extent to which any risks to national security or public order can be mitigated by conditions of consent.				
Possible outcome	a. Investment approved without conditions b. Investment approved subject to conditions c. Investment blocked or unwound				