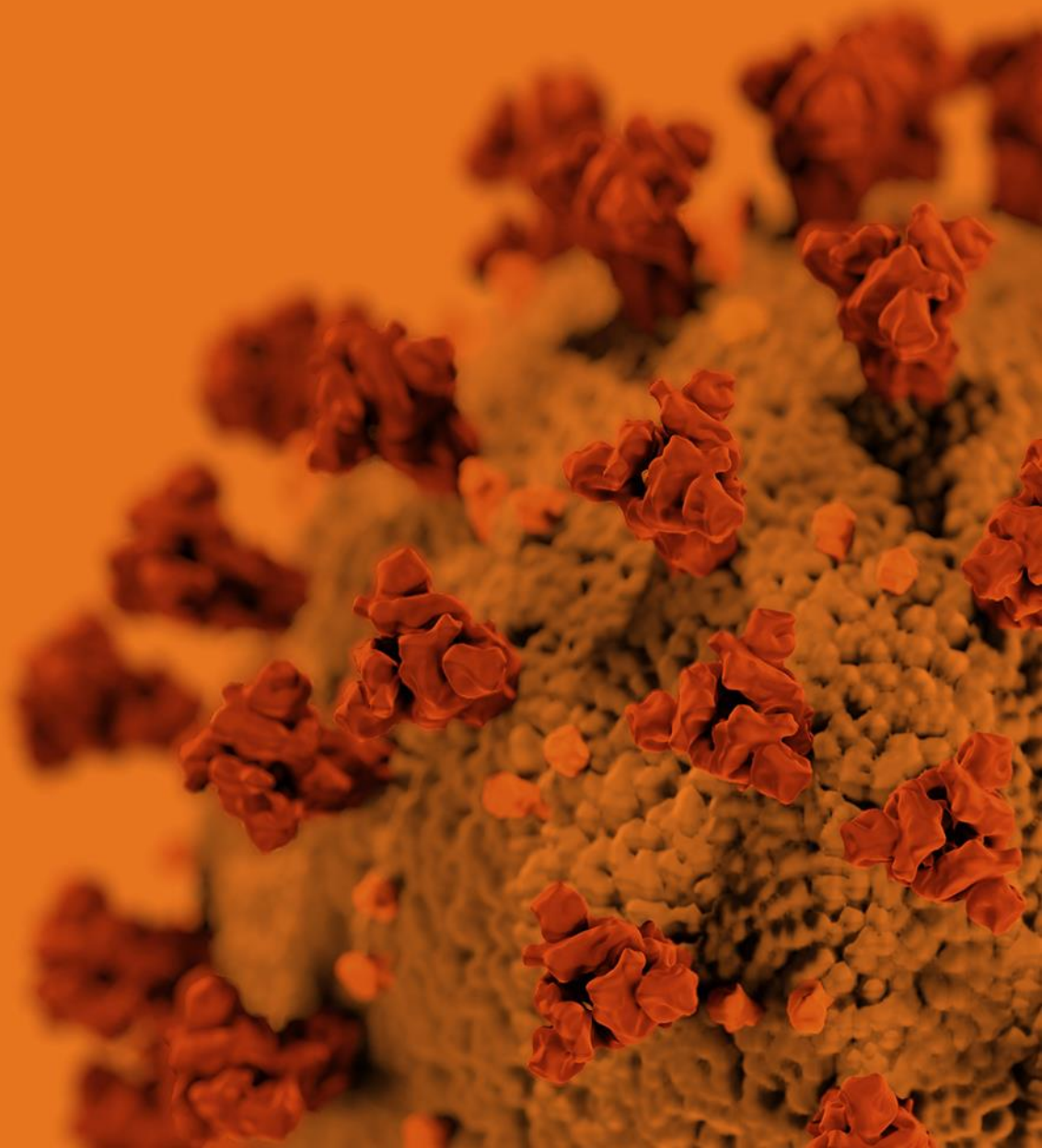
CHAPMAN TRIPP



Chapman Tripp submission to the Finance and Expenditure Select Committee on The Overseas Investment (Urgent Measures) Amendment Bill

18 May 2020

The Overseas Investment (Urgent Measures) Amendment Bill

Introduction

This submission is from Chapman Tripp.

About Chapman Tripp

Chapman Tripp is a full service law firm. We have offices in Auckland, Wellington and Christchurch.

Our practice includes providing legal advice on a range of overseas investment matters currently subject to the Overseas Investment Act 2005 (the ***Act***) proposed to be impacted by The Overseas Investment (Urgent Measures) Amendment Bill (the ***Bill***).

Overview of submission

Chapman Tripp supports many of the amendments proposed in the Bill. In particular, we welcome the decision to bring forward refinement of the investor test, exclusion of certain New Zealand listed issuers and managed investment schemes, reduction of the scope of land deemed sensitive due to what it adjoins, and the imposition of timeframes for decision making.

We acknowledge the Government's policy intention to establish emergency measures, especially application of a notification regime and national interest test, to protect vulnerable industries from aggressive takeover. Given urgency, and the short timeframe for consultation and further amendment to the Bill, we primarily focus in this submission on technical changes to ensure the Bill is fit for purpose and functions as intended.

We urge the Finance and Expenditure Select Committee (FEC) to recommend that the exclusion for listed issuers, proposed to only be a standing consent (though new clause 31 of new Part 4 to the Act), instead be included as a permanent exemption by adopting a modified test for **overseas person** and by addressing the long standing "tipping point" anomaly.

We also suggest an important refinement to the proposed ownership test for listed issuers, by looking at cumulative ownership in excess of 50% by foreign portfolio investors only (rather than all overseas persons). We think these two changes will significantly enhance the ability for fundamentally New Zealand issuers in New Zealand's listed equity capital market to raise additional capital during the uncertainty of the COVID-19 response.

It is important the operation of the emergency notification regime, and subsequently the call-in powers, are clear. We suggest an important refinement to the definition of strategically important business (***SIB***) to clarify that those involved in SIBs should be prescribed by class in supporting regulations and be limited to those that are themselves the operators or suppliers of the relevant critical infrastructure. We also suggest a non-contentious but significant amendment to the new section 82(2)(a) of the Bill to clarify that the notification regime should apply to New Zealand investments only.

Other engagement

We would like to appear in front of FEC to discuss the key points of our submission and any questions Members may have.

We also plan to submit separately on the Overseas Investment Amendment Bill (No 3) once FEC has called for submissions.

Clause of Bill	Provision	Comments
6(2)	6(1) – definition of **relevant government enterprise**	It is important that investors have certainty on whether a transaction will be subject to the national interest test. However, the proposed definition of *relevant government enterprise* will make it difficult for some investors to determine (with certainty or, in some cases, at all) whether they are a "*non-NZ government investor*" for the purposes of the Act, and therefore whether the national interest test may apply to a transaction. The practical difficulty in applying the definition arises from the circularity that occurs in conjunction with the definitions of *non-NZ government investor* and *relevant government investor* (such that upstream holdings need assessing beyond the immediate investor entity), and the fact that the ownership and control interests of *relevant government investors* must be considered on an aggregated basis. Widely held entities, such as listed companies, private equity funds or other collective investment vehicles, would need to be in a position to assess the status of a significant number (and, in some cases, most or all) of their investors, in order to determine their own status. Such an assessment is impractical, as it would require an entity to have sufficient information on its investors to: (a) know which limb of the *relevant government enterprise* definition to apply when assessing that investor; and (b) understand the ownership and control structure of that investor. Further, for listed companies there would be additional challenges faced, such as: (i) a listed company's shareholding changing on an ongoing basis; (ii) many shareholders likely using a custodian to hold their shares; and (iii) in many cases, the direct shareholders of the listed company will not, ultimately, be the entities that need to be assessed for the purposes of the definition. The way the *relevant government enterprise* definition is drafted means, therefore, that it will capture entities that would not properly be considered government enterprises. We consider that the policy objectives can be achieved, while also giving investors greater certainty of the relevant threshold, by focusing the definition on individual relevant government investors (and their associates). ***Proposed change*:** we recommend the definition of *relevant government enterprise* is amended as set out below. We have proposed a 10% threshold (as opposed to 25%) in the various limbs of the definition, to align with the position taken in new section 20A(1)(b) and deal with the policy concern we consider the Bill is seeking to address. This will ensure that a widely held entity only needs to perform the relevant analysis on significant investors. See also our comments in respect of limited partnerships, below. "***relevant government enterprise*** *means—* *(a) a body corporate (W), if a relevant government investor ~~or investors have~~(either alone or together with its associates) has, directly or indirectly, a more than 10% ownership or control interest in W; or* *(b) a partnership, an unincorporated joint venture, or any other unincorporated body of persons (Z) (other than a trust or unit trust or managed investment scheme) if—* *(i) more than ~~25%~~10% of Z's partners or members are relevant government investors; or* *(ii) ~~1 or more~~ a relevant government investor~~s have~~ (either alone or together with its associates) has a beneficial interest in or entitlement to more than ~~25%~~10% of Z's profits or assets (including on Z's winding up); or* *(iii) ~~1 or more~~ a relevant government investor~~s have~~ (either alone or together with its associates) has the right to exercise, or to control the exercise of, more than ~~25%~~10% of the voting power at a meeting of Z; or* *(c) a trust (X) (other than a managed investment scheme) if—*

Clause of Bill	Provision	Comments
		(i) more than ~~25%~~10% of X's governing body are relevant government investors; or *(ii) ~~1 or more~~ a relevant government investor~~s have~~ (either alone or together with its associates) has a beneficial interest in or entitlement to more than ~~25%~~10% of X's trust property; or* *(iii) more than ~~25%~~10% of the persons having the right to amend or control the amendment of X's trust deed are relevant government investors; or* *(iv) more than ~~25%~~10% of the persons having the right to control the composition of X's governing body are relevant government investors; or* *(d) a unit trust (Y) (other than a managed investment scheme) if—* *(i) the manager or trustee, or both, are relevant government investors; or* *(ii) ~~1 or more~~ a relevant government investor~~s have~~ (either alone or together with its associates) has a beneficial interest in or entitlement to more than ~~25%~~10% of Y's trust property; or* *(e) a managed investment scheme if—* *(i) the manager or the trustee (as the case may be) is a relevant government investor; or* *(ii) more than ~~25%~~10% of the value of the investment products in the managed investment scheme is invested on behalf of ~~1 or more~~ a relevant government investor~~s~~ (either alone or together with its associates),—* *where terms in this paragraph have the same meanings as in the Financial Markets Conduct Act 2013".*
6(2)	6(1) – definition of **relevant government enterprise**	It is unclear under which limb of the proposed definition of *relevant government enterprise* a limited partnership ought to be assessed – it could fit into the provisions for a body corporate or a managed investment scheme. Neither of those provisions has been drafted to fit the circumstances of a limited partnership, where limited partners are passive investors and a general partner exercises control over the limited partnership. Given the wide use of limited partnerships as investment vehicles, we think the Act should clearly state how limited partnerships should be assessed by including a separate limb within the definition. Note our comment is not restricted to limited partnerships established under the New Zealand Limited Partnerships Act 2008, but rather a limited partnership established under any jurisdiction. See also our proposed change to the definition of *overseas person* below. ***Proposed changes*:** add "*(other than a limited partnership)*" after "*a body corporate (W)*" in sub-clause (a) and after "*a managed investment scheme*" in sub-clause (e) of the definition of *relevant government enterprise*. Add the following as a new sub-clause (f) to the definition of *relevant government enterprise*: "*(f) a limited partnership (Z) if—* *(i) a general partner of Z is a relevant government investor; or* *(ii) a relevant government investor (together with its associates) has a beneficial interest in or entitlement to more than 10% of Z's profits or assets (including on its winding up);* *(iii) a relevant government investor (together with its associates) has the right to exercise or control the exercise of more than 10% of the voting rights to amend or control the amendment of Z's limited partnership agreement; or*

Clause of Bill	Provision	Comments
		(iv) a relevant government investor (together with its associates) has the right to exercise or control the exercise of more than 10% of the voting rights to appoint a general partner of Z."
6(2)	6(1) – definition of **SIB**	It is not clear how a business that is "involved in" should be interpreted for sub-clauses (c) to (g) and (i) of the definition of *SIB*, as those words imply a broader test than under the remaining sub-clauses. For example: • a business that operates a duty free shop or a passenger drop-off at an airport is arguably "involved" in an airport under sub-clause (c); or • a business that is listed on a stock exchange, or uses a payment system, is arguably "involved" in financial market infrastructure under sub-clause (g). The Summary of Approach to Supporting Regulations published on 15 May 2020 signals a useful narrowing of the *SIB* definition in some, but not all, instances. For example, sub-clause (e) of the *SIB* definition covers businesses "*involved in drinking water, waste water, or storm water infrastructure*", which the proposed approach to regulations clarifies as meaning entities "*that operate*" specific drinking water supply schemes or "*that provide*" specific networks. The regulations that set out the relevant classes for the definition of SIB should wherever possible refer to companies or entities that are the operators or suppliers of the relevant critical infrastructure. We will provide this feedback to the Treasury for the purposes drafting the regulations. In addition, the drafting of the definition of SIB should be clear that SIBs are those businesses or entities prescribed by the classes set out in the regulations (for example, Auckland International Airport Limited) rather than those "*involved in*" those businesses (such as Auckland International Airport Limited's cleaning contractors). ***Proposed change*:** Combined with the approach to regulations outlined above, amend (c) to (g) and (i) of the definition of SIB to read as follows: "*(c) a business of a class set out in regulations that is involved in ports or airports:* *(d) a business of a class set out in regulations that is involved in electricity generation, distribution, metering, or aggregation:* *(e) a business of a class set out in regulations that is involved in drinking water, waste water, or storm water infrastructure:* *(f) a business of a class set out in regulations that is involved in telecommunications infrastructure or services:* *(g) a business of a class set out in regulations that is a financial institution or is involved in financial market infrastructure:* … *(i) in section 20A (relating to transactions of national interest),—* *(i) a business of a class set out in regulations that is involved in an irrigation scheme:* *(ii) any other business that is involved in a strategically important industry or that owns or controls high-risk critical national infrastructure of a class set out in regulations; and :"*

Clause of Bill	Provision	Comments
7	Section 7 Amended (Who are overseas persons)	The Bill should permanently fix the anomaly that deems listed issuers with widespread foreign portfolio ownership (less than 10% holdings), or managed investment schemes (including KiwiSaver) which hold assets predominantly for New Zealand investors, to be treated as overseas persons rather than the treatment in the Bill of deeming such persons to have a standing consent (as proposed by clause 64, inserting clause 31 into a new Part 4 of the Act). The **listed issuer** anomaly has been a problem for many years which has become progressively more acute as the list of previously exempted portfolio investors in Schedule 3 of the Overseas Investment Regulations 2005 (*the **Regulations***) has been reduced to now having no such exempted investors. In essence we are proposing enacting the new *overseas person* definition now, with one refinement, so that only foreign portfolio investors (rather than all overseas persons cumulatively) be taken into account when assessing whether more than 50% of a listed issuer is owned by overseas persons. Such an approach is consistent with the concept of a **notional single person** (or **less than 10% holders**) test under the Income Tax Act continuity provisions which generally disregard unassociated investments of less than 10% in a listed issuer as affecting continuity of ownership on the basis that at below that level they do not have any influence. Note some overseas persons grant control over their voting decisions to third party managers or do not exercise voting rights (such as passive index funds), so we are proposing that the foreign portfolio investor test look at both beneficial interests in, or control over, 10% of more of specified securities with control rights. In addition, for the same reasons as set out above in relation to the definition of *relevant government enterprise*, we propose that limited partnerships are covered by a distinct provision within the *overseas person* definition. ***Proposed change*:** We therefore recommend replacing clause 7 of the Bill with the following, and by omitting clause 31 from Part 4 intended to be inserted by clause 65 of the Bill: 7(1) Replace section 7(2) with: *(2) In this Act, **overseas person** means—* *(a) an individual who is neither a New Zealand citizen nor ordinarily resident in New Zealand; or* *(b) a body corporate (other than a limited partnership) that is incorporated outside New Zealand or is a more than 25% subsidiary of a body corporate incorporated outside New Zealand (other than a limited partnership); or* *(c) a body corporate—* *(i) that is a New Zealand listed issuer; and* *(ii) that meets the ownership test in subsection (3)(a), or the control test in subsection (3)(b), or both; or* *(d) a body corporate (**A**) (other than a New Zealand listed issuer or a limited partnership) if an overseas person or persons have—* *(i) more than 25% of any class of A's securities; or* *(ii) the power to control the composition of more than 25% of A's governing body; or* *(iii) the right to exercise or control the exercise of more than 25% of the voting power at a meeting of A; or*

Clause of Bill	Provision	Comments
		*(e) a partnership, unincorporated joint venture, or other unincorporated body of persons (other than a trust or unit trust or managed investment scheme) (**A**) if—* *(i) more than 25% of A's partners or members are overseas persons; or* *(ii) an overseas person or persons have a beneficial interest in or entitlement to more than 25% of A's profits or assets (including on A's winding up); or* *(iii) an overseas person or persons have the right to exercise or control the exercise of more than 25% of the voting power at a meeting of A; or* *(f) a trust (**A**) (other than a managed investment scheme) if—* *(i) more than 25% of A's governing body are overseas persons; or* *(ii) an overseas person or persons have a beneficial interest in or entitlement to more than 25% of A's trust property; or* *(iii) more than 25% of the persons having the right to amend or control the amendment of A's trust deed are overseas persons; or* *(iv) more than 25% of the persons having the right to control the composition of A's governing body are overseas persons; or* *(g) a unit trust (**A**) (other than a managed investment scheme) if—* *(i) the manager or trustee, or both, are overseas persons; or* *(ii) an overseas person or persons have a beneficial interest in or entitlement to more than 25% of A's trust property; or* *(h) a managed investment scheme <u>(other than a limited partnership)</u> if—* *(i) the manager or the trustee (as the case may be) is an overseas person; or* *(ii) more than 25% of the value of the investment products in the managed investment scheme is invested on behalf of overseas persons,—* *where terms in this paragraph have the same meanings as in the Financial Markets Conduct Act 2013<u>; or</u>* *<u>(i) a limited partnership (**A**) if—</u>* *<u>(i) A is an overseas limited partnership registered under Part 3 of the Limited Partnerships Act 2008; or</u>* *<u>(ii) a general partner of A is an overseas person; or</u>* *<u>(iii) an overseas person or persons have a beneficial interest in or entitlement to more than 25% of A's profits or assets (including on its winding up);</u>* *<u>(iv) an overseas person or persons have the right to exercise or control the exercise of more than 25% of the voting rights to amend or control the amendment of A's limited partnership agreement; or</u>* *<u>(v) an overseas person or persons have the right to exercise or control the exercise of more than 25% of the voting rights to appoint a general partner of A.</u>* *(3) For the purpose of applying subsection (2)(c)(ii) to a New Zealand listed issuer (A),—* *(a) the **ownership test** is that ~~an overseas person has, or 2 or more overseas persons~~ <u>foreign portfolio investors</u> cumulatively have~~,~~ a beneficial entitlement to, or a beneficial interest in, more than 50% of A's securities:*

Clause of Bill	Provision	Comments
		*(b) the **control test** is that—* *(i) at least 1 foreign portfolio investor ~~overseas person (alone or together with its associates) has a beneficial entitlement to, or a beneficial interest in,~~ has control of 10% or more of any class of A's securities that confer control rights; and* *(ii) when the interests of each foreign portfolio investor ~~overseas person to which subparagraph (i) applies~~ are added together, those foreign portfolio investors ~~overseas persons~~ cumulatively have the right to—* *(A) control the composition of 50% or more of A's governing body; or* *(B) exercise or control the exercise of more than 25% of the voting power at a meeting of A.* (c) a ***foreign portfolio investor** is an overseas person (alone or together with its associates) that has a beneficial entitlement to, or a beneficial interest in, or a right to control, 10% or more of any class of A's securities that confer control rights.*
9	Section 12 Amended (What are overseas investments in sensitive land)	Consistent with the proposed correction to permanently address the listed issuer anomaly by the change to section 7 (discussed above), rather than dealing with the "tipping point" anomaly as a standing consent, we think the correction to this anomaly should be made permanently with effect from commencement of the Bill. ***Proposed change*:** We therefore recommend replacing clause 9 of the Bill with the following: 9(1) Replace section 12 with: *(1) An **overseas investment in sensitive land** is the acquisition by an overseas person, or an associate of an overseas person, of all or any of the following (a section 12 interest):* *(a) an estate or interest in land if—* *(i) the land that the estate or interest relates to is sensitive land under Part 1 of Schedule 1; and* *(ii) the estate or interest acquired is—* *(A) a freehold estate; or* *(B) if the land that the interest relates to is residential land, any interest in land (other than an exempted interest) for a total term (as calculated in accordance with Schedule 1A) of 3 years or more; or* *(C) if the land that the interest relates to is sensitive (but not residential) land, any interest in land (other than an exempted interest) for a total term (as calculated in accordance with Schedule 1A) of 10 years or more:* *(b) rights or interests in securities of a person (A) if A owns or controls (directly or indirectly) an estate or interest in land described in paragraph (a) and, as a result of the acquisition,—* *(i) the overseas person or the associate (either alone or together with its associates) has a more than 25% ownership or control interest in A; or* *(ii) the overseas person or the associate (either alone or together with its associates) has an increase in an existing more than 25% ownership or control interest in A; or* *(iii) A becomes an overseas person in either of the following circumstances:* *(A) A is a New Zealand listed issuer and the tipping point for New Zealand listed issuers is met; or*

Clause of Bill	Provision	Comments
		(B) A is not a New Zealand listed issuer. *(2) In this Act, the **tipping point for New Zealand listed issuers**, for the purposes of subsection (1)(b)(iii)(A), is met in respect of a New Zealand listed issuer if—* *(a) at least 1 overseas person (alone or together with its associates) (each a **foreign portfolio investor**) has a beneficial entitlement to, or a beneficial interest in, or a right to control, 10% or more of any class of A's securities that confers control rights; and* *(b) when the interests of each overseas person to which paragraph (a) applies are added together, those foreign portfolio investors ~~overseas persons~~ cumulatively have—* *(i) the power to control the composition of 50% or more of A's governing body; or* *(ii) the right to exercise or control the exercise of more than 25% of the voting power at a meeting of A.*
17	20A(1)(c)	The wording of the new section 20A(1)(c) could capture passive landlords transacting premises leased to SIBs where the landlord has no involvement in the SIB. ***Proposed change*:** amend new section 20A(1)(c) to read "*a transaction of a kind described in section 12(1)(a) by an SIB where the estate or interest in land is used in carrying on an SIB*"
17	20D	Currently, there is no obligation on the Minister in new section 20D of the Act to notify a person if they cease to be a critical direct supplier. ***Proposed change*:** add the following as a new subsection (4) to new section 20D of the Act: "*The Minister must (a) notify a person if they cease to be a critical direct supplier and, where relevant, remove that person's name from the list referred to in subsection (2)(b)(i).*"
17	20E(2)	It will not be practicable for a listed issuer to give the notices contemplated by sections 20E(2) and (4) in the event that the listed issuer is an unpublished CDS. ***Proposed change:*** *a*mend new section 20E to add: "*(8) Sections 20E(2) and (4) do not apply to a listed issuer.*"
18(2)	23(4)	A person should not be in breach of the Act under section 45 for a failure to comply with new section 23(4), given the information requested by the regulator (in connection with an application) could be information that the applicant cannot obtain within the timeframe, or at all. Further, it should be open to an applicant to take a different course of action (for example, withdrawing its application) without being in breach of section 45 of the Act. ***Proposed change*:** amend new section 23(4) to read: "*A person required to provide information under subsection (3) must comply with the regulator's notice within the time, and in the manner, specified in it. A person who fails to comply with this section does not commit an offence under section 45.*"

Clause of Bill	Provision	Comments
49	Section 61B amended (Purpose of exemptions)	We strongly support the amendments to the exemption power in section 61B of the Act, as the test introduced from 22 October 2018 by section 47 of the Overseas Investment Amendment Act 2018 has proved to be too narrow to be effective. We suggest clause 49 commence on Royal Assent, not 14 days afterwards. ***Proposed change:*** Although the words in proposed new s 61B are widely drawn, given the Bill also proposes a solution for some listed issuers, we recommend that new s 61B (viii) to be inserted by clause 49(3) of the Bill makes it clear that listed issuers that do not qualify for the automatic relief can still apply for an individual exemption as follows: *(3) After section 61B(c)(vii), insert:* *(viii) persons (including listed issuers), transactions, rights, interests, or assets that the Minister considers to be fundamentally New Zealand owned or controlled or to have a strong connection to New Zealand:* ***Further proposed change:*** Given the proposed addition of new section 61B(c)(viii), together with the changes to sections 7 and 12 discussed above, and the fact that no person is currently listed in Schedule 3 of the Regulations, we recommend the following consequential amendments to the Regulations to preserve the existing exemptions of the two entities currently listed in Schedule 4. *49(4) Consequentially amend the Overseas Investment Regulations 2005, by:* *(a) replacing the definition of **specified persons** in clause 3 with the following:* ***exempted New Zealand controlled person** has the meaning given in regulation 48(1)* *(b) replacing regulation 48 with the following:* *(1) Every person listed in Schedule 4 (an **exempted New Zealand controlled person)** together with its subsidiaries is deemed to be exempted from the requirement for consent provisions of the Act.* *(2) However, the exemption under subclause (1) does not apply to an exempted New Zealand controlled person and its subsidiaries if an overseas person (together with its associates) has 25% control, or 2 or more overseas persons have cumulatively 75% control, of the exempted New Zealand controlled person by having (directly or indirectly)—* *(a) a beneficial entitlement to, or a beneficial interest in, 25% or more or 75% or more (as the case may be) of the specified securities of the exempted New Zealand controlled person; or* *(b) the right to exercise or control the exercise of 25% or more or 75% or more (as the case may be) of the voting power at a meeting of the exempted New Zealand controlled person; or* *(c) the right to appoint or control the appointment of 25% or more or 75% or more (as the case may be) of the board of directors (or other persons or body exercising powers of management, however described) of the exempted New Zealand controlled person.* *(3) To avoid doubt, Schedule 4 may be amended by further regulations made under section 61C of the Act.* (c) *revoking Schedule 3.*

Clause of Bill	Provision	Comments
52	82(2)(a)	The wording of new section 82(2)(a) means that the notification requirement technically applies to offshore share transfers even if the target has no assets in New Zealand. This provision should make it clear that it relates to New Zealand investments only. ***Proposed change*:** amend the provision (using similar wording to section 13(1)(c) of the Act) as follows: "*the acquisition by an overseas person, or an associate of an overseas person, of rights or interests in securities of a person (A), where A holds or controls property (including goodwill and other intangible assets) in New Zealand used in carrying on business in New Zealand, if, as a result of the acquisition the overseas person or the associate (either alone or together with its associates) has…*"
52	82(2)(b)	The wording of new section 82(2)(b), combined with the suggested approach to regulations, to require that investments in assets worth more than 25% of the relevant business must be notified will have very broad application and could result in very large volumes of notifications being made. Further, some of the uncertainty in the proposed wording will result in precautionary notifications. Our key concerns with this limb of the emergency notification regime are: • the wording is not clear which for party's business the property is "*used in carrying on business in New Zealand*". Land, for example, can be held for many purposes unrelated to carrying on business. If non-sensitive land that is not used by the vendor in carrying on business in New Zealand was sold to an overseas investor that was going to use that land for its business, it is not clear whether notification would be required. We understand that the Bill is intended to protect New Zealand's productive business assets and so consider notification should not be required where the property is not used by the vendor in carrying on business in New Zealand. • in nearly all situations, it will be difficult for an overseas investor to obtain sufficient information about the vendor's business and remaining assets to confidently determine whether the property to be acquired is worth more than 25% of the vendor's business. The parties may have valuation information on the property to be acquired but the vendor is not required to (and is not likely to be willing to) provide the acquirer with the total value of their assets. Absent this information, overseas investors will default to notification. • "*property*" includes the taking of a leasehold estate, the exercise of valuing a complete leasehold estate and comparing that valuation to the landlord's business assets is unlikely to be completed. We anticipate that precautionary notifications of routine leasing undertaken by overseas persons in New Zealand would overwhelm the available resources to consider the emergency notifications and is not what was intended. Further, we understand from Australian property investment clients that the temporary lowering of monetary thresholds by FIRB is causing significant issues with progressing routine commercial leasing. ***Proposed change:*** amend section 82(2)(b) as follows: "*the acquisition by an overseas person, or an associate of an overseas person, of property (including goodwill and other intangible assets but excluding an estate or interest of a class set out in the regulations) in New Zealand used by the vendor in carrying on business in New Zealand*

Clause of Bill	Provision	Comments
		(whether by 1 transaction or a series of related or linked transactions) of any value that effectively amounts to a change in control of the business of the vendor, as defined in 10 the regulations." In addition to the above amendments, we consider that it will be critical that the regulations that support section 82(2)(b) provide certainty for parties transacting interests in land other than freehold and dealing with routine leasing in a way that does not hinder normal economic activity. In particular, we consider that the regulations should provide for: • In the absence of contrary information, the total consideration payable will be sufficient for determining the value of the assets. In the context of the grant of a new lease this should be the total rent payable during the initial term; and • Any renewals of existing leases in place before the commencement of the Bill do not require notification.
52	86	The wording of the existing exemptions in the Regulations exempts a number of transactions from the requirement to obtain consent under the Act, such as an intra-group restructure. However, those exemptions will not exempt from the requirement to notify a transaction under the new section 85. While we will provide feedback to the Treasury to ensure this is addressed in the drafting of regulations, we also consider extending the existing exemptions in the Regulations should be contemplated in the new section 86. ***Proposed change:*** add the following to the end of clause 86: *"(c) extending the effect of any exemption set out in the regulations so that the exemption applies to the requirement to notify under section 85."*
52	87(1)(d)	The requirement to provide a statutory declaration together with a notification under new section 87 is impractical in the context of the emergency notification regime and will impose unnecessary costs on those making notifications. Some other form of statement verifying that the information provided is true and correct is more appropriate. ***Proposed change*:** replace "*statutory declaration*" with "*statement*" in new section 87(1)(d) of the Act. The No. 3 Amendment Bill could reverse this change for notifications provided under the permanent call-in power. A similar issue recently arose in the context of the business hibernation regime now forming Schedule 13 of the Companies Act 1993. The COVID-19 Response (Further Management Measures) Legislation Bill as introduced required statutory declarations before entry into the business hibernation regime, but the Epidemic Response select committee accepted submissions that the requirement for statutory declarations should be changed to certification.

Clause of Bill	Provision	Comments
53	82(2)(b)	The wording of new section 82(2)(b) of the Act as amended by section 53 of the Urgent Measures Bill (i.e. the provision that will apply with the permanent call-in power) means that the acquisition of <u>any</u> asset used by a business carrying on a SIB – including non-core or minor assets and assets easily replaceable – is subject to the call-in power. For the call-in power to apply, the asset being acquired should be critical to the carrying on of the SIB and one that cannot readily be replaced. ***Proposed change*:** add "*that is critical to the carrying on of that SIB and cannot readily be replaced*" to the end of section 82(2)(b).
53(13)	6(1) – definition of **SIB**	The inclusion of "*otherwise has access to sensitive information*" in sub-clause (j) of the definition of *SIB* could be interpreted in a manner that significantly broadens the scope of the definition. For example, under the Summary of Approach to Supporting Regulations document, "sensitive information" includes credit scores, and a dataset on 30,000 individuals is noted as a proposed threshold. A landlord or employer performing a credit check on an individual technically has access to a database with credit information on more than 30,000 individuals, even if that access comes at a cost and isn't utilised broadly by the landlord/employer in a manner that should engage the definition of *SIB*. ***Proposed change*:** while having "*access to*" other classes of sensitive information (e.g. genetic information) is an appropriate threshold, it should not apply to financial information (including credit scores) where the other requirements of sub-clause (j) ("*develops, produces, maintains*") already provide adequate protection.
54	Schedule 1AA, Part 3, clauses 14(2) and 15(2)	The provisions of clauses 14(2) and 15(2) of Schedule 1AA do not carve out offers for securities listed on a recognised exchange (whether in New Zealand or overseas), where the offer was made prior to commencement. Without that carve out, such an offer could be caught mid-transaction (i.e. before acceptances have been received) and be subject to the provisions of the amended Act (including the emergency notification processes), which would result in public market uncertainty for relevant investors. We are aware of processes (including offshore processes, where the target holds assets in New Zealand) that could potentially fall into this category – i.e. where an offer may be made prior to commencement of the amendments in the Emergency Measures Bill, but before acceptances have been received in respect of that offer. ***Proposed change*:** amend clause 14(2) of Schedule 1AA to read: "*Part 1 of this schedule applies when determining whether a transaction is entered into before commencement or on or after commencement (see clause 1(4) and (5))<u>, provided further that a regulated offer (including a scheme of arrangement or other equivalent transaction, however described) made or announced before commencement in respect of securities listed on a recognised stock exchange (whether in New Zealand or elsewhere), even if, immediately before commencement, that offer has not been accepted or approved in full or in part, must be treated as a transaction entered into before commencement</u>.*"
17	20A(1)	New section 20A(1) of the Act refers to sections 12(1)(a) and 12(1)(b)(i) and (ii); however, subsection (1) of section 12 will only be inserted by the No. 3 Amendment Bill. ***Proposed change*:** amend references in new section 20A(1) of the Act to refer to section 12(a) and 12(b)(i) and (ii). The No. 3 Amendment Bill will need to be updated to amend section 20A(1) and insert the revised section references.

Clause of Bill	Provision	Comments
54(2)	Schedule 1AA, Part 4, clauses 31(1), 32(1) and (3)	We have already noted in our submission on clauses 7 and 9 above that we think the change for listed issuers should be made permanent from commencement of the Urgent Measures Bill. ***Proposed change*:** We also consider the proposed standing consent in clause 32 of Part 4 proposed to be inserted into Schedule 1AA for sensitive adjourning land is uncontroversial and should be made as a permanent change now, rather than a standing consent. Paragraphs 43 to 46 of the Treasury *Report Back on consultation on the Phase 2 reforms* (24 June 2020) noted that overall submitters supported narrowing the scope of the regime with most submitters supporting the option Treasury recommended to the Minister and now reflected in clause 32 of the proposed Part 4. Making the listed issuer change (modified in the form discussed above) and the adjourning land change permanent will also greatly assist accessibility to the law rather than the more convoluted 'standing consent' regime linked to the No. 3 Bill, which may not be enacted for some time. If our primary submission is not accepted, we note clauses 31(1) and 32(1) and (2) refer to "*of this Act*" but the provisions referred to will only be inserted by the No. 3 Amendment Bill. ***Proposed alternative change*:** Therefore, if our primary submission is not accepted, we suggest amending references to "*of this Act*" where they appear in clauses 31(1) and 32(1) and (2) to "*of the 2020 Amendment Act*".
N/A	Parts 4 and 5 of the Regulations	The exemptions contained in Parts 4 and 5 of the Regulations do not permit eligible investors to rely on the relevant exemption if they wish to structure the transaction using a New Zealand subsidiary (whether existing or newly incorporated). We do not consider there to be any good policy reasons for this prohibition. The reality of many corporate transactions is that a purchaser wishes to use a tax efficient structure by utilising a local subsidiary to make an acquisition. The inability of a purchaser to do that and rely on the relevant exemption could also result in New Zealand vendors being paid less for assets, if a purchaser factors in the costs of an inefficient tax structure to the price it is willing to pay. ***Proposed change*:** provided that the subsidiary is incorporated in New Zealand and is wholly owned by eligible investors (including New Zealanders for these purposes), we suggest that the exemptions in Parts 4 and 5 of the Regulations ought to apply.

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