

25 August 2021

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Overseas Investment (Exempt Investment from OECD Countries) Amendment Bill

Purpose

1. We have considered whether the Overseas Investment (Exempt Investment from OECD Countries) Amendment Bill (the Bill), a member's Bill in the name of Damien Smith MP, is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching this conclusion, we have considered the consistency of the Bill with s 19 (freedom from discrimination) of the Bill of Rights Act. Our analysis is set out below.

The Bill

3. The Bill amends the Overseas Investment Act 2005 (the principal Act).
4. The principal Act provides that 'overseas persons' must get consent in order to invest in 'sensitive assets'. It also provides that certain transactions that do not require consent may be called-in by the Minister of Finance to be screened for national security and public order risks.
5. The Bill adds a new cl 8A to Schedule 3 of the principal Act to create an exemption 'OECD'¹ persons² from the need to obtain consent to invest in sensitive assets (except residential land,³ for which consent would still be required).
6. Clause 5 of the Bill amends s 82 of the principal Act to provide that transactions that are exempt under the new exemption may still be considered under the call-in regime. However, as drafted, the Bill refers to the version of s 82 of the principal Act that was in force prior to 7 June 2021. That version of s 82 related to an 'emergency notification regime' which was introduced in June 2020 to ensure that heightened foreign investment risks caused and exacerbated by the COVID-19 pandemic could be managed effectively. The current s 82 refers to a more limited range of transactions that may be called-in to be screened for national security and public order risks. We have taken a purposive approach and have assumed that cl 5 will be updated to refer to the existing provision.

¹ The Organisation for Economic Co-operation and Development (the OECD) is an international organisation which brings together 38 member countries (including New Zealand) who together with governments, policy makers and citizens, work on establishing evidence-based international standards and finding solutions on a range of social, economic and environmental challenges (see www.OECD.org).

² This is defined in cl 4 to include individuals who are citizens or ordinarily resident in, an OECD country as well as specifying when a body corporate, partnership, joint venture, trust, or unit trust is an OECD person.

³ As defined in s 6 Overseas Investment Act 2005.

Consistency of the Bill with the Bill of Rights Act

Section 19 – Freedom from discrimination

7. Section 19(1) of the Bill of Rights Act affirms the right to be free from discrimination. The Human Rights Act 1993 provides that ethnic or national origins, which includes nationality or citizenship, is a prohibited ground of discrimination.⁴
8. The key question, in assessing whether there is a limit on the right to freedom from discrimination, is whether the legislation draws a distinction on one of the prohibited grounds of discrimination under s 21 of the Human Rights Act, and if so, whether the distinction involves disadvantage to one or more classes of individuals.⁵ Whether a disadvantage arises is a factual determination.⁶
9. As set out in our previous advice,⁷ the principal Act's consent regime for overseas investment in sensitive New Zealand assets treats foreign-owned or controlled corporations differently from locally-owned corporations, and treats non-citizens who are not ordinarily resident in New Zealand differently from citizens and people who are ordinarily resident. The Bill creates an exemption, except where the investment is in residential land, from this regime for citizens and people who are ordinarily resident in OECD countries and corporations incorporated in those countries.
10. In our previous advice,⁸ we acknowledged that it is arguable that the overseas investment regime does not engage s 19 of the Bill of Rights Act because the Act distinguishes between people based on their citizenship and their residency status, rather than purely on the basis of their national and ethnic origins.
11. If s 19 is engaged and limited by the creation of the exemption (in that there is differential treatment between non-citizens who are not ordinarily resident in an OECD country and people who are citizens or ordinarily resident in an OECD country), we consider that the limitation is justifiable under s 5 Bill of Rights Act.
12. Where a provision is found to limit a right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of s 5 of the Bill of Rights Act. The s 5 inquiry may be approached as follows:⁹
 - a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - b. If so, then:

⁴ Human Rights Act 1993, s 21(1)(g).

⁵ See, for example, *Atkinson and others v Minister of Health* [2010] NZHRRT 1; *McAlister v Air New Zealand* [2009] NZSC 78; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31.

⁶ See, for example, *Child Poverty Action Group v Attorney-General* above n 5 at [179]; and *McAlister v Air New Zealand* above n 5 at [40] per Elias CJ, Blanchard and Wilson JJ.

⁷ Ministry of Justice *Legal Advice – Consistency with the New Zealand Bill of Rights Act 1990: Overseas Investment Amendment Bill* (10 March 2020) and Ministry of Justice *Legal Advice – Consistency with the New Zealand Bill of Rights Act 1990: Overseas Investment (COVID-19 Emergency Measures) Amendment Bill* (7 May 2020).

⁸ Ministry of Justice, above n 7.

⁹ *Hansen v R* [2007] NZSC 7.

- i. is the limit rationally connected with the objective?
 - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. is the limit in due proportion to the importance of the objective?
- 13. The principal Act's consent regime for overseas investment in sensitive New Zealand assets is aimed at ensuring overseas investment has genuine benefits for New Zealand.
- 14. The Bill's explanatory note characterises investment by investors from OECD countries as "the least risky sources of investment". It notes that membership of the OECD is restricted to countries committed to preserving and advancing democracy and market capitalism, and recognises that many OECD nations are allies of New Zealand on national security issues.
- 15. Exempting investors from countries who are members of the OECD from the consent regime, except where the investment is in residential land, recognises investments by these investors are likely to be of genuine benefit to New Zealand and support greater levels of productivity, jobs and higher income. We consider this objective of increasing the attractiveness of investing in New Zealand by OECD countries to be sufficiently important, and that the exemption created by the Bill is be rationally connected to this objective and limits the right no more than reasonably necessary.
- 16. We note that citizenship is not the only factor taken into account when determining whether the exemption will apply. The Bill does not draw distinctions between citizens of OECD countries and those who are ordinarily resident there. In addition, it applies to corporations created in these countries, which may or may not reflect the citizenship or residency of the owners of those corporations. In these circumstances, we consider any limitation on s 19 is reasonable and proportionate to the objective of streamlining investment from OECD countries to make New Zealand a more attractive destination for investment from these sources.
- 17. We therefore consider that the Bill appears to be consistent with the right to be free from discrimination affirmed by s 19(1) of the Bill of Rights Act.

Conclusion

- 18. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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