

12 May 2022

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Overseas Investment (Forestry) Amendment Bill**

### **Purpose**

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1. We have considered whether the Overseas Investment (Forestry) Amendment Bill (the Bill) 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 not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 24352/4.1). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered section 19 (freedom from discrimination). Our analysis is set out below.

### **The Bill**

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4. The Bill amends the Overseas Investment Act 2005 (the principal Act). The principal Act is New Zealand's primary tool for regulating foreign investment. It seeks to balance the need to support high quality investment with the need to ensure that the Government has tools available to manage risks.
5. The main objective of this Bill is to ensure that overseas investments that result in the conversion of farmland (or other land) to forestry, benefit New Zealand and that any risks can be better managed.
6. Drivers for investment in forestry have changed and New Zealand has consequently seen an increase in forestry investment. This includes increasing conversions of productive farmland to forest (by both domestic and overseas investors). However, as economic and regulatory contexts change, it is important to consider the environmental, social, economic and other impacts of investment forestry to ensure that all stakeholders continue to benefit. The principal Act's current (relatively permissive) 'special forestry' test does not always provide sufficient flexibility to enable these concerns to be managed.
7. The Bill remedies this by applying the principal Act's existing, but more stringent, 'benefit to New Zealand' test, to overseas investments that will result in converting land-use to production forestry. The 'benefit to New Zealand' test is a more complex test than the 'special forestry' test; it requires in-depth consideration of the benefits the investment brings relative to the current use of the land, and involves greater discretion for decision-makers. Applying this test will ensure that overseas investment in forestry genuinely benefits New Zealand, and that any risks can be better managed.
8. Finally, the Bill makes some minor and technical changes to the principal Act's forestry provisions to ensure their workability and clarity.

## Consistency of the Bill with the Bill of Rights Act

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### Section 19 – Freedom from discrimination

9. 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.<sup>1</sup>
10. 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.<sup>2</sup> Whether a disadvantage arises is a factual determination.<sup>3</sup>
11. As set out in our previous advice,<sup>4</sup> 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.
12. The Bill alters the consent regime as it applies to overseas investment in forestry conversion, by applying the principal Act's more stringent 'benefit to New Zealand' test to forestry conversions (with the exception of forestry conversions that rely on standing consent granted or applied for before commencement) instead of the relatively permissive 'special forestry' test.
13. In our previous advice,<sup>5</sup> we acknowledged that it is arguable that the overseas investment regime does not engage s 19 of the Bill of Rights Act because the principal Act distinguishes between people based on their citizenship and their residency status, rather than purely on the basis of their national and ethnic origins.
14. If s 19 is engaged and limited by the application of the 'benefit to New Zealand' test to forestry conversions, we consider that the Bill is justifiable under s 5 of the Bill of Rights Act because these aspects of the Bill serve, and are rationally connected to, the sufficiently important objective of effectively managing investment-related risks.
15. 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:<sup>6</sup>

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<sup>1</sup> Human Rights Act 1993, s 21(1)(g).

<sup>2</sup> 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.

<sup>3</sup> See, for example, *Child Poverty Action Group v Attorney-General* above n 2 at [179]; and *McAlister v Air New Zealand* above n 2 at [40] per Elias CJ, Blanchard and Wilson JJ.

<sup>4</sup> 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).

<sup>5</sup> Ministry of Justice, above n 4.

<sup>6</sup> *Hansen v R* [2007] NZSC 7.

- a. Does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
- b. If so, then:
  - 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?

- 16. 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. The extension of the 'benefit to New Zealand' test to overseas investment in forestry conversion is rationally connected to the Bill's objective of ensuring that overseas investments that result in conversion of farmland (or other land-uses) to forestry, benefit New Zealand and providing stronger tools to better manage the risks and concerns when they arise from overseas investment.
- 17. Any limitation on the right is limited to the inclusion of overseas investments that will result in converting land-use to production forestry. The application of this more stringent test is clearly aimed at achieving investment which has genuine benefits for New Zealand. Finally, the limit is in due proportion to the importance of the objective as the restriction on overseas investment is still limited to sensitive land.
- 18. 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**

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



Jeff Orr

**Office of Legal Counsel**