

10 March 2020

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Overseas Investment Amendment Bill

Purpose

1. We have considered whether the Overseas Investment 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 with the latest version of the Bill (PCO 20953/16.1). We will provide you with further advice if the final version of the Bill 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 this conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression), s 19 (freedom from discrimination) and s 21 (freedom from unreasonable search and seizure) of the Bill of Rights Act. Our analysis is set out below.

The Bill

4. The Bill amends the Overseas Investment Act 2005 ('the principal Act'). The Bill aims to strengthen how the Act manages risks, including by introducing a national interest test and call-in power, embedding a higher threshold for acquiring farm land, and requiring investors to disclose information to Inland Revenue for tax purposes. The Bill also aims to make it simpler to make productive investments in New Zealand by no longer requiring lower-risk transactions to be screened and simplifying the screening process for other transactions.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of Expression

5. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹

¹ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

6. Various provisions in the Bill *prima facie* limit the right to freedom of expression by:
 - a. extending the existing obligation to offer farm land interests to persons who are not overseas persons by requiring advertising to occur before a transaction is entered into with an overseas person;
 - b. requiring unpublished critical direct suppliers to notify new and prospective investors of their status, and to notify the regulator when they do so;² and
 - c. requiring an overseas person or associate to notify the regulator before investing in a strategically important business that is either a critical direct supplier or a business involving military or dual-use technology.

Consistency with s 14 of the Bill of Rights Act

7. A provision found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of that Act. The s 5 inquiry asks whether the objective of the provision is sufficiently important to justify some limitation on the freedom of expression; and if so, whether the limitation is rationally connected and proportionate to that objective and limits the freedom of expression no more than reasonably necessary to achieve that objective.³
8. We consider that the limitations on s 14 of the Bill of Rights Act serve and are rationally connected to the important objectives of ensuring that New Zealanders have a meaningful chance to acquire farm land interests and managing national security and public order risks.
9. Farm land is recognised in the Bill and in the principal Act as having significant economic and cultural importance to New Zealand. It is therefore reasonable and proportionate to require that farm land be advertised on the open market to give New Zealanders a chance to acquire it, before a transaction has been entered into with an overseas person. The other notification requirements relate to the Bill's new call-in power, and ensure that investors and the regulator are made aware of transactions which could impact New Zealand's national security and public order.
10. For these reasons, we conclude that any limits to the freedom of expression imposed by the Bill are justified under s 5 of the Bill of Rights Act.

Section 19 – Freedom from discrimination

11. Section 19(1) of the Bill of Rights Act affirms the right to be free from discrimination. The Human Rights Act provides that ethnic or national origins, which includes nationality or citizenship, is a prohibited ground of discrimination.⁴
12. 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

² Under proposed new s 20D, a person is a "critical direct supplier" if the Minister is satisfied that they are a direct supplier of goods or services to an intelligence or security agency, the goods and services are integral to the functioning of the agency as an intelligence or security agency, and the supply of those goods and services cannot readily be replaced.

³ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [123].

⁴ Section 21(1)(g).

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

13. A distinction will arise if the legislation treats two comparable groups of people differently on one or more of the prohibited grounds of discrimination. Whether a disadvantage arises is a factual determination.

National interest test and call-in power introduced by the Bill

14. 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 residents of New Zealand by requiring them to apply for consent to invest in certain New Zealand assets.
15. The Bill's risk management provisions extend this regime, in particular by introducing:
 - a. a national interest test, which allows the government to refuse consent to any overseas investment that is found to be contrary to New Zealand's national interest; and
 - b. a regime for managing significant national security and public order risks, involving a call-in power that can apply the consent regime to certain investments not normally screened and new regulatory tools to address actions that pose risks.

Consistency with s 19 of the Bill of Rights Act

16. We acknowledge 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 whether they are citizens of and ordinarily resident in New Zealand, rather than purely on the basis of their national and ethnic origins.
17. If s 19 is engaged and limited by the overseas investment regime, we consider that its extension by the Bill is justifiable under s 5 because these aspects of the Bill serve, and are rationally connected to, the sufficiently important objective of effectively managing investment-related risks.
18. The national interest test and the new national security and public order risk management regime will only be used when necessary to mitigate risks. Most of the transactions the national interest test applies to will already require consent under the principal Act. Transactions that are subject to the new call-in power could involve investment in critical infrastructure. It is important to New Zealand's national security and public order that these transactions be managed where necessary. Therefore, we consider any limitation on s 19 is reasonable and proportionate to the objective of effectively managing foreign investment risks.
19. For these reasons, we 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.

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.

Section 21 – Freedom from unreasonable search and seizure

20. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search and seizure, whether of the person, property or correspondence, or otherwise. The right protects a number of values including “property, personal freedom, privacy and dignity”.⁶
21. The Bill amends information gathering powers in the principal Act. We consider these powers could constitute a search under s 21 of the Bill of Rights Act. The provisions discussed below compel the provision of information or documents, which prima facie also engages the right to freedom of expression. However, for the purposes of this advice we have decided to consider the consistency of these provisions with s 21 of the Bill of Rights Act, as the information or documents are compelled primarily for the purposes of enforcement.

Information gathering powers amended by the Bill

22. The Bill amends ss 38 to 41 of the principal Act, which allow the regulator to give a notice requiring certain information or documents to be provided for monitoring and statistical purposes. The amendments extend the information gathering power to include information relevant to call-in transactions and the new power to issue a direction order. The Bill also introduces a new s 87, which will allow the regulator to request further information from a proposed acquirer or other person after the notification of a call-in transaction.
23. A new s 38A has also been inserted which enables regulations to be made requiring overseas persons who make, or apply to make, an overseas investment in sensitive New Zealand assets to provide the Commissioner of Inland Revenue with information the Commissioner considers necessary or relevant for tax purposes.

Consistency with s 21 of the Bill of Rights Act

24. A search is consistent with s 21 of the Bill of Rights Act if it is “reasonable”. The Supreme Court has held an unreasonable search cannot, logically, be demonstrably justified under s 5 of the Bill of Rights Act.⁷ In assessing whether the information gathering power in the Bill is reasonable, we have considered the importance of the objective and whether the provisions are rationally connected and proportionate to that objective.
25. We consider that the extension of the information gathering powers in ss 38 to 41 of the Act is reasonable for the purposes of s 21 of the Bill of Rights Act. The information and documents the regulator will be able to require are necessary for the effective administration and enforcement of the national security and public order risk management regime introduced by the Bill. This strengthens the ability of the regulator to ensure investment in New Zealand by overseas people does not give rise to a significant risk to national security or public order. Furthermore, the principal Act contains safeguards surrounding the publication or disclosure of the obtained documents and provides for remedies if the information gathering powers are used unlawfully.
26. The power in proposed s 38A to make regulations requiring investors to disclose information to Inland Revenue for tax purposes is also reasonable. This provision aims

⁶ See, for example, *Hamed v R* [2012] 2 NZLR 305 at [161] per Blanchard J.

⁷ *Ibid* at [162].

to support the integrity of New Zealand's tax system by giving Inland Revenue information about an overseas investor's tax arrangements that can be used to monitor compliance with New Zealand's tax laws. Importantly, the Commissioner may only collect information that is considered necessary or relevant to the administration or enforcement of an Inland Revenue Act or a function of the Commissioner.

27. We therefore consider that the information gathering power is not unreasonable for the purposes of s 21 of the Bill of Rights Act.

Conclusion

28. 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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