

7 May 2020

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Overseas Investment (COVID-19 Emergency Measures) Amendment Bill

Purpose

1. We have considered whether the Overseas Investment (COVID-19 Emergency Measures) 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 22903/4.0). 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 19 (freedom from discrimination) 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'). This Bill and the Overseas Investment (Other Measures) Amendment Bill ('the Other Measures Bill') form part of a package to replace the Overseas Investment Amendment Bill (No 2) ('the previous Bill') which was introduced on 19 March 2020. This advice should be considered in conjunction with our advice on the previous Bill¹ and the Other Measures Bill.²
5. In addition to carrying forward provisions from the previous Bill deemed critical to the government's COVID-19 response, this Bill contains measures that are considered to be urgently needed to respond to changes to the foreign investment risk environment caused by the economic effects of COVID-19. The main changes:
 - a. introduce an 'emergency notification regime' that temporarily extends the call-in power proposed in the previous Bill by requiring investors to notify the government of all foreign transactions, regardless of monetary value, that would result in more than 25 per cent foreign ownership of a firm or its assets. These transactions can then be screened for consistency with New Zealand's national interest; and

¹ Ministry of Justice *Legal Advice – Consistency with the New Zealand Bill of Rights Act: Overseas Investment Amendment Bill* (10 March 2020).

² Ministry of Justice *Legal advice - Consistency with the New Zealand Bill of Rights Act: Overseas Investment (Other Measures) Amendment Bill* (7 May 2020).

- b. exempt classes of low risk transactions from the requirement to obtain consent to enable distressed firms to quickly access debt and equity finance in order to remain viable.

Section 19 – Freedom from discrimination

6. 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.³
7. 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.⁴ Whether a disadvantage arises is a factual determination.
8. As set out in our previous advice,⁵ 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. It does this by requiring them to apply for consent to invest in certain New Zealand assets.
9. The Bill expands the circumstances in which these differences in treatment are applied by extending the scope of the call-in power proposed in the previous Bill.

Consistency with s 19 of the Bill of Rights Act

10. In our previous advice,⁶ 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 residency status, rather than purely on the basis of their national and ethnic origins.
11. Nevertheless, if s 19 is engaged and limited by the Bill's expansion of the call-in power, we consider that the limitation is justifiable under s 5 of the Bill of Rights Act. This is because the call-in power serves, and is rationally connected to, the sufficiently important objective of effectively managing risks to New Zealand's national interest associated with transactions by overseas persons in the context of COVID-19. It does so by mitigating the risk that, during the economic downturn, overseas investors could acquire New Zealand firms and assets at 'fire sale' prices that do not reach the Act's current thresholds for government scrutiny, in circumstances that could undermine New Zealand's prosperity and wider national interest.
12. The emergency notification power will only be used to manage risks to New Zealand's essential security and to maintain adequate control over sensitive or nationally important social and economic assets. The power will be reviewed every 90 days and will be removed once the COVID-19 pandemic or its economic aftermath cease to have a significant impact in New Zealand. In these circumstances, we consider any limitation on

³ Section 21(1)(g).

⁴ 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.

⁵ Ministry of Justice, above n 1.

⁶ Ministry of Justice, above n 1.

s 19 is reasonable and proportionate to the objective of effectively managing foreign investment risks.

13. 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.

Conclusion

14. 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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