

1 December 2017

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 20769/2.0). 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(1) (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') with the purpose of ensuring that investments made by overseas persons in New Zealand will have genuine benefits for the country. Under the principal Act, there is a consent regime for approving investments by overseas persons in sensitive New Zealand assets. The Bill redefines "sensitive land" to include residential land, so that overseas buyers of residential land must first obtain consent under this regime. The Bill also makes changes to the criteria for consent for "sensitive land".
5. The Bill also makes general changes to the principal Act, including enhancing the disclosure, compliance and enforcement regime.

Consistency of the Bill with the Bill of Rights Act

Section 19(1) – 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 provides that ethnic or national origins, which includes nationality or citizenship, is a prohibited ground of discrimination.¹
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

¹ Human Rights Act 1993, s 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.²

8. 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.
9. The Bill extends the consent regime for overseas investments by including residential land in the definition of “sensitive land”. The Bill makes changes to the criteria for approving investments by overseas persons in “sensitive land”. This regime 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.
10. 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:³
 - 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?
11. We consider the distinction drawn by the Bill to be justifiable under s 5 of the Bill of Rights Act because the Bill’s objective is to ensure investments by overseas persons in New Zealand have genuine benefits for the country. We consider that this objective is sufficiently important to justify a limitation on the right to be free from discrimination.
12. We consider that extending the consent regime to include residential land in the definition of “sensitive land” and amending the criteria for consent is rationally connected to this objective and limits the right no more than is reasonably necessary to achieve it. Citizen or residency status is not the only factor taken into account when deciding who is subject to the consent regime, for example, whether a person has been residing in New Zealand for the preceding 12 months is also a factor. Further, the Bill does not draw distinctions between New Zealand citizens and foreign nationals who are residents of New Zealand. The amended criteria for assessing whether consent should be given 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.

² 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.

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

13. The Bill also provides that the Governor-General may make regulations for the purpose of implementing obligations under international agreements that have entered into force before the passing of the Bill. These regulations may result in different treatment for foreign nationals from certain countries. With that being said, we consider this distinction to be justified as the differentiation is made on the basis of trade agreements between New Zealand and other countries where there are benefits to New Zealand.
14. The Bill also provides that the Governor-General may make regulations for the purpose of providing for the acquisition by a Māori person of an interest in Māori freehold land according to the Te Ture Whenua Māori/Māori Land Act 1993. We consider this distinction to be justified as this would allow for Māori who reside overseas to acquire land to which they have an interest without going through the consent process.
15. 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.

Section 21 – Freedom from unreasonable search and seizure

16. 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”.⁴
17. 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.

Information gathering powers amended by the Bill

18. Clauses 21, 22 and 23 amend ss 38 to 40 of the principal Act, which allow the regulator to give a notice that requires certain information or documents to be provided for monitoring compliance and statistical purposes. The amendments require the information or documents be provided in the manner specified in the notice.
19. Clause 24 amends s 41 of the principal Act, which currently allows the regulator to require information and documents for the purpose of detecting offences. The section is extended to allow the regulator to require information or documents where the regulator has reasonable grounds to believe that the supply of the information or document is necessary or desirable for the purposes of administering or enforcing the principal Act.
20. Clause 25 inserts new s 41A(1) which deals with the effect of a proceeding relating to the regulator’s information gathering powers. Until a final decision is given, the powers may continue to be exercised and no person is excused from fulfilling the person’s obligations to provide information or documents. However, new s 41A(2) allows the court to make an interim order overriding the effect of s 41A(1).
21. These provisions 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 the provisions with s 21 of the Bill of Rights Act as the compelled information or documents are primarily for the purposes of enforcement.

⁴ See, for example, *Hamed v R* [2012] 2 NZLR 305 at [161] per Blanchard J.

Consistency with s 21 of the Bill of Rights Act

22. 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.⁵
23. 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.
24. We consider that this power is not unreasonable for the purposes of s 21 of the Bill of Rights Act. The information and documents sought by the regulator are for the purposes of effectively administering and enforcing the principal Act. Exercise of this power requires the regulator to have reasonable grounds to believe that this is necessary or desirable for these purposes. This strengthens the ability of the regulator to ensure investment in New Zealand by overseas people has genuine benefits for the country. This is, therefore, rationally connected and proportionate to the objective.
25. Furthermore, the Bill contains additional safeguards surrounding the publication or disclosure of the obtained documents and provides for remedies if the court finds the exercise of the information gathering power was used unlawfully.
26. We therefore consider that the information gathering power is not unreasonable for the purposes of s 21 of the Bill of Rights Act.

Conclusion

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

Jeff Orr
Chief Legal Counsel
Office of Legal Counsel

⁵ Ibid at [162].