

1 November 2004

Attorney-General

**LEGAL ADVICE
CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
OVERSEAS INVESTMENT BILL**

1. We have considered whether the Overseas Investment Bill (the "Bill") (PCO 6016/11) is consistent with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). We understand that this Bill is to be considered by the Cabinet Legislation Committee at its meeting on 4 November 2004. We have been asked to consider this Bill under some urgency.
2. We have not yet received the version of the Bill that will be considered by the Cabinet Legislation Committee. However, we understand from Treasury officials that any changes to the Bill are likely to be minor and are unlikely to give rise to Bill of Rights Act issues. If any subsequent amendments do give rise to a Bill of Rights Act issue we will advise you immediately.
3. The Bill sets out a regime for overseas investments in sensitive New Zealand assets, which replaces and modifies aspects of the existing regime for overseas investment in New Zealand. The Bill:
 - defines "sensitive New Zealand assets";
 - sets out a regime under which overseas persons wishing to invest in sensitive New Zealand assets can seek consent from the Ministers of Finance, Land Information, or Fisheries, depending on the nature of the asset in question. The consent regime includes criteria for consent, the procedure for obtaining consent, imposing and modifying conditions on consent, and revoking consent;
 - sets out the regulator's monitoring role and powers, including the power to require provision of information and statutory declarations as to compliance;
 - sets out an enforcement regime, including powers of entry, search and seizure;
 - sets out five offences, which include maximum penalties of \$100,000, or \$300,000, or \$300,000 or 12 months imprisonment;
 - gives the High Court the power to order the disposal of property and payment of civil penalties in certain circumstances;
 - provides administrative provisions for implementing the Act, including regulation-making powers and transitional provisions.
4. We have concluded that the Bill appears to be consistent with the Bill of Rights Act. In reaching this conclusion, we have considered the following issues:

Right to be free from discrimination on the basis of national origin

5. Section 19(1) of the Bill of Rights Act provides that everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993. The prohibited grounds of discrimination include ethnic or national origin, which includes nationality or citizenship. Therefore, it is necessary to consider whether the Bill discriminates on the basis of national origin.
6. The Bill appears to raise an issue under section 19(1) by establishing a regime for approving investment by overseas persons in sensitive New Zealand assets. The Bill 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.
7. The Bill's policy objective is to control ownership of sensitive New Zealand assets by persons who are based offshore and whose connection with New Zealand is tenuous. The Bill seeks to achieve this objective by imposing a consent regime under which the impact of proposed investments can be given proper consideration, which seems to bear a rational and proportionate connection to the policy objective. It does not draw distinctions between New Zealand citizens and foreign nationals who are residents of New Zealand. For these reasons, to the extent an issue is raised under section 19(1), we have concluded that the Bill appears to be justifiable in terms of section 5 of the Bill of Rights Act.

Compelled expression

8. The Bill contains a number of provisions which require people, particularly applicants or consent-holders, to provide information to the regulator. For instance:
 - clause 24(3) permits the regulator to require additional information from applicants for the purposes of processing consent applications;
 - clause 39 permits the regulator to require consent holders to provide information for monitoring their compliance with consent conditions;
 - clause 40 permits the regulator to require information for statistical or monitoring purposes from any person with information relevant to overseas investments in sensitive New Zealand assets;
 - clause 41 permits the regulator to require consent holders to provide a statutory declaration relating to their compliance with any conditions imposed on the consent. Clause 41(3) provides that such a declaration is not admissible in evidence in any proceeding under the Bill except for proceedings under clause 46 (offence of making false or misleading statements).
9. These provisions raise issues under section 14 of the Bill of Rights Act. Section 14 protects freedom of expression, which includes the right to say nothing. We have considered whether these provisions can be justified in terms of section 5 of the Bill of Rights Act.

10. The objective of these provisions is to promote the effective operation of the Bill, by ensuring the regulator can obtain sufficient information to carry out its statutory functions. The provisions also provide an incentive to comply with the Bill by facilitating effective monitoring of compliance with its requirements.
11. We consider that there is a rational and proportionate connection between the provisions listed above and their objective. The extent of the compelled expression is limited to the purposes of the regime established by the Bill. Clause 41(3) protects consent holders from the possibility that their statutory declarations might be used against them in civil or criminal proceedings under the Bill, except that they may be prosecuted for making a false statutory declaration.

Enforcement powers – entry, search and seizure

12. Clauses 55-59 empower the regulator to apply for and exercise a search warrant. These clause set out the powers conferred by the search warrant, requirements when executing a search warrant, and disposal of things seized under the warrant.
13. We have concluded that these provisions are consistent with section 21, which provides that everyone has the right to be secure against unreasonable search or seizure. Key factors in reaching this conclusion include the process of prior authorisation for the search warrant and limitations on the manner in which it may be executed, such as the requirement of entry at reasonable times.

Offences

14. The Bill contains five offences:
- an indictable offence of giving effect to an overseas investment transaction without consent (clause 42);
 - an indictable offence of defeating, evading or circumventing the operation of the Bill (clause 43);
 - an indictable offence of resisting, obstructing or deceiving a person exercising powers or functions under the Bill (clause 44);
 - a summary offence of failing to comply with notice, requirement or condition without lawful excuse (clause 45);
 - a summary offence of making a false or misleading statement (clause 46).
15. We have concluded that these offences do not raise any issues under the Bill of Rights Act. Except for clause 45, all of the offences include a mental element, so they give effect to the presumption of innocence (section 25(c), Bill of Rights Act). The maximum penalties for the indictable offences are imprisonment for 12 months (for individuals) or a \$300,000 fine (for individuals and bodies corporate). The maximum penalty under clause 46 is a \$300,000 fine.
16. Clause 45 appears to be a reverse onus offence, as it provides that it is an offence to fail to comply with a notice, requirement or condition without lawful

excuse. Due to section 67(8) of the Summary Proceedings Act 1957, the onus is on the defendant to demonstrate that he or she had a lawful excuse.

17. We have concluded that this formulation seems reasonable and proportionate in the circumstances. Clause 45 is effectively an offence of failing to comply with the requirements of a licensing regime, and we accept that the defendant is most likely to possess the information relevant to the reasons for non-compliance. Furthermore, the level of the penalty (maximum fine of \$100,000) is intended to reflect the nature of the investments covered by the Bill.

Conclusion

18. For the reasons given above, we have concluded that the Bill appears to be consistent with the Bill of Rights Act.
19. In accordance with your instructions, we attach a copy of this opinion for referral to the Minister of Justice. We also attach a copy for referral to the Minister of Finance, if you approve.

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Cc Minister of Justice
Minister of Finance

Referred accordingly

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