

## **Privacy Commissioner's Submission to the Finance and Expenditure Select Committee on the Overseas Investment (Urgent Measures) Amendment Bill**

### **Executive Summary**

1. The Overseas Investment (Urgent Measures) Amendment Bill (the Bill) amends the Overseas Investment Act 2005 (the Act). This Bill is one of two being introduced to replace the Overseas Investment Amendment Bill (No 2) introduced on 19 March 2020. The Bill contains some of the proposals from the original amendment Bill and urgent measures to mitigate the economic effects of COVID-19.
2. The purpose of the Bill is to ensure that risks posed by foreign investment can be managed effectively while better supporting productive overseas investment by reducing the regulatory burden of the screening process.
3. One of my functions under the Privacy Act 1993 is to examine legislation before Parliament and to consider any matters affecting individuals' privacy. The Privacy Act is New Zealand's main privacy law. It governs the collection, use, storage and disclosure of personal information and provides a mandate for my Office to consider wider developments or actions that affect personal privacy. Central to my examination of proposed legislation is the principle that policy and legislation should be consistent with privacy rights unless there is very good reason (and evidence) to override those rights.
4. My comments in this submission are limited to those clauses regarding to the collection and disclosure of personal information, specifically:
  - clause 29: additional purposes for requiring information under section 41 of the Act
  - clause 52: new section 126 regarding information disclosure between agencies, and
  - clause 65: amending Schedule 7 to the Tax Administration Act 1994.
5. I recommend strengthening the privacy safeguards within new section 126:
  - Agencies should only disclose information when they believe it is necessary, rather than when 'necessary or desirable'.
  - The Bill should provide for regulations to govern information sharing under section 126 as pre-condition for sharing; for example, the type of information that can be shared and any conditions of sharing. There should be a requirement to consult the Privacy Commissioner about any such regulations.
  - The interaction between section 126 and the Privacy Act should be made explicit. My preference is that is that disclosures under section 126 are managed exclusively under section 126 and that any subsequent use or information sharing through exceptions in the Privacy Act should be restricted.
  - The Bill should provide that the Privacy Commissioner must be consulted before agencies are added by regulation to the list of agencies in section 126.

### **Clause 29: Additional purposes for requiring information under section 41 of the Act**

6. Section 41 of the Act provides for the regulator to require persons to provide information. This section was amended in 2018 so that the regulator may require any person:
  - (a) to provide to the regulator, within the time and in the manner specified in the notice, any information or class of information specified in the notice; or
  - (b) to provide to the regulator any document or class of documents specified in the notice (within the time and in the manner specified in the notice); or
  - (c) if necessary, to reproduce, or assist in reproducing, in usable form, information recorded or stored in any document or class of documents specified in the notice (within the time and in the manner specified in the notice).
7. The regulator can only require information from a person when it holds reasonable grounds to believe that it is necessary or desirable to provide the information for one of several purposes related to compliance with the Act.
8. Clause 29 of the Bill provides for two new purposes for which the regulator may require information to be provided:
  - (aa) investigating whether a transaction is an overseas investment transaction or a call-in transaction;
  - (ab) investigating whether a transaction, an event, or a matter is contrary to the national interest or gives rise to, or is likely to give rise to, a significant risk to national security or public order.

#### *Comment on clause 29*

9. The proposed new purposes appear appropriate given they are limited to specifying additional reasons, related to the regulator's functions under the Act, to require the provision of information.

### **Clause 52: information disclosure between agencies**

10. Clause 52 inserts new section 126 into the Act, providing for the disclosure of information between agencies for the purpose of managing national security and public order risks associated with transactions by overseas persons.
11. Specified agencies would be authorised to disclose information between them if the disclosing agency has reasonable grounds to consider the disclosure necessary or desirable for that purpose. Sixteen agencies (including the regulator, and three intelligence and security agencies) are specified for this information disclosure power. The Bill also provides for regulations to specify additional agencies.
12. Under section 126 a disclosing agency may impose conditions on the provision of information, such as those relating to storage, use, access and disposal.

13. I consider that the privacy safeguards within section 126 could be strengthened through:

- Deleting 'or desirable';
- Providing for regulations governing information sharing;
- Clarifying the relationship between section 126 and the Privacy Act; and
- Consulting the Privacy Commissioner when adding agencies

*Deleting 'or desirable'*

14. Section 126 would allow information to be disclosed between agencies where there are reasonable grounds to believe disclosure is 'necessary *or desirable*' for managing national security and public order risks associated with transactions by overseas persons. The words 'or desirable' set a low threshold for disclosure. Necessity is the usual and preferable test for information sharing between different government agencies, as an exception to the standard restrictions on the disclosure of personal information.

15. I **recommend** that section 126(1) be amended to delete the words 'or desirable', at least in respect of personal information. Allowing disclosure only where there are reasonable grounds to believe it is *necessary* would provide greater protection for personal information. I recommend below an equivalent amendment to clause 65.

*Providing for regulations governing information sharing*

16. At present the only safeguard for information disclosure under section 126 is the ability of disclosing agencies to impose conditions on the provision of information to another agency. This is expressed as a discretion. In my view a more effective mechanism is needed to ensure that the sharing of personal information is reasonable, and that suitable privacy measures apply. The regulations would set conditions and deal with other matters relating to disclosure of information between agencies.

17. I **recommend** that clause 52 be amended to provide for a power to make regulations governing the disclosure of information under section 126. The regulations would cover such matters as the type of information that can be shared and any conditions of sharing such as the retention period, security measures, verifying the accuracy of the information, and setting limits on further use and disclosure of the information. These regulations should be in place before sharing personal information under section 126. There should also be a requirement to consult the Privacy Commissioner before making such regulations. These amendments would bring the Bill into closer alignment with the information sharing power in section 139 of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009.

*Clarifying the relationship between section 126 and the Privacy Act*

18. Section 126 is currently silent on the interaction between disclosure of information under the section and the provisions of the Privacy Act. To avoid confusion, it is desirable to be clear about the statutory relationship and the extent to which section 126 overrides the privacy principles, and the extent to which they continue to apply.

19. In general, under the Privacy Act's principles personal information should be used or disclosed only for the purpose for which it was obtained by an agency or a directly related purpose. However, the principles also provide for a number of exceptions, such as where disclosure is necessary for the maintenance of the law. If section 126 does not deal expressly with the relationship with the Privacy Act, agencies could be unclear about which statute governs the disclosure in question where personal information is concerned.
20. Section 126 could explicitly make it clear that the privacy principles remain operative, for example, to permit ongoing secondary use and disclosures in accordance with the Privacy Act for a related purpose or for law enforcement purposes.
21. Alternately, if section 126 is intended to displace the privacy principles (with relevant safeguards being covered by regulations) it should be made clear in the provision that section 126 applies in place of those privacy principles in the Privacy Act. This would be my preference as it will ensure that personal information disclosed for national security and public order risks associated with transactions by overseas persons are not used for wider purposes.
22. I **recommend** the Committee consult officials on how section 126 is intended to interact with the Privacy Act. The issue is linked to the issue of making regulations to support section 126 to provide the necessary privacy measures.

*Consulting the Privacy Commissioner when adding agencies*

23. Under sections 126(2)(o) and 127(1)(e), agencies can be added to the list of 'disclosing agencies' by regulation. I **recommend** that the Bill be amended to require consultation with the Privacy Commissioner before agencies are added as disclosing agencies. This will help to ensure there are appropriate limits on the agencies that have access to personal information under the provision.

**Clause 65: amending Schedule 7 to the Tax Administration Act 1994**

24. Schedule 7 of the Tax Administration Act includes provisions allowing sensitive revenue information to be disclosed to certain agencies. The Bill inserts a new clause 39B in Schedule 7, allowing the Commissioner of Revenue to disclose sensitive revenue information despite the Tax Administration Act's requirements of confidentiality with respect to such information.
25. The amendment would allow sensitive revenue information to be disclosed to the regulator under the Overseas Investment Act for any or all of the following purposes:
  - enabling the regulator to consider whether an investor meets the investor test under the Act;
  - managing national security and public order risks associated with transactions by overseas persons;
  - any purpose set out in section 41(1A) of the Act.


26. The regulator under the Overseas Investment Act would also be able to disclose such information to agencies set out in new section 126 of the Act (discussed above), for the purpose of managing national security and public order risks associated with transactions by overseas persons.
27. The Commissioner of Revenue may disclose information to the regulator only where it is reasonable and practical to do so, the information is readily available, and it is not undesirable to disclose the information.

*Comment on clause 65*

28. This provision is similar to other existing exceptions in schedule 7 of the Tax Administration Act and appears justified in terms of the regulator's role.
29. Consistent with my recommendation for clause 52, I **recommend** that clause 65 be amended to delete the words 'or desirable' in the phrase 'necessary or desirable'.

**Conclusion**

30. I **recommend** that the privacy protections in the Bill be strengthened by making the amendments I have identified to clauses 52 and 65.
31. I trust my comments are of use to the Committee in its consideration of the Bill.

A handwritten signature in blue ink, consisting of a large, stylized 'J' followed by a horizontal line and a small upward stroke.

John Edwards  
**Privacy Commissioner**

20 May 2020