# The Treasury

## Phase 2 Reform of Overseas Investment Act Information Release

## March 2021

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TE TAI ŌHANGA
THE TREASURY

# Treasury Report: Responding to the Regulations Review Committee's concerns about the Overseas Investment Amendment Regulations

| Date: | 9 July 2020 | Report No: | T2020/2099 |
|---|---|---|---|
| | | File Number: | IM-5-3-8-9 (COVID Response Reforms) |

## Action sought

| | Action sought | Deadline |
|---|---|---|
| Minister of Finance<br>(Hon Grant Robertson) | **Note** the contents of this report. | None |
| Associate Minister of Finance<br>(Hon David Parker) | **Note** that the Regulations Review Committee (Committee) has raised concerns about two regulations in the Overseas Investment Amendment Regulations 2020.<br>**Sign** the draft response at Annex 2 and provide it to the Committee.<br>OR<br>**Provide feedback** on the draft response at Annex 2 to officials. | 13 July 2020 |

## Contact for telephone discussion (if required)

| Name | Position | Telephone | | 1st Contact |
|---|---|---|---|---|
| [35] | Analyst, International | [39] | N/A (mob) | ✓ |
| Thomas Parry | Manager, International | | [35] | |

## Minister's Office actions (if required)

| **Return** the signed report to Treasury. |
|---|

| Note any feedback on the quality of the report | |
|---|---|

**Enclosure**: Yes (annexed)

Annex 1: Letter from the Regulations Review Committee

Annex 2: Draft response to the Regulations Review Committee

Annex 3: Summary of approach to Overseas Investment Amendment Regulations

## Executive Summary

The Regulations Review Committee (the Committee) has written to you with concerns about two recently enacted regulations from the Overseas Investment Amendment Regulations 2020 (the Regulations) (Annex 1). This report provides a proposed response.

We consider that the Committee has misunderstood the intent and operation of these regulations, and that no amendments to the two regulations are necessary.

### *Regulation 3B*

The Committee is concerned that the approach taken to the definition of sensitive information in regulation 3B is not within scope of the regulation-making power in the Overseas Investment Act 2005 (the OI Act). The Committee considers that the OI Act only permits the Regulations to narrow the definition of sensitive information by positively identifying information that is excluded from the definition of sensitive information. That is, it presumes that all sub-classes of information are sensitive information, except where information is specifically excluded.

The Committee considers that regulation 3B has reversed this presumption. That regulation provides that all sub-classes of information are not sensitive information, except where information is specifically included. Officials consider that the OI Act grants broad discretion as to how the Regulations can identify the classes of information that are not sensitive information. The approach taken in regulation 3B results in narrowing the definition of sensitive information. It is therefore justified and consistent with Parliament's intent as to scope (in line with advice provided to Parliament's Finance and Expenditure Committee).

It is not clear that it would be feasible to describe information under regulation 3B as a positive list, due to the complexity of the regulation, and difficulty associated with the identification and categorisation of a comprehensive list of data and information. Further, a list of what is not sensitive information would be likely to result in over-capture of data in the definition of sensitive information. This would be contrary to Parliament's intention that the provision should only capture data sets that raise national security or public order risks.

### *Regulation 69B*

The Committee is concerned that regulation 69B has been created before its empowering provision permits it to be made. The Committee contends that before regulation 69B can be used, its empowering provision requires amendments in the Overseas Investment Amendment (No 3) Bill (the No 3 Bill) to be passed.

We do not consider that Parliament intended the empowering provision to be contingent upon amendments to the OI Act made by the No 3 Bill. This is because one of the purposes of regulation 69B is to prescribe land for transitional standing consents under the Overseas Investment (Urgent Measures) Amendment Act 2020, before the transitional standing consents are converted into a permanent form by the No 3 Bill.

### *Next steps*

We recommend that you sign the draft response to the Committee (Annex 2), and provide it to the Committee by 16 July 2020. If you have any feedback on the draft response, please provide this to officials by 13 July 2020.

## Recommended Action

We recommend that you:

a **Note** that the Regulations Review Committee (the Committee) is concerned about two regulations from the Overseas Investment Amendment Regulations 2020, specifically that:

  i. regulation 3B is not in accordance with the general object and intentions of the Overseas Investment Act 2005, and
  ii. regulation 69B has been made before its empowering provision permits it to be made.

b **Note** that officials consider that regulation 3B reflects Parliament's intention, the original policy rationale, and is within scope of the authorised regulation-making power.

c **Note** that officials consider that the empowering provision for regulation 69B permits the regulation to be made, and that regulation 69B is therefore authorised.

d **Agree** that no amendments to regulations 3B and 69B are necessary.

*Agree/disagree.*

e **Sign** the draft response to the Committee (Annex 2), and provide it to the Committee by 16 July 2020.

*Agree/disagree.*

OR

f **Provide feedback** on the draft response to officials by 13 July 2020, to enable us to provide you with an updated version to provide to the Committee by 16 July 2020.

*Agree/disagree.*

Thomas Parry
**Manager International**

Hon David Parker
**Associate Minister of Finance**

**Treasury Report:** Responding to the Regulations Review Committee's concerns about the Overseas Investment Amendment Regulations

## Purpose of Report

1. This report provides you with a proposed response (Annex 2) to the Regulations Review Committee's (the Committee) concerns about two regulations from the recently enacted Overseas Investment Amendment Regulations 2020 (the Regulations) (Annex 1).

## Regulations Review Committee's concerns

2. The Committee has scrutinised the Regulations, in accordance with its mandate to scrutinise delegated legislation. The Regulations operationalise changes to the Overseas Investment Act 2005 (OI Act) made by the Overseas Investment (Urgent Measures) Amendment Act 2020 (the Urgent Measures Act).

3. On 23 June 2020, the Committee wrote to you advising that it has concerns about:

    a regulation 3B, which prescribes classes of information that are sensitive information. The Committee is concerned that the approach to the regulation is not within scope of the regulation-making power authorised by Parliament, and

    b regulation 69B, which identifies land significant to Māori that is sensitive adjoining land. The Committee is concerned that the regulation is not authorised by its empowering provision.

4. We consider that both regulations are consistent with their policy rationales and Parliament's intent, meaning they are authorised and achieving their intended effect. As such, we do not consider that any amendments are necessary.

## Regulation 3B refines the definition of sensitive information

5. Regulation 3B refines the OI Act's definition of sensitive information. The Committee is concerned that the approach taken in regulation 3B is not within the scope of the power authorised by Parliament.

6. The Committee considers that "Parliament intended the four categories of information (genetic, biometric, health, and financial information) to be sensitive information except for specific sub-classes of information within those categories". The Committee has understood the OI Act to only permit the Regulations to narrow the definition of sensitive information by identifying a positive list of information that is excluded from the definition of sensitive information. This approach presumes that all sub-classes of information within the four categories are sensitive information, except where information is specifically excluded from the definition.

7. The Committee considers the Regulations have "reversed the presumption by describing that those four categories are not sensitive information, except for the specific sub-classes, which are sensitive information."

*How the OI Act and Regulations define sensitive information*

8. The OI Act defines sensitive information as "information, <u>but not of a class set out in regulations</u> that is genetic, biometric, health, and financial information of individuals or relates to the sexual orientation or sexual behaviour of individuals."

9. The Regulations describe the classes of information that are not sensitive information in the format: "genetic/biometric/financial/health data <u>is not sensitive information unless</u>…"

*We consider that 3B reflects Parliament's intention, and is consistent with the empowering provision*

10. We do not agree that the OI Act only allows the Regulations to describe classes of information that are not sensitive information as a positive list. Rather, we consider the OI Act allows broad discretion as to how the Regulations can describe the classes of information that are not sensitive information.

11. Regulation 3B adopts a negative approach; it sets out classes of information that are not sensitive information, except for information of a certain kind within each category.[1] This approach provides that all sub-classes of information under each of the four categories <u>are not</u> sensitive information, except for that information which is expressly included in scope. This has the effect of narrowing the definition of sensitive information. As such, we consider regulation 3B is in line with Parliament's intent and within scope of its empowering provision.

12. This can be illustrated through an example of how regulation 3B describes what genetic information is not sensitive information. Regulation 3B provides that "genetic information is not sensitive information unless it is information about an individual's inherited or acquired genetic characteristics resulting from the analysis of a biological sample". Those other classes of genetic information (for example, genetic information that cannot be used to identify or track an individual) are not sensitive information because they are of little strategic value.

13. We note that the advice provided by officials to Parliament's Finance and Expenditure Committee (FEC) supports our reading of the empowering provision. Officials provided the FEC with a summary of how the supporting regulations were intended to be made (refer Annex 3), to assist FEC's understanding of implications of the Urgent Measures Act's empowering provisions. This provides further evidence that regulation 3B is consistent with Parliament's intent.

14. Officials from PCO and the Treasury adopted the negative approach in 3B, as it is not clear that it would be possible for officials to create a comprehensive list of classes of data and information (e.g. genetic) that should be excluded from the definition of sensitive information. The approach favoured by the Committee would raise several issues:

    a any such regulation would likely result in an unintended over-capture of information, contrary to Parliament's intent that the call-in power should only capture data sets that raise national security or public order risks, and

    b it would produce a complex regulation, increasing compliance costs for investors and enforcement costs for the Overseas Investment Office.

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[1] Regulation 3B provides that information in each of the four categories is *excluded* from being sensitive information except for information of a certain kind within that category (that is, it sets out classes of information that are not sensitive information).

## Authorisation for regulation 69B

15. The Committee expressed concern that regulation 69B is unauthorised, because they believe the regulation has been made before its empowering provision states it may be made. They also consider that the regulation serves no purpose.

*Context for regulation 69B*

16. As part of the Phase Two reform, Cabinet agreed to amend the types of land screened under the OI Act, simply because it adjoins land that is sensitive in its own right (that is, 'sensitive adjoining land') [DEV-19-MIN-0306 and CAB-19-MIN-0593 refer]. These amendments included:

    a the removal of several categories of land from the definition of sensitive adjoining land, and

    b a change to mechanism by which land significant to Māori, as prescribed in certain enactments, is categorised and screened as sensitive adjoining land (to increase certainty, without subjecting new types of land to screening under the OI Act as sensitive adjoining land).

17. Regulation 69B prescribes land significant to Māori that is sensitive adjoining land, giving effect to the decision described in paragraph 16(b) (above).

18. Cabinet agreed to introduce the changes to the scope of sensitive adjoining land as a transitional standing consent,[2] which would be converted into a permanent form by provisions in the Overseas Investment Amendment Bill (No 3) (the No 3 Bill), if passed.

*The empowering provision permits land significant to Māori to be prescribed under regulation 69B for a standing consent*

19. The Urgent Measures Act inserted a regulation-making power into the OI Act to enable the easier identification of land significant to Māori as sensitive adjoining land, for two purposes:[3]

    a the standing consent for sensitive adjoining land transactions under the OI Act as amended by the Urgent Measures Act, and

    b the Table 2 definition of sensitive adjoining land in the OI Act, once it has been amended by the No 3 Bill.

20. Regulation 69B identifies land of significance to Māori (that was already screened under the OI Act), for the purposes of the standing consent for sensitive adjoining land, inserted by the Urgent Measures Act.[4] The regulation is therefore in accordance with its empowering provision.

*Parliament did not intend the empowering provision to be contingent upon amendments in the No 3 Bill*

21. We consider that the Committee has misinterpreted the intended effect of a clause in the empowering provision. They contend that before regulation 69B can be used to prescribe land for the standing consent inserted by the Urgent Measures Act, the empowering provision requires the No 3 Bill to be passed.

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2 Clause 32, Part 4, Schedule 1AA, Overseas Investment (Urgent Measures) Amendment Act 2020.

3 Section 61(1)(lb), Urgent Measures Act.

4 Clause 32, Part 4, Schedule 1AA, Urgent Measures Act.

22. The standing consents are a transitional mechanism devised to give effect to Cabinet-agreed policy changes in the period after the Urgent Measures Act was enacted and before the changes are converted into a permanent form by the No 3 Bill. If the empowering provision precluded regulation 69B from being used to prescribe land for the standing consents until such time as the No 3 Bill had been passed, this would defeat the purpose of enacting a transitional standing consent.

23. We therefore consider that the empowering provision does allow regulation 69B to prescribe land of significance to Māori, which is sensitive adjoining land, for the purposes of the standing consent in Part 4 of the Urgent Measures Act.

*We consider that regulation 69B serves an important purpose*

24. As the Committee identified, one of regulation 69B's two purposes relates to prescribing land under amendments in the No 3 Bill. As that Bill is still before a Select Committee, regulation 69B is not currently being used for this purpose.

25. The above discussion illustrates that regulation 69B serves a separate, important purpose, in relation to the standing consents inserted by the Urgent Measures Act.

## Next steps

26. We have prepared a letter that responds to the Committee's concerns (Annex 2). We recommend that you sign this letter and provide it to the Committee by 16 July 2020. Alternatively, if you have any feedback on the draft response, please provide this to officials by 13 July 2020.

**REGULATIONS REVIEW COMMITTEE**

23 June 2020

Hon David Parker
Associate Minister of Finance
Executive Wing
Parliamentary Buildings
Wellington

Dear Minister

# Overseas Investment Amendment Regulations 2020

Under Standing Order 318(1), all regulations are subject to examination by Parliament's Regulations Review Committee. As part of the committee's scrutiny of the use of delegated legislation to respond to the current epidemic, we examined the above regulations at our meeting on 17 June 2020.

The committee has two specific concerns about these regulations that we wish to draw to your attention.

New regulation 3B—not in accordance with the general objects and intentions of the Act

New regulation 3B provides that four specific categories of information (genetic information, biometric information, health information, and financial information) are not sensitive information unless the information falls within the relevant sub-classes of information within those respective categories. Those sub-classes of information are sensitive information.

Regulation 3B is made under section 127(1)(b) of the Overseas Investment Act 2005 (the Act), which provides that regulations may be made for the purpose of:

> *prescribing classes of information that are not sensitive information*

While regulation 3B appears to comply with this empowering provision, we consider that it is inconsistent with the definition of "sensitive information" in section 6 of the Act. That section provides that "sensitive information" means:

> *information, but not of a class set out in regulations, that—*
>
> *(a) Is genetic, biometric, health, or financial information of individuals or relates to the sexual orientation or sexual behaviour of individuals; or*
>
> *(b) […]*

It seems clear from that definition, that Parliament intended the four categories of information (genetic, biometric, health, and financial information) to be sensitive information except for specific sub-classes of information within those categories. The regulations have reversed the presumption by describing that those four categories are not sensitive information, except for the specific sub-classes, which are sensitive information.

Therefore, regulation 3B appears to breach Standing Order 319(2)(a)—that the regulation is not in accordance with the general objects and intentions of the enactment under which it is made.

New regulation 69B—makes some unusual or unexpected use of the powers conferred by the enactment

We are concerned that new regulation 69B has been made before its empowering provision states that it may be made.

Regulation 69B prescribes enactments for the purposes of table 2 of Part 1 of Schedule 1 of the Act as that table is amended by the Overseas Investment Amendment Act (No 3) 2020.

However, that Act is not yet enacted. The bill is currently before the Finance and Expenditure Committee, with a report back date of 14 November 2020.

Also, regulation 69B is made under section 61(1)(lb) of the Act, which provides for regulations to be made:

> *prescribing enactments for the purposes of the standing consent in Part 4 of schedule 1AA and of rows 10 and 11 of table 2 in Part 1 of Schedule 1 (after Schedule 1 is amended by the Overseas Investment Amendment Act (No 3) 2020)*

We consider this clause means that the empowering provision can only be used after Schedule 1 is amended. This would also seem to be the most reasonable interpretation of this clause as, without the amendment to Schedule 1, the list of enactments in new regulation 69B serves no purpose because the current Schedule 1 does not recognise such a list.

**Recommendation**

We recommend that you amend the regulations to:

- **ensure** that the approach in regulation 3B to the prescribing classes of information that are not sensitive information reflects the scope of the power authorised by Parliament, that is, that the regulations exclude categories of information from the definition of sensitive information rather than exclude all information unless it has particular characteristics;
- **delete** new regulation 69B until the proposed amendment to Schedule 1, contained in the Overseas Investment Amendment Bill (No 3), is enacted.

**Conclusion**

We would be grateful to receive your response to our concerns by Thursday, 16 July 2020. Please email your response to the Clerk of the Committee, [35] at

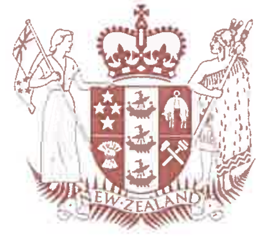
regulations.review@parliament.govt.nz. Please contact the Clerk of Committee, by email or on [39] if you have any questions.

Yours sincerely

Alastair Scott
Chairperson

Hon David Parker BCom, LLB

Attorney-General
Minister for the Environment
Minister for Trade and Export Growth
Associate Minister of Finance




15 JUL 2020

Alastair Scott
Chairperson
Regulations Review Committee
By email: regulations.review@parliament.govt.nz

Attention: the Clerk of the Committee

Dear Alastair

I am writing in response to your letter of 23 June 2020, notifying me of the Regulations Review Committee's (the Committee) concerns about two regulations from the Overseas Investment Amendment Regulations 2020 (the Regulations). Thank you for the opportunity to respond.

The Committee's concerns are that:

- regulation 3B is not within scope of the power authorised by Parliament; and
- regulation 69B has been made before its empowering provision enables it to be made.

Accordingly, the Committee has recommended that these regulations be amended.

I have carefully reviewed the two regulations in light of your concerns, and believe that they are operating as Parliament intended and in line with the respective policy rationales. I do not agree that an amendment to either regulation is necessary. The reasons for this position are explained below.

Officials would be happy to meet with the Committee to discuss the context and intended operation of each regulation, if that would be helpful.

**Regulation 3B**

I note the Committee's concern that the approach taken to the definition of sensitive information in regulation 3B is not within scope of the Overseas Investment Act 2005's (the OI Act's) regulation-making power.

The Committee considers that the OI Act only permits the Regulations to narrow the definition of sensitive information through a positive or inclusionary approach. This approach presumes that all sub-classes of information are sensitive information, unless information is identified as specifically excluded from the definition. The Committee's view is that the Regulations have reversed this presumption.

*How the OI Act and Regulations define sensitive information*

The OI Act, as amended by the Overseas Investment (Urgent Measures) Amendment Act 2020 (Urgent Measures Act), defines sensitive information as "information, but not of a class set out in regulations that is genetic, biometric, health, and financial information of individuals or relates to the sexual orientation or sexual behaviour of individuals."

The Regulations narrow this definition, by providing for classes of information that are not sensitive information, in the format: "genetic/biometric/financial/health data is not sensitive information unless ...".

*The approach to 3B reflects Parliament's intention, and is permitted by the empowering provision*

The OI Act grants broad discretion as to how the Regulations can identify the classes of information that are not sensitive information.

Regulation 3B adopts a negative approach; it provides that all sub-classes of information <u>are not</u> sensitive information, except for that information which is expressly included in the definition. This has the effect of narrowing the definition of sensitive information. I therefore consider that regulation 3B is within scope of the empowering provision in the OI Act and in line with Parliament's intent.

This can be illustrated through an example of how regulation 3B describes genetic information that is not sensitive information. It provides that "genetic information is not sensitive information unless it is information about an individual's inherited or acquired genetic characteristics resulting from the analysis of a biological sample". Those other classes of genetic information (for example, genetic information that cannot be used to identify or track an individual) are not sensitive information.

The advice officials provided to Parliament's Finance and Expenditure Committee (FEC) affirms this reading of the empowering provision. Officials provided FEC with a summary of how the supporting regulations to the Urgent Measures Act were intended to be made (refer Annex 1), to assist FEC's understanding of the implications of the Urgent Measures Act's empowering provisions. This supports the view that regulation 3B is consistent with Parliament's intent.

Officials from PCO and the Treasury adopted the negative approach in 3B, as it is not clear it would be possible for officials to create a comprehensive list of classes of data and information (e.g. genetic) that should be excluded from the definition of sensitive information. That approach would raise issues:

- any such regulation would likely result in an unintended over-capture of information, contrary to Parliament's intent that the call-in power should only capture data sets that raise national security or public order risks; and
- it would produce a complex regulation, increasing compliance costs for investors and enforcement costs for the Overseas Investment Office.

**Regulation 69B**

The Committee expressed concern that regulation 69B is unauthorised, because they believe the regulation has been made before its empowering provision states it may be made. They also believe that the regulation serves no purpose.

*Context for regulation 69B*

As part of the Phase Two reform, Cabinet agreed to amend the types of land screened under the OI Act, simply because it adjoins land that is sensitive in its own right (that is, 'sensitive adjoining land') [DEV-19-MIN-0306 and CAB-19-MIN-0593 refer]. These amendments included:

- the removal of several categories of land from the definition of sensitive adjoining land, and
- a change to mechanism by which land significant to Māori, as prescribed in certain enactments, is categorised and screened as sensitive adjoining land (to increase certainty, without subjecting new types of land to screening under the OI Act as sensitive adjoining land).

Regulation 69B prescribes land significant to Māori that is sensitive adjoining land, giving effect to the Cabinet decision referenced above.

Cabinet agreed to introduce the changes to the scope of sensitive adjoining land as a transitional standing consent,[1] which would be converted into a permanent form by provisions in the Overseas Investment Amendment Bill (No 3) (the No 3 Bill), if passed.

*The empowering provision permits land significant to Māori to be identified under regulation 69B, for the standing consent for sensitive adjoining land*

The Urgent Measures Act inserted a regulation making power to enable easier identification of land significant to Māori as sensitive adjoining land, for two purposes:[2]

- the standing consent for sensitive adjoining land transactions under the OI Act, as amended by the Urgent Measures Act, and
- the Table 2 definition of sensitive adjoining land in the OI Act, once that has been amended by the No 3 Bill.

Regulation 69B identifies land significant to Māori (that was already screened under the OI Act), for the purposes of the standing consent for sensitive adjoining land, inserted by the Urgent Measures Act. The regulation is therefore in accordance with its empowering provision.

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1 Clause 32, Part 4, Schedule 1AA, Overseas Investment (Urgent Measures) Amendment Act 2020.
2 Section 61(1)(lb), Urgent Measures Act.

*Parliament did not intend the empowering provision to be contingent upon amendments in the No 3 Bill*

The Committee has interpreted a clause in the empowering provision ("after Schedule 1 is amended by the Overseas Investment Amendment Act (No 3) 2020)") to mean that changes in the No 3 Bill must be passed before regulation 69B can be used to prescribe land for the standing consent inserted by the Urgent Measures Act.

The standing consents in the Urgent Measures Act are a transitional mechanism devised to give effect to Cabinet-agreed policy changes in the period after the Urgent Measures Act was enacted, and before the changes are converted into a permanent form by the No 3 Bill. If the empowering provision precluded regulation 69B from being used to prescribe land for the standing consents, until such time as the No 3 Bill had been passed, this would defeat the purpose of enacting a transitional standing consent.

I therefore consider that the OI Act allows regulation 69B to prescribe land of significance to Māori for the purposes of a standing consent.

*Regulation 69B serves an important purpose*

As the Committee identified, one of regulation 69B's two purposes relates to prescribing land under amendments in the No 3 Bill. As that Bill is still before a Select Committee, regulation 69B is not currently being used for this purpose.

The above discussion illustrates that regulation 69B serves a separate, important purpose, in relation to the standing consents inserted by the Urgent Measures Act.

Yours sincerely

Hon. David Parker
**Associate Minister of Finance**