



Complaint regarding the Overseas Amendment Investment Regulations 2008

Report of the Regulations Review
Committee

Forty-eighth Parliament
(Dr Richard Worth, Chairperson)
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Presented to the House of Representatives

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1 Introduction

Summary of recommendations

The Regulations Review Committee recommends that the Government

- review the Overseas Investment Amendment Regulations 2008, and consider whether the Overseas Investment Act 2005 should be amended to address strategically important infrastructure as a class of sensitive asset separate to sensitive land
- introduce legislation amending the Overseas Investment Act 2005, either to omit section 17(2)(g), or to add to section 17(2)(g), a requirement to consult with relevant parties
- take steps to ensure that primary legislation does not allow regulations to be made adding factors or criteria listed in primary legislation, where such factors or criteria are to be taken into account in ministerial decision-making.

The Overseas Investment Amendment Regulations 2008 (the regulations) were made pursuant to sections 17(2)(g) and 61(1)(d) of the Overseas Investment Act 2005 (the Act) and entered into force on 4 March 2008. The regulation-making power authorises regulations that add to the factors listed in section 17 that must be taken into account when Ministers are considering an application regarding sensitive land. We received a complaint regarding the regulations from New Zealand Business Roundtable and Wellington Chamber of Commerce on 17 March 2008.

We have not been tempted to express a view on the merits of the decision which the two Ministers reached. That is beyond our jurisdiction and clearly might involve policy consideration. Our focus has been to look at the legislative form of words and the appropriateness of the drafting approach using regulation.

Complaint process

Under Standing Order 316, where a complaint is made to us by a person aggrieved at the operation of a regulation, we must consider whether it relates, on the face of it, to one of the grounds on which we may draw a regulation to the special attention of the House.

In this case the complainants consider the regulations are inconsistent with Standing Order 315(2) in five respects.¹ The five grounds that the complainants rely on are that the regulation

- 1 trespasses unduly on personal rights and liberties

¹ Appendix B contains the relevant Standing Orders.

2 appears to make some unusual or unexpected use of the powers conferred by the statute

3 unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal

4 contains matters more appropriate for parliamentary enactment

5 is retrospective where this is not expressly authorised by the empowering statute.

Remedies sought

The complainants request that the regulations be drawn to the special attention of the House and that they be disallowed.

Evidence

We received a written submission from the complainants dated 17 March 2008. The submission was released to the Treasury for comment on 20 March 2008. We received a written submission from the Treasury dated 18 April 2008. We also received a response from Dr Cullen on 2 April 2008 to questions about the regulations that we raised with the Minister prior to receipt of the complaint. The complainants made a further written submission in response on 6 June 2008.

On 15 May 2008 we invited Professor John Burrows to provide advice on the regulations in his capacity as a member of the Legislation Advisory Committee. We requested Professor Burrow's views on whether the regulations and sections 17(2)(g) and 61(1)(d) of the Overseas Investment Act 2005 are consistent with the Legislation Advisory Committee guidelines. Professor Burrows provided advice dated 28 May 2008 which was released to the parties for comment.

We heard evidence relating to the complaint on 1 July 2008 from all parties.²

On 21 August we received an independent submission on the complaint from the New Zealand Law Society Rule of Law Committee.

² Appendix E contains a transcript of the hearing.

2 Trespasses unduly on personal rights and liberties

Complainants' view

The complainants argue that the announcement of the regulations lowered the value of Auckland International Airport Limited (AIAL) by \$300 million. The complainants say that the property rights of AIAL shareholders were therefore unduly trespassed upon by the announcement. This went beyond the realms of normal commercial risk associated with investment as the loss was caused by regulatory intervention. The complainants argue that the loss was anticipated in the Treasury advice to the Minister on this matter and was a cause for concern to the Treasury.

The Treasury's view

The Treasury argues that property rights are not entrenched in the New Zealand Bill of Rights Act 1990 and that the regulations did not amount to an unauthorised taking as described in the Legislation Advisory Committee guidelines. The Treasury concedes that the regulation affected the share price, but argues that it does not trespass unduly on property rights. The legislative regime under the Act already provides for screening of investment proposals and the proposal was always at risk of regulatory intervention.

Our view

We have developed a three-stage test for considering this ground:

- 1 Is there a personal right or liberty to be trespassed against?
- 2 Has that right or liberty been trespassed against?
- 3 Is the trespass an undue trespass?

The committee has not limited itself to rights enshrined in statute in the past. We have taken a reasonably liberal approach to what constitutes a right and we consider that common law rights in respect of property should be protected from trespass by regulations, irrespective of whether they are protected by statute.

It seems to be agreed that as a matter of fact the AIAL share price went down significantly following the making of the regulations. While we acknowledge that shareholders may have suffered a loss as a result of the regulations we are not convinced this amounts to a trespass against a right. We agree with the Treasury that no taking of property arises from the regulations. The rights of AIAL shareholders include the right to enjoy the benefits of those shares and to sell the shares at their discretion. We are not aware of rights in respect of stable share prices, except those safeguards specified in securities legislation, which are of no application to this situation.

We tend to agree with the Treasury that regulations modifying the criteria to be considered were clearly envisaged under the Act and that share value fluctuation due to authorised regulatory intervention is something that shareholders simply have to accept. If there was a property right affected by the regulations we do not consider that it was unduly trespassed against by the regulations.

3 Unusual or unexpected use

Complainants' view

The complainants state that the regulations constitute an unusual and unexpected use of the regulation-making powers in the Act. They argue that the regulations were designed to affect the outcome of one specific transaction, the proposed bid by the Canadian Pension Plan Investment Board for a 40 percent shareholding in Auckland International Airport Limited. The complainants say that this amounted to changing the rules in the closing minutes of the game.

At the hearing the complainants developed their argument further under this heading, following a line of argument developed by Professor Burrows in his opinion. The starting point is section 3 of the Act. Section 3 states

The purpose of this Act is to acknowledge that it is a privilege for overseas persons to own or control sensitive New Zealand assets by—

- (a) requiring overseas investments in those assets, before being made, to meet criteria for consent; and
- (b) imposing conditions on those overseas investments.

Professor Burrow's analysis of the Act found that it deals with two types of sensitive asset, sensitive land and significant business assets. Sensitive land is defined in Schedule 1 of the Act. Professor Burrows says "there is a strong flavour of conservation of rural land running through the concept of sensitive land". The criteria for consent to an overseas investment in sensitive land are found in section 16 of the Act. One of the criteria is whether the overseas investment will or is likely to benefit New Zealand. The Minister must take a number of factors into account when considering this criterion. Those factors are found in section 17. Section 17(2)(g) permits regulations to add to this list of factors.

Significant business assets are defined in section 13 of the Act. The criteria for allowing overseas investment in New Zealand significant business assets are prescribed in section 18. There is no regulation-making power to add to the list of criteria prescribed in section 18.

Professor Burrows comes to the conclusion that the regulation was an unusual and unexpected use of the regulation-making power. His reasoning is that the Government took advantage of the coincidence that a piece of strategically important infrastructure which was really a significant business asset, happened to be located on sensitive land. A regulation-making power was not available to insert additional criteria for consideration of significant business assets; however it was available for consideration of sensitive land. Because the link between strategically important infrastructure and sensitive land is tenuous and is likely to be a rare occurrence, Professor Burrows concludes that there is a case for

saying the regulations are an unusual and unexpected use of the regulation-making power. This conclusion is supported by the NZLS.

The complainants agree with this conclusion. At the hearing they appeared to take the argument a step further. The complainants said that the regulation effectively establishes a third class of property that is subject to the Overseas Investment Act regime: strategically important infrastructure (which happens to be on sensitive land). The complainants argue that this is a significant change to the structure of the Act, which formerly dealt with two distinct types of overseas investment: sensitive land and significant business assets. The complainants also say that the regulation is poor law in that it treats strategic infrastructure inconsistently. Strategic infrastructure that is on sensitive land is subject to one set of criteria while other strategically important infrastructure is either not subject to the Act or is considered as a significant business asset.

The Treasury's view

The Treasury considers that the regulations are precisely what was intended by section 17(2)(g) and section 61(1)(d). The Treasury says that section 17(2)(a) already deals with the concept of national benefit in relation to acquisitions of sensitive land, and that strategically important infrastructure is a natural extension of that concept. The Treasury also suggests that the schema of the Act is not just about conservation of sensitive land but includes the business activity that is being carried out on the sensitive land. The Treasury concedes that the regulations were unexpected by markets but says that it is not always feasible or desirable to pre-signal a change in regulation, particularly where commercial sensitivity is concerned.

Our view

On this ground we find merit in the arguments of both Professor Burrows and the complainants. On the face of it Auckland International Airport Limited would logically be dealt with under the Act as a significant business asset rather than as sensitive land. Intervention by regulation was needed to improve the adequacy of the assessment process under the Act for the AIAL decision. Intervention was possible only by treating AIAL as sensitive land. By good fortune the airport is located on a foreshore and constitutes sensitive land. Regulating a sensitive asset that is more correctly regarded as a significant business asset under the sensitive land category constitutes an unusual use of the regulation-making power.

A further concern is that intervention in a specific decision was dealt with through a regulation of general application that adds a significant new policy consideration to the Act. The Treasury advice to the Minister indicates that making such a regulation would “make it easier for future governments to take a more selective approach to foreign investment and this in itself may raise uncertainty”.

Although introduced as a subset of sensitive land, the concept of strategically important infrastructure is such a broad and significant class of assets it deserves a statutory class of its own. The reason for limiting consideration of strategically important infrastructure to those assets that are located on sensitive land appears to be that this was the limitation of the regulation-making power. Strategically important infrastructure is not a concept that is referred to in the Act other than in the regulations. Our view is that adding strategically

important infrastructure to the section 17 criteria introduces significant new policy considerations. Using regulations to do so constitutes an unusual and unexpected use of the regulation-making power.

4 Is the matter better suited to parliamentary enactment?

Complainants' view

The complainants say that in terms of good regulatory practice the policy initiative contained in the regulations should have been subject to the regulatory impact statement system and should have followed a transparent parliamentary process. The complainants are concerned that allowing regulations of this nature undermines the rule of law. It gives the Executive too much flexibility in law making and is damaging to New Zealand's reputation as a country that upholds the rule of law.

The complainants say that law of general application that is forward-looking, containing significant public policy and public power should be debated in Parliament. They say that the regulations effectively amend the scope of the Act by introducing a third category of strategically important infrastructure. Such a change should only be implemented through primary legislation. The submission of the NZLS Rule of Law Committee expresses similar views.

The Treasury's view

The Treasury considers that the regulations are precisely what was intended by section 17(2)(g) and section 61(1)(d). The Treasury states that the regulations are consistent with the purposes and the general schema of the Act. They are therefore suited to delegated legislation. The Treasury agrees with the analysis of Professor Burrows.

Professor Burrows considers the arguments to be finely balanced on this ground. On one side are arguments, sourced from the Legislation Advisory Committee guidelines, that matters of high policy should generally be left to enactment by Parliament. Matters that are likely to be controversial and the subject of strong competing submissions to select committees will normally fit in this category. On the other side is the argument that the regulations introduce only a discretionary factor for consideration. That discretionary factor is relevant to a decision to be made affecting the field of foreign relations. As this field tends to fall within the jurisdiction of the Executive, Professor Burrows considers the regulations are appropriate, by a narrow margin.

Our view

The Treasury advice to the Minister argues that stand-alone legislative action would have been in breach of New Zealand's international trade obligations. While advising against intervention, the Treasury advice prefers the regulation-making mechanism under the Overseas Investment Act if intervention is to be pursued. It argues that this will result in less international fallout.

One option the Treasury did not comment on was amending the Overseas Investment Act by primary legislation to insert the additional strategically important infrastructure factor.

While this would have been an unusual step given the existence of section 17(2)(g), it would have had the same effect as regulation, without necessarily causing the international fallout of stand-alone legislation. At the hearing the Treasury said that the time required to pass such legislation would have influenced the decision to opt for regulations.

We consider that section 17(2)(g) is an undesirable regulation-making power. It is a form of Henry VIII clause which permits regulations to add to the factors that may be statutorily taken into account in the decision-making process. Professor Burrows observed that the factors introduced by regulation have the same level of generality as those prescribed elsewhere in section 17(2). We agree with this assessment. The regulations are effectively amending primary legislation.

We consider that the proliferation of clauses similar to this is cause for concern. Since receiving this complaint, this committee has consistently advised select committees against including similar provisions in bills without appropriate safeguard. We will continue to do so.

5 Rights and liberties of persons dependent upon administrative decisions

Complainants' view

The complainants argue that the lack of definition of the term *strategically important infrastructure* means that the rights and liberties of persons are unduly subject to the discretionary powers of the decision-makers under the Act.

The Treasury's view

The Treasury says that statutes that empower a Minister to make decisions using criteria contained in regulations mean that it is inevitable that the Minister will have to exercise discretionary power. This is envisaged by the relevant primary legislation. Further, the Minister's decision can be subject to judicial review.

Our view

This is a difficult ground to establish in this situation. The Act empowers Ministers to make decisions according to criteria specified in the Act. Additional factors may be taken into account in making those decisions, and those factors include some factors supplied by regulations. The Act already provides that rights and liberties of persons may be affected by administrative decision. The 2008 regulations do not markedly alter that situation. We accept the arguments of the Treasury on this ground.

6 Is the regulation retrospective?

Complainants' view

The complainants argue that the intervention of the regulation is retrospective in the sense that it disrupts an existing takeover bid. The complainant concedes that this is bad regulatory practice rather than being unlawful.

The Treasury's view

The Treasury say that the regulation was not applied to decisions that had already been made. At the time the regulation came into force, no decision had been made on the AIAL bid. Those applicants with undecided applications were invited to comment on the impact the additional criterion would have on their applications.

Our view

Professor Burrows concluded that the regulation did not have retrospective effect. Professor Burrows cited the approach taken by the Court of Appeal in an analogous situation involving the Commerce Commission.³ The Court of Appeal found that the application of amended legislation to existing applications was acceptable as the applications were future looking and the decision did not address past transactions.

The approach of Professor Burrows and the Court of Appeal is consistent with the arguments presented by the Treasury. We accept those arguments.

³ *Foodstuffs (Auckland) Ltd v Commerce Commission* [2002] 1 NZLR 353.

7 Conclusion

In our view the Overseas Investment Regulations 2008 constitute an unusual and unexpected use of the regulation-making power. The regulations also contain matters that can be argued to be more appropriate for parliamentary enactment.

We note that the AIAL decision has already been made and that any action taken in respect of the regulations will have no impact on that decision. Nevertheless the regulations are of general application and we think that the issues raised by the complainants in respect of the application of the Act to strategically important infrastructure should be considered by the Government.

We have also noted our concern regarding section 17(2)(g). The proliferation of regulation-making clauses such as this is troubling, and we recommend against their use. Section 17(2) is a form of Henry VIII clause. Such clauses should be used only where urgent need to add to statutory decision making criteria is envisaged. In such circumstances the regulation-making power should be used in conjunction with satisfactory safeguards to ensure a transparent and open legislative process is followed.

Recommendations

The Regulations Review Committee recommends that the Government

- review the Overseas Investment Amendment Regulations 2008, and consider whether the Overseas Investment Act 2005 should be amended to address strategically important infrastructure as a class of sensitive asset separate to sensitive land
 - introduces legislation amending the Overseas Investment Act 2005, either to omit section 17(2)(g), or to add to section 17(2)(g), a requirement to consult with relevant parties
 - take steps to ensure that primary legislation does not allow regulations to be made adding factors or criteria listed in primary legislation, where such factors or criteria are to be taken into account in ministerial decision-making.
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Appendix A

Committee personnel

Committee members

Dr Richard Worth (Chairperson)

Hon Mark Burton

Hon Marian Hobbs

Eric Roy

Dr Pita Sharples

Lesley Soper

Lindsay Tisch

Committee staff

Claire MacMillan, Clerk of Committee

Tim Workman, Clerk-Assistant (Legal Services)

Appendix B

Standing Orders relevant to the Regulations Review Committee

314 Functions of Regulations Review Committee

- (1) The Regulations Review Committee examines all regulations.
- (2) A Minister may refer draft regulations to the committee for consideration and the committee may report on the draft regulations to the Minister.
- (3) In respect of a bill before another committee, the committee may consider—
 - (a) any regulation-making power,
 - (b) any provision that contains a delegated power to make instruments of a legislative character, and
 - (c) any matter relating to regulations,—and report on it to the committee that is considering the bill.
- (4) The committee may consider any matter relating to regulations and report on it to the House.
- (5) The committee investigates complaints about the operation of regulations, in accordance with Standing Order 379, and may report on the complaints to the House.

315 Drawing attention to a regulation

- (1) In examining a regulation, the committee considers whether it ought to be drawn to the special attention of the House on one or more of the grounds set out in paragraph (2).
- (2) The grounds are, that the regulation—
 - (a) is not in accordance with the general objects and intentions of the statute under which it is made:
 - (b) trespasses unduly on personal rights and liberties:
 - (c) appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made:
 - (d) unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal:

- (e) excludes the jurisdiction of the courts without explicit authorisation in the enabling statute:
- (f) contains matter more appropriate for parliamentary enactment:
- (g) is retrospective where this is not expressly authorised by the empowering statute:
- (h) was not made in compliance with particular notice and consultation procedures prescribed by statute:
- (i) for any other reason concerning its form or purport, calls for elucidation.

316 Procedure where complaint made concerning regulation

- (1) Where a complaint is made to the committee or to the chairperson of the committee by a person or organisation aggrieved at the operation of a regulation, the complaint must be placed before the committee at its next meeting for the committee to consider whether, on the face of it, the complaint relates to one of the grounds on which the committee may draw a regulation to the special attention of the House.
- (2) The person or organisation making the complaint is given an opportunity to address the committee on the regulation unless the committee agrees by unanimous resolution not to proceed with the complaint.

Appendix C

Overseas Investment Regulations 2008 (SR 2008/48)

4 Application

These regulations apply to all applications under the Overseas Investment Act 2005 that have not been decided as at the date on which these regulations come into force, irrespective of whether the application was made before, or is made after, that date.

5 Other factors for assessing benefit of overseas investment in sensitive land

Regulation 28 is amended by adding the following:

“(h) whether the overseas investment will, or is likely to, assist New Zealand to maintain New Zealand control of strategically important infrastructure on sensitive land.”

Appendix D

Overseas Investment Act 2005

3 Purpose

The purpose of this Act is to acknowledge that it is a privilege for overseas persons to own or control sensitive New Zealand assets by—

- (a) requiring overseas investments in those assets, before being made, to meet criteria for consent; and
- (b) imposing conditions on those overseas investments.

4 Overview

(1) In this Act,—

- (a) this Part deals with preliminary matters, including the purpose of this Act and interpretation:
- (b) Part 2 contains the consent and conditions regime for overseas investments in sensitive New Zealand assets, and is organised as follows:
 - (i) subpart 1 states when consent is required and the criteria for consent (except that those matters are stated in the Fisheries Act 1996 for overseas investments in fishing quota):
 - (ii) subpart 2 sets out the procedure for obtaining consent and imposing conditions of consent:
 - (iii) subpart 3 describes the role of the person (the regulator) who administers the regime:
 - (iv) subpart 4 confers monitoring powers on the regulator:
 - (v) subpart 5 deals with aspects of enforcement, including offences under this Act, penalties, and the Court's powers to make orders for effective enforcement:
 - (vi) subpart 6 relates to regulations and other miscellaneous matters:
 - (vii) subpart 7 contains transitional provisions (mostly relating to the dissolution of the Overseas Investment Commission and the employment consequences for its employees) and amendments to other enactments.

(2) This Act replaces the Overseas Investment Act 1973 and the Overseas Investment Regulations 1995.

- (3) This section is a guide only to the general scheme and effect of this Act.

10 Consent required for overseas investments in sensitive New Zealand assets

- (1) A transaction requires consent under this Act if it will result in—
- (a) an overseas investment in sensitive land (see section 12);
 - (b) an overseas investment in significant business assets (see section 13).
- (2) See also sections 56 to 58B of the Fisheries Act 1996, which require consent for a transaction that will result in an overseas investment in fishing quota.

11 Consent must be obtained before overseas investment given effect

- (1) Consent must be obtained for a transaction before the overseas investment is given effect under the transaction.
- (2) The procedure for obtaining consent (including who must obtain consent) is set out in subpart 2.

What are overseas investments in sensitive New Zealand assets

12 What are overseas investments in sensitive land

An overseas investment in sensitive land is the acquisition by an overseas person, or an associate of an overseas person, of—

- (a) an interest in land if—
 - (i) the land is sensitive under Part 1 of Schedule 1; and
 - (ii) the interest acquired is a freehold estate or a lease, or any other interest, for a term of 3 years or more (including rights of renewal, whether of the grantor or grantee), and is not an exempted interest; or
- (b) rights or interests in securities of a person (A) if A owns or controls (directly or indirectly) an interest in land described in paragraph (a) and, as a result of the acquisition,—
 - (i) the overseas person or the associate (either alone or together with its associates) has a 25% or more ownership or control interest in A; or
 - (ii) the overseas person or the associate (either alone or together with its associates) has an increase in an existing 25% or more ownership or control interest in A; or
 - (iii) A becomes an overseas person.

13 What are overseas investments in significant business assets

- (1) An overseas investment in significant business assets is—

- (a) the acquisition by an overseas person, or an associate of an overseas person, of rights or interests in securities of a person (A) if—
 - (i) as a result of the acquisition, the overseas person or the associate (either alone or together with its associates) has a 25% or more ownership or control interest in A or an increase in an existing 25% or more ownership or control interest in A; and
 - (ii) the value of the securities or consideration provided, or the value of the assets of A or A and its 25% or more subsidiaries, exceeds \$100 million; or
 - (b) the establishment by an overseas person, or an associate of an overseas person, of a business in New Zealand (either alone or with any other person) if—
 - (i) the business is carried on for more than 90 days in any year (whether consecutively or in aggregate); and
 - (ii) the total expenditure expected to be incurred, before commencing the business, in establishing that business exceeds \$100 million; or
 - (c) the acquisition by an overseas person, or an associate of an overseas person, of property (including goodwill and other intangible assets) in New Zealand used in carrying on business in New Zealand (whether by 1 transaction or a series of related or linked transactions) if the total value of consideration provided exceeds \$100 million.
- (2) However, an overseas person that was lawfully carrying on business in New Zealand on 15 January 1996 (which was when the Overseas Investment Regulations 1995 came into force) does not require consent for an overseas investment in significant business assets described in subsection (1)(b) if the investment requires consent only because it comes within that paragraph.

16 Criteria for consent for overseas investments in sensitive land

- (1) The criteria for an overseas investment in sensitive land are all of the following:
- (a) the relevant overseas person has, or (if that person is not an individual) the individuals with control of the relevant overseas person collectively have, business experience and acumen relevant to that overseas investment;
 - (b) the relevant overseas person has demonstrated financial commitment to the overseas investment;
 - (c) the relevant overseas person is, or (if that person is not an individual) all the individuals with control of the relevant overseas person are, of good character;
 - (d) the relevant overseas person is not, or (if that person is not an individual) each individual with control of the relevant overseas person is not, an individual of the kind referred to in section 7(1) of the Immigration Act 1987 (which lists certain persons not eligible for exemptions or permits under that Act):

(e) either subparagraph (i) is met or subparagraph (ii) and (if applicable) subparagraph (iii) are met:

(i) the relevant overseas person is, or (if that person is not an individual) all the individuals with control of the relevant overseas person are, New Zealand citizens, ordinarily resident in New Zealand, or intending to reside in New Zealand indefinitely:

(ii) the overseas investment will, or is likely to, benefit New Zealand (or any part of it or group of New Zealanders), as determined by the relevant Ministers under section 17:

(iii) if the relevant land includes non-urban land that, in area (either alone or together with any associated land) exceeds 5 hectares, the relevant Ministers determine that that benefit will be, or is likely to be, substantial and identifiable:

(f) if the relevant land is or includes farm land, either that farm land or the securities to which the overseas investment relates have been offered for acquisition on the open market to persons who are not overseas persons in accordance with the procedure set out in regulations (unless the overseas investment is exempt from this criterion under section 20).

(2) See section 19 in relation to subsection (1)(c) and (d).

17 Factors for assessing benefit of overseas investments in sensitive land

(1) If section 16(1)(e)(ii) applies, the relevant Ministers—

(a) must consider all the factors in subsection (2) to determine which factor or factors (or parts of them) are relevant to the overseas investment; and

(b) must determine whether the criteria in section 16(1)(e)(ii) and (iii) are met after having regard to those relevant factors; and

(c) may, in doing so, determine the relative importance to be given to each relevant factor (or part).

(2) The factors are the following:

(a) whether the overseas investment will, or is likely to, result in—

(i) the creation of new job opportunities in New Zealand or the retention of existing jobs in New Zealand that would or might otherwise be lost; or

(ii) the introduction into New Zealand of new technology or business skills;
or

(iii) increased export receipts for New Zealand exporters; or

-
- (iv) added market competition, greater efficiency or productivity, or enhanced domestic services, in New Zealand; or
 - (v) the introduction into New Zealand of additional investment for development purposes; or
 - (vi) increased processing in New Zealand of New Zealand's primary products:
 - (b) whether there are or will be adequate mechanisms in place for protecting or enhancing existing areas of significant indigenous vegetation and significant habitats of indigenous fauna, for example, any 1 or more of the following:
 - (i) conditions as to pest control, fencing, fire control, erosion control, or riparian planting:
 - (ii) covenants over the land:
 - (c) whether there are or will be adequate mechanisms in place for—
 - (i) protecting or enhancing existing areas of significant habitats of trout, salmon, wildlife protected under section 3 of the Wildlife Act 1953, and game as defined in sections 2(1) of that Act (for example, any 1 or more of the mechanisms referred to in paragraph (b)(i) and (ii)); and
 - (ii) providing, protecting, or improving walking access to those habitats by the public or any section of the public:
 - (d) whether there are or will be adequate mechanisms in place for protecting or enhancing historic heritage within the relevant land, for example, any 1 or more of the following:
 - (i) conditions for conservation (including maintenance and restoration) and access:
 - (ii) agreement to support registration of any historic place, historic area, wahi tapu, or wahi tapu area under the Historic Places Act 1993:
 - (iii) agreement to execute a heritage covenant:
 - (iv) compliance with existing covenants:
 - (e) whether there are or will be adequate mechanisms in place for providing, protecting, or improving walking access over the relevant land or a relevant part of that land by the public or any section of the public:
 - (f) if the relevant land is or includes foreshore, seabed, or a bed of a river or lake, whether that foreshore, seabed, riverbed, or lakebed has been offered to the Crown in accordance with regulations:
 - (g) any other factors set out in regulations.

61 Regulations

(1) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations for all or any of the following purposes:

(a) determining how to measure value or apply the value thresholds under section 13:

(b) prescribing, for the purposes of the criteria in section 16(1)(f), procedures for offering the farm land or the securities to which the overseas investment relates for acquisition on the open market to persons who are not overseas persons:

(c) providing what is required for an offer of foreshore, seabed, riverbed, or lakebed to the Crown to be sufficient for the purposes of section 17(2)(f), including prescribing—

(i) the maximum period for which the offer must be open:

(ii) at what price the land must be offered, and a valuation procedure for fixing that price:

(iii) on what terms and conditions the land must be offered to the Crown, with the purpose of ensuring it is offered on terms and conditions equivalent to those offered to the overseas person:

(iv) power for the relevant Ministers to reject an offer as not being sufficient for the purposes of section 17(2)(f) because it is not on terms and conditions equivalent to those offered to the overseas person:

(d) prescribing other factors that the relevant Ministers may apply under section 17(2)(g) of this Act or under section 57H of the Fisheries Act 1996:

(e) prescribing fees and charges to be paid, or the amounts to be charged, a means by which they may be calculated and ascertained, or a rate at which they may be calculated or ascertained, for the purpose of meeting or assisting in meeting costs of Ministers and the regulator in exercising functions and powers, and performing duties, and providing services, under this Act (but also the previous costs of Ministers and the Commission in relation to those matters under the Overseas Investment Act 1973):

(f) prescribing maximum bonds to be charged under section 25, a means by which bonds may be calculated or ascertained, or a rate at which bonds may be calculated or ascertained, for the purpose of meeting estimated reasonable costs of Ministers and the regulator in monitoring compliance with a condition or conditions of consent or exemption, and providing for the payment, and repayment if conditions are met, of those bonds:

(g) prescribing maximum administrative penalties to be charged by the regulator, a means by which administrative penalties may be calculated or ascertained, or a rate at which administrative penalties may be calculated or ascertained, for the purposes of sections 52 and 53:

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- (h) exempting or providing for exemptions from, or waivers, refunds, or discounting of, fees, charges, amounts, or administrative penalties:
 - (i) exempting (on terms and conditions, if appropriate) any transaction, person, interest, right, or assets, or class of transactions, persons, interests, rights, or assets, from the requirement for consent or from the definition of overseas person or associate or associated land:
 - (j) providing for the relevant Minister or Ministers to exempt (on terms and conditions, if appropriate), after having regard to the purpose of this Act, any transaction, person, interest, right, or asset from the requirement for consent or from the definition of overseas person or associate or associated land (and to amend or revoke those exemptions):
 - (k) providing for applications for exemptions:
 - (l) providing for and regulating the giving or service of notices for the purposes of this Act, and the effect of those notices:
 - (m) providing for transitional provisions:
 - (n) providing for any other matters contemplated by this Act or necessary for its administration or necessary for giving it full effect.
- (2) The Minister must have regard to the purpose of this Act before recommending any regulations be made under subsection (1)(i).

Appendix E

Corrected transcript of evidence 1 July 2008

Members

Dr Richard Worth (Chairperson)
 Hon Mark Burton (Deputy Chairperson)
 Dr Jackie Blue
 Mark Blumsky
 Hon Marian Hobbs
 Lesley Soper
 John Hayes

Staff

Claire MacMillan, Clerk of Committee
 Tim Workman, Legal Adviser

Witnesses

Business Roundtable:
 Roger Kerr, Executive Director, Business Roundtable
 Charles Finny, Chief Executive Wellington Regional Chamber of Commerce
 Andy Nichols, Partner, Chapman Tripp

The Treasury:
 Jeremy Corban, Assistant Secretary, Economic Performance Group
 Jane Meares, Treasury Solicitor
 Ivan Kwok, Principal Adviser

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| Worth | We'll start by hearing from the complainants, and I'll ask Roger Kerr, Charles Finny, and Andy Nichols to come to the table, if they are present. Our plan is to proceed in this way. We allocate you quarter of an hour to say whatever you do wish to say. There is a representative from Hansard here. There will be a transcript taken, and that transcript will be sent to you after this hearing to give you 7 days if you wish to make any corrections to what is there. We have read the materials. <i>[Introductions]</i> So, if you'd like to start, please. |
| Kerr | Thank you, Chairman. I think you know who is appearing here <i>[Introductions]</i> The Business Roundtable and the Wellington Regional Chamber of Commerce have made the complaint because we think the regulation is contrary to good regulatory practice and in breach of what Standing Orders affirm as good practice. So I'm going to make a few brief remarks without going right through our complaints, and then Charles Finny is going to |

speak even more briefly and Andy Nichols will have a few more words after that.

I'm also authorised, Chairman, to say that the New Zealand Shareholders Association supports our complaint. Their concern is, and I quote, "the Government's appropriation of part of the value of the shares the Government sold to them, and for which they paid full price rather than the impaired price that the shares now carry."

Both the Business Roundtable and the Wellington Regional Chamber of Commerce are very concerned about the making of regulations, as you know. You've seen us in other contexts suggesting that there is too much bad practice, and hence our very keen interest in regulatory responsibility legislation. The Government's action in this case, in our view, is damaging to New Zealand's commercial interests for reasons that were very well outlined in the Treasury report to the Minister.

I want to put on the table, right up front again, that we are not saying, first, that the Canadian bid had merit. That should have been for shareholders to decide. We're not saying that Ministers made a wrong decision, given the law. We're not saying that the Order in Council was itself unlawful. We did not seek legal advice on this point. Professor Burrows, in the submission that you have from him, argues that it was *intra vires*, and he may be right; that's not our concern. This isn't a judicial review before a High Court on a narrow point of lawfulness. Your committee has a wider responsibility for good regulatory practice in the light of Standing Orders.

What we're saying is that our complaint can be sustained, we think, on no fewer than five of the nine grounds for disallowing a regulation contained in Standing Orders, and one is sufficient to disallow it. We submit that the committee should start with the broader context of the regulation and the paper trail behind it. It's clear that the Government wanted to disrupt the Canadian bid. It's clear that Michael Cullen first wanted to do it through legislation. We think he was correct; he got it right the first time. We think it's clear that there would have been strong opposition in submissions on an amendment bill, as Professor Burrows notes, and we think it's clear that the regulation was a last-resort, tactical move to circumvent proper parliamentary debate. Finally, no regulatory impact analysis was done, contrary to Cabinet requirements and despite the fact that there was plenty of time. At one point a whole amendment bill was being drawn up; there was plenty of time to have prepared an RIS.

I won't go through the five grounds of our complaint and our comments on the responses from Dr Cullen and the Treasury in any detail. Our central point, on page 2 of our submission—point (v)—is that "the amending regulation was inconsistent with the principle of the rule of law insofar as the government changed the rules affecting a takeover bid that was already underway", and we spell out at that point of our comments why the rule of law, which it is the committee's role to help uphold, is so important. The

tax changes affecting the transaction are further evidence of the Government's disruptive intent.

Professor Burrows only comments on three of our five grounds of complaint. I've already commented on the issue of whether the change should have been a matter for Parliament to consider. We think it should; he says the matter is finely balanced. On the issue of "unusual or unexpected" use of power, he agrees with us. On retrospectivity, we agree with Professor Burrows that the change was not retrospective in the sense that it overturned past transactions, but we say it was certainly retrospective in the sense that it sought to disrupt an existing bid, and in that sense it was bad regulatory practice, even though possibly not unlawful.

We stand by the other two grounds of our complaint, which were not discussed by Professor Burrows. We draw the committee's attention to our comments on page 4 on the role of the Treasury. In summary, we see this episode as damaging New Zealand's hard-earned reputation as a country that upholds the rule of law and, thus, its economic and commercial interests. We believe that the committee has a duty and some powers to rectify the situation, and we would urge you to exercise them fully.

Charles will follow.

Worth We might ask questions at the close of your complaint.

Finny Thank you for having us here today. My comments will be even briefer. The Wellington Regional Chamber of Commerce was one of the first organisations to comment on the Government's decision to amend the Overseas Investment Regulations through an Order in Council. Our press release was, I believe, attached to our original complaint. We were upset that this issue was not debated before Parliament, and that an Order in Council was used as opposed to the legislative route. We saw this act by the Government as being of major importance for the economy and having major implications for overseas perceptions of New Zealand's openness on foreign investment. We expressed concern over the implications of this move for our international commitments. Finally, we raised concerns about the changing of the rules part-way through an application process.

Our concern has not eased with the passage of time; indeed, access to the documents that lie behind Government decisions have heightened our concerns. As a former, reasonably experienced, public servant, I have to say that this was very poor practice—practice I would have advised any Government against following, should I still have been a public servant. In my view, the issues involved were so important, in terms of domestic policy, in terms of implications for our international attractiveness as an investment destination, and in terms of our international obligations, that these policy changes were more appropriate for parliamentary enactment rather than the use of regulation. We think that our concern should be

drawn to the attention of the House, and that the House should be encouraged to disallow the regulation.

Finally—and this is a very quick comment on the regulation itself—we are still confused as to what it actually means. We do not think it was well drafted. There is huge uncertainty as to what it means. We do not yet know what “strategically important infrastructure” is. We do not know what “sensitive land” is. This is causing great uncertainty, and we know it is deterring investment decisions.

Nichols Some opening comments from me, Mr Chairman. In New Zealand we lay claim to a tradition where law is of general application and forward-looking, significant public policy and public power is debated in Parliament, and the law is coherent and it means what it says. These principles are important, and this regulation offends each one. We know the executive was targeting Auckland International Airport shareholders. The paper trail shows this, and the inconsistent nature of the resulting law is further evidence.

The policy changes are significant. The regulation effectively amends the scope of the Act, set by Parliament in section 10, by introducing a third category of “strategically important infrastructure” into the overseas investment regime, along with “sensitive land”. The paper trail shows an initial expectation that legislation was required, and, in fact, a bill was drafted and ready to go, and tactical advice was received from Treasury to use regulation instead.

The regulation is poor law. It is inconsistent. The regulation treats strategically important infrastructure differently, depending on whether it is located on sensitive land or not. This is because regulations can only be made in relation to sensitive land, and in a situation targeted by the Government—Auckland International Airport—the business happened to be located by the sea, but no attempt was made to introduce a general policy on strategic infrastructure. We now have a law that regulates overseas investment in some strategically important infrastructure assets but not others.

The regulation is broadly worded to a degree that negates accountability, and it is misleading. The regulation is a Trojan horse for the introduction of a mandatory criterion. While in practice the existence of strategically important infrastructure on sensitive land will be determinative for any ministerial decision, the regulation is drafted on the fiction that this is only one of a number of considerations to be weighed. Again, the Government incurred the cost of this fiction when it chose to avoid legislating for a transparent process. Regulations such as this are corrosive of our commitment to legality and good government. Something has gone wrong here to a significant degree, and we submit there is a role for the committee to correct that.

Burton Just a question, almost rhetorical, but, none the less, the question I wanted brought back to you, Mr Kerr—Roger, you highlighted in your remarks the issue around whether the use of regulation or enactment was the proper course here, and made reference to Professor Burrows. You left off the very last bit of what he said, of course, in his conclusion—that is, you referred to it being finely balanced, but none the less, he fell on the side of this being justified, and that it was justified under the enactment and was an appropriate use of regulation. I suppose for this committee, our business is not necessarily to argue the policies of Governments, regardless of who they are, but to look at the appropriate use of legislation, and, therefore, the regulation that may spring from it. In light of Professor Burrows' advice on behalf of the Law Commission, how can your complaints still be sustained, would you argue? Because I think, like you, I recognise and acknowledge his considerable expertise and authority in providing that advice to us.

Kerr We've got five grounds of complaint, of course, and he's agreed with us on one, so there are only two others that he has commented on. You're quite correct; I didn't complete his statement—and I wasn't trying to hide anything – and he said he thought the use of regulation, although finely balanced, was *intra vires*. Now, we don't agree with that, actually, as a legal judgment, and I'd like to ask Andy to comment.

Nichols I think, that Professor Burrows' opinion holds a lot of weight. Clearly there's an issue for the committee to weigh, because Professor Burrows did think the regulation offended Standing Orders on one of the relevant grounds. but clearly the committee has to make its own decision. On the issue of whether this was an issue more properly for Parliament than for a regulation, I think we need to look at the factors that Professor Burrows weighed, and I think that's over to you as to whether you find them to be persuasive. So the things that he looked at, where he drew an analogy with the granting of immigration visas, and said that this was part of the executive role of external relations. He also took some comfort from the fact that this was cast as one of the factors to be weighed in the Minister's decision.

Our view is that that's a poor analogy in terms of the business of the executive and the delineation of Parliament's role. The regulation has much less to do with something like granting visas and has a lot more to do with restricting the economic freedom of New Zealanders, who were the shareholders that were targeted for wanting to sell into this bid, or were potentially denied the opportunity to sell into the bid. I've already spoken about our view on whether it's a fiction to say that this is just one factor to be weighed, if it's present at all. He said it was finely balanced. I think you have to consider what you think of the analogy that he drew with the granting of visas, and whether issuing a regulation stopping shareholders from having the opportunity to weigh up this bid is a fair analogy. We don't think it is.

- Hobbs I don't want to go back on that, but I might come back on it towards the end, because I don't read him in quite the same way as you're reading him. You just made a comment, sir, when you said the law is coherent and means what it says, which is a hell of a shock to me, because I wondered why we have law courts and lawyers, if that's so.
- Nichols There's always going to be questions around the boundary of meaning, but here we have a regulation that effectively puts in place a mandatory criterion. I don't think anybody around this table has any expectation that if an application involves a strategically important infrastructure asset, and that it is on sensitive land, because that was the hook they found, I don't think anybody has any expectation that that application would go through—I mean, any ministry or decision maker. The regulation is drafted as if it's one factor to be weighed. That's the fiction.
- Hobbs The second question I want to ask is around the argument you put out, that it trespasses unduly on personal rights and liberties. You begin your paragraph there by saying: "We submitted that the decision affected the vested rights of shareholders, and that the costs of an action ... should not have been borne by them but by taxpayers at large." I have a slight problem, and I'm just exploring it: personal rights and liberties, and shareholding—because there's an element when you go into a sharemarket, surely; it's not so much about your personal rights and liberties, but you are making a considered risk when you invest. Now, that's slightly different from personal rights. My right to free speech is different from my right to have a guaranteed return on money that I invest, and I see a difference.
- Kerr What we're talking about here is rights in property, which we all recognise as rights under the rule of law, and it's most important for such rights to be upheld. What we're saying is that we're not engaged in the substance of a policy debate; we're talking about the process of good lawmaking, and the LAC guidelines are very clear on this point. "Are vested rights being taken?" is one of the questions that's asked, and "Has the issue of compensation been addressed?" is another. These are the questions we're saying should have been considered here, and we would argue that as a policy matter—which isn't for discussion today—the Government might well have been at liberty to take action like this, but the cost should not have fallen on those that had, in good faith, under an existing set of rules, put their money into Auckland Airport shares.
- Nichols If I may say something—it is important to tease out the distinct questions there. So, "Do property rights count?", is the first question. Then, secondly, "What—
- Hobbs Do they count as personal liberty, and personal rights and liberty? There is a difference.
- Nichols That's right. And we say that they are; they are fundamental to the rule of law that this committee is charged with upholding. The second question is:

what were the expectations of the shareholders? The expectations of the shareholders were that the rules would not change halfway through the game. And the last thing that I would throw in is that, to be fair to Treasury, in the advice that they gave to the Minister, they did say: “Don’t do it.” They said: “Here’s the bill that you asked for, but don’t do it.” They advised the Minister that “this intervention will arbitrarily change the property rights of existing shareholders”. That was the advice from Treasury.

- Hobbs This is a supplementary to this, and I want to draw an analogy. We have before us always an inordinate amount of regulation from Land Transport, and in recent vehicle emissions rules, suddenly cars do not have the same value as they had before the passing of those regulations about what you’re allowed to emit from your cars. Therefore, that is significantly affecting property rights, surely. Are you saying that we cannot, therefore, pass any laws or regulations?
- Finny Marian, isn’t that an issue that has been attacked through legislation, and hasn’t it been through a full select committee process?
- Hobbs No; it’s a regulation. Most of the land transport and most—we’ve just had a current case in front of us to do with Euro 4. I won’t go into the regulatory details of it, but that’s one of the situations where you have a law passed, and the law gives right to regulation and the fine light of that regulation, and it can affect the property values.
- Burton Doesn’t it go—and this is supplementary to that, as well—to what the LAC guidelines have meant by “property” and “property rights”? It’s my understanding that it’s tended to be used, both in policy and indeed practically, to refer to the confiscation or the removal of a physical property—not necessarily when you’re referring to an impact on the value of something. It’s the latter that we seem to be talking about in this case.
- Nichols You can get dragged off into some constitutional and theoretical questions around what amounts to a taking, and you get into an American jurisprudential discussion there, and that’s not what we’re talking about here. Certainly, regulation affects property rights—that’s the question. But I think the task that is before the committee is not so much the constitutional question around takings, and it’s not so much the legal question around ultra vires; it’s around the quality of the law, and whether the Government offended the rule of law in what’s been done. So it is questions like: should these matters have been dealt with by Parliament? It is matters like: is this a surprising use of the regulatory power? We’ve got, effectively, a regulation that adds a third category to the Act, and we’ve got a regulation that regulates for some strategic infrastructure assets and not others. Those questions are what we have to grapple with. Certainly, regulation in general is inevitable and it will sometimes impact on property rights, but I think the question of degree here, which is for you to weigh, is—

- Burton Just one clarification—and then I will shut up. Can I just be really clear? Is it your contention that this is a use of regulation by the executive that was not anticipated by lawmakers, or that the lawmakers, in fact, got it wrong in permitting the potential use by the executive in this way?
- Nichols The former.
- Burton OK; thank you.
- Worth I'd just like to come to that point, Mr Nichols, because one of the things which Professor Burrows does say is that there is a basis for our intervention because the regulation makes “unusual or unexpected” use of powers. That argument is scripted—you’ve probably got the material there—at paragraph 23 of Professor Burrows’ report. Do you think his argument is well captured there, or would you add to it in any way?
- Nichols From recollection—sorry, I’ll go straight to that paragraph.
- Worth The last paragraph. He says that the regulation “is an ‘unusual and unexpected’ use of the regulation-making power.”
- Nichols Yes, he does. And he focuses in on the inconsistent nature of this regulation. So if the Government had set out on a proper policy process to ask the question: “Should we have specific rules around strategic infrastructure?”, we wouldn’t be in the position that we are in under this regulation. It deals with some strategic infrastructure and not others, on the totally arbitrary happenstance as to whether it is on sensitive land, or not. The only reason for this is that it was the only available regulatory tool under the Act. So Professor Burrows has focused in on that, and we agree with him. I would also say it was “unusual and unexpected” that the regulation would be used in substance to add a third category to the Act. So we’ve been trucking along, assuming that this Act was about sensitive land and significant business assets, and now we have a third category. Now, it’s dressed up as being part of the regulation and it’s dressed up about being a consideration in relation to land, but in practice we now have a third category under the Act, and that’s certainly a surprising use, as well.
- Blumsky It’s just interesting, isn’t it—the Minister, a sensitive land issue—he was just bloody lucky the airport was next to the harbour, absolutely lucky, because if I read the professor, if the airport were anywhere else it wouldn’t be sensitive land.
- Nichols That’s right.
- Blumsky So do you agree that the definition of “sensitive land” is appropriate, because I haven’t got the clause that defines what “sensitive land” is? He says Manukau Harbour is sensitive land—because it’s adjacent to Manukau Harbour, it’s sensitive land. I haven’t read the definition. Have you got—

Nichols You shouldn't, either. The definition of "sensitive land" is Byzantine and hard, but it is something that the practitioners work with under the legislation. I'm not sure that the particular difficulty is the definition of "sensitive land" but the difficulty is, what's the definition of a "strategic infrastructure asset", and, if we're concerned about those assets, why are we only concerned about the ones that are on sensitive land and why are we not regulating the ones that aren't on sensitive land? And the only reason for that is just happenstance and what Professor Burrows has said amounts to an unusual use of the regulation.

Kerr There's a couple of further points, Chairman, that we make in that context—ground (c) of Standing Orders 315(2). A very important one in our mind is the targeting of a specific transaction. We're saying that it may be one thing, as Professor Burrows says in relation to the Commerce Act, to change law affecting things that are in the pipeline, in a way that applies generally. It's quite another to go after a specific target. So far as we can see, there's no particular legal case law on what the meaning of "unusual or unexpected" is, and certainly, as far as the market was concerned, this regulation came from left field. There was an instant drop in the AIAL share price. In our view these factors should be added to those that Professor Burrows mentions.

Worth Right. I think we'll stop there and we'll hear from Treasury. Thank you.
[Introductions]

Corban Thank you. Thanks for asking us to appear here. It was very helpful, the introduction by Business Roundtable and others. Some of the issues that were raised there were concerning Treasury's performance. I think that I need to ask you, as the Chairman—are they issues that you want us to address here? Our preference is to focus primarily on the task at hand for the committee, which as we understand it is around helping you come to a view as to whether the executive was making appropriate use of the regulation-making powers available to it.

Worth Yes, and our ability to intervene in the context of the Standing Orders, or not to intervene. That is really the task that we have to grapple with.

Corban In terms of the consistency with the Standing Orders, you sought views from the Law Commission on this. As we have heard, they agreed on all but one point—that it was consistent with the Standing Orders. The point that they disagreed on, that they examined, was around the "unusual and unexpected" point—was this "unusual or unexpected"? The approach that they took, as we have heard, was "Well, this is just a coincidence."; it was just, you know, that you could hook it on to the fact that this infrastructure was on sensitive land. That wasn't the anticipation; that was their argument.

We came to a different view on this when we examined it, and we were guided by what was in the Regulations Review Committee digest on how to understand what is meant by "unusual and unexpected". The key points of

inquiry laid out there, urge one to ask: does the regulation sit comfortably with a policy behind the principal legislation, and is it in-line with the objects and intentions of the empowering Act? When we looked at it through that frame, it seems that it is. It seems that it is well within the frame of the Act. Section 3 of the Act, laying out the purpose, says: “The purpose of the Act is to acknowledge it is a privilege for overseas persons to own or control sensitive New Zealand assets, by requiring overseas investments in those assets before being made to meet criteria for consent, and imposing conditions on those overseas investments.” So, when you look at it from that frame, it’s hard to argue that it’s outside the policy intent of the Act. Therefore, it’s hard to argue that it’s “unusual or unexpected”.

On the other points that Professor Burrows raises—well, we reached the same conclusions. It was *intra vires*, it was a matter that, on balance, was appropriate for regulation, and it was a matter that wasn’t retrospective. In terms of the other issues raised by the Business Roundtable in their complaint, I think I will focus on a couple. The first one is: did this trespass unduly on personal rights and liberties? On the second one, I think I will come back to the “unusual or unexpected” point, again.

Again, the Regulation’s Review Committee digest lays out three tests to consider whether a regulation does trespass unduly on personal rights and liberties—the first is, was there a right there; the second is, was there a trespass there; and the third is, was it undue? In our view, yes, there was a right there. We have heard about the property rights of the shareholders being at stake here—in particular, the right of those shareholders regarding who they sell their shares to; that’s the issue at stake.

Was this a trespass? Arguably, the new regulation does impact on existing property rights—that’s what we said in our advice. Whether that constitutes a trespass is a different point. The overseas investment regime already restricts those rights by making sale to an overseas person subject to approval, and, moreover, by contemplating and allowing additional factors to be taken into account in the screening of investment proposals to be specified through regulation. So given that the legislative framework contemplated the possibility of such action, in our view it’s hard to argue that this constituted a trespass.

Thirdly, even if you thought it did, you need to weigh up: was it undue? That’s a matter of judgement. Again, in our view you couldn’t argue that it was undue. The Business Roundtable’s complaint is laid out in their note. It takes a different approach on this and centres on the issue of compensation, as we’ve talked about. We’ve already run through the arguments that a lot of regulatory activity affects value; the judgement about whether to compensate for that, or not, is quite a deep policy matter, outside of the scope of this issue at hand. So it wasn’t an issue that was considered in this transaction.

On the question of “unusual or unexpected”—I’ve talked earlier about our view on that. The Business Roundtable in their complaint takes a plain-English approach to interpreting “unusual and unexpected”. From that perspective, I have to agree with them. Yes—it wasn’t expected; that’s why the share price fell. But I’m not sure that that is the right test, in this case. The Law Commission take a different approach again. They see it as “unusual and unexpected” as it relies on a coincidence in the statute to achieve its aims. So it seems to me that there’s quite a lot of room for interpretation about what “unusual and unexpected” means. As I said before, we are guided by the judgements that you have come to before on this, which leaves us to think that, well, it is within the frame of the Act, so you can’t come to a view that it’s “unusual or unexpected”.

I think they are the main points that I would like to raise here in response to the comments that have been made so far. There are a couple of issues of fact that may be worth clarifying. One’s about the time frames in which this was done, where people have been saying “Well, this was done over a matter of weeks and surely there’s enough time to go through all of this.” This was done in a matter of days—something like 36 hours. So I think that needs to be borne in mind. The second point is I’m not sure that everyone is looking at the right Cabinet paper. I think that some people are looking at drafts of a Cabinet paper and saying “Well how come this wasn’t included in that, rather than the final Cabinet paper?”. I’m thinking in particular about whether the assessments of the costs and benefits of this action were drawn to the minds of Ministers when they were taking the decision.

- Worth I think on that, it’s important that we proceed on the basis of the correct material. So, what we have, thanks to the Business Roundtable paper given out at the beginning, is a section of material, which—do you think it may not be accurate?
- Meares I don’t think that we’ve got anything attached to the copy that we received.
- Corban That was the draft Cabinet paper and, as I was saying, the final that was considered by Cabinet had moved from there, and it was more fulsome about the costs and benefits. That’s available on Treasury’s website.
- Hobbs Just two questions. The last was around the share price dropping. Now, I am not a great investor in shares, but can I just put this through with you: if you have shares in a company, and there’s a decision being made—and it’s nothing to do with a Government decision, it’s a decision being made—you hope that x will happen. Y happens, and your share prices drop; isn’t that natural? Do you see what I’m trying to say?
- Corban Yes and I think—
- Hobbs Because the argument seems to go that because the price dropped, it’s nothing to do with—I haven’t got this quite clearly in my head—but the

- argument that is put there is that the share price drops, and that's somehow to do with the airport having—they were hoping it was going to—
- Blumsky It's like going to the TAB and putting money on a horse, and no one told you they shopped your horse before the race started.
- Hobbs But you see it's all to do with your hope. Your hope is that x is going to happen, a judgement gets made that y happens—it's not because of the innate value. Oh, never mind! Number 2, I just want to see if I've got you right here. There was a right—it was a property right; was it a trespass? These are words that you're using in a legal sense. And you say there is not a trespass on that right because already that right has been framed in section 3 of the legislation. Already that right has been—boundaries have been put around that right, in section 3 of the legislation. And that, therefore, that warning having been given—that framing having been set up there—this right is not trespassed upon.
- Corban It's more than section 3 of the legislation; the framework of the legislation sets it to say that if you're going to be selling your property to overseas persons, that's going to be subject to screening. Here are the factors that are going to be taken into account, and the Government can add factors through regulation provided it's consistent with this framework.
- Hobbs Since you are all lawyers—well I don't know—sitting at the end there, can you just help me out? Right—"trespass" and then "undue", is that an even tighter defence? I don't understand it.
- Meares In my opinion you would have to read all of them together, of course. But as Mr Nichols said, where trespass, and taking for, is a matter of significant jurisprudential discussion—
- Hobbs Sometimes I feel uneducated, but please go on.
- Worth I guess there's no dispute that—it's common ground that this regulatory change was a targeted attempt to provide for the possibility of refusing consent to the airport transaction. That's common ground isn't it?
- Corban I would see it more as the Government's concerns were crystallised and prompted by this transaction, but they were seeking to address the generic framework here. There was an issue that was brought to light and crystallised because of the Auckland airport deal and that, for them, revealed weaknesses in the generic framework around screening.
- Worth I wonder if you are putting that at too high a level, given the paper trail that we do have, and the concerns, which were expressed in that draft. But be that as it may, if we look at regulation 28, the "strategically important infrastructure" is exactly what—airport development, is it?
- Meares It's not defined in the Act, as a number of other terms in that regulation aren't defined.

- Worth Right. But what is your view as to what the strategically important infrastructure was, in the case of the airport transaction? Was it the airport—what would it have been?
- Kwok I think it was the airport as the gateway to New Zealand. It is a highly important piece of infrastructure—the airport as a whole. It has no meaning to say “Well, is it the runway; is it the tower?” It’s the whole lot, because it doesn’t function without the whole lot.
- Worth It seems to me that it was some of the assets of the airport. Those aspects that were infrastructure-related, as distinct from other assets. Or, is it something greater than that—is it control of the full sweep of assets of the company?
- Kwok I think you can’t divorce the bits because it doesn’t operate without all of the bits. So, the fact of the matter is that the runway is on land, which is close to the sea, etc. But it comes back to the fact that it’s infrastructure—however you might define that. I think it’s not that hard. I think that you’d say, for example, that airports are strategic infrastructure, and I think that you’d say that ports are strategic infrastructure. You’d probably say that the roading network is strategic infrastructure. You’d say the railway is a strategic bit of infrastructure; you’d say that the transmission lines are a significant piece of infrastructure. So I think people are making too much of this lack of definition, because I don’t think it’s that hard. I think we’re trying to see problems that aren’t really there.
- Worth What would you say was in the regulation of application to this particular case, the airport—the “sensitive land”? The sensitive land was the airport land or the harbour?
- Kwok The airport. It’s the fact that the definition of significant land takes into account the adjacent harbour, and so that’s how you end up saying therefore, because there is a definition of significant—
- Blumsky Sensitive land?
- Kwok —sensitive land, then it does link in.
- Blumsky What’s the definition of sensitive land?
- Worth I think what Mr Kwok is saying is that the sensitive land is the harbour.
- Meares Sensitive land is a list of things that are sensitive land, which are defined by where they are—like whether they are harbour, or lake bed I think—and the size of them. And then there is another list of things which are also sensitive land, when they adjoin sensitive land in the first category. They also become sensitive land by being joined to the first type.
- Corban I’d also note there that sensitive land includes any non-urban land, more than 5 hectares, which is a lot.

- Worth So what are you saying the sensitive land is in this case? Is it the harbour, or is it the land on the airport—
- Meares I don't think in this case we necessarily analysed what sensitive land the airport owned, because that would be something that they would have disclosed in their application to the Overseas Investment Office. We would not have seen it until after the application was made, so we've never done an analysis of what particular sensitive land holdings the airport company had. But we knew that there was sensitive land involved in their acquisition, and that is why they had made an application to the office.
- Worth If the committee accepts that this was a targeted regulatory change, it is really an irrelevance that it was on sensitive land. The focus was, as Mr Kwok has said, on strategically important infrastructure—which the airport, in a New Zealand context, has. Is that a fair comment?
- Meares I think there is a good argument that the schema of the Act is not just about the land involved, and about the heritage and conservation, and so on, aspects of it, but also about the business activity that's being carried on, on that land. So, both in the Act itself—and I think it's section 17—there is a description of the type of activity carried on, on the land, and also in the other regulations, which have been issued under 17(2)(g), 28(a)-(g), there are indicators that what's important is the business that's being carried on, on the sensitive land.
- Blumsky This line here that says “advantage seems to have been taken of a coincidence”, I think it's a lovely little word: advantage. In your report that I've got—the executive summary, where you have the bill written up—it has got here that: “We advise against any intervention in the current share market transaction on:” and a list of three quite significant grounds. Do you advise against any intervention—
- Corban Yes.
- Blumsky Then you've got here—you talk about that “it may be possible” for the Minister “to strengthen criteria Ministers use to assess the” investment he made—the call to do this. “While this still poses a number of risks,”—what you haven't done is actually listed what those risks say; you have just said it poses a number of risks. I suppose that the issue for me is that I reckon those risks that you alluded to before—the three of them—two of those would still have been very relevant. I was just surprised when you say that “While this still poses a number ...”, you actually don't then go and list what those risks were. Could you tell us what you think the risks were?
- Corban Well, certainly. Like you are saying, our advice at the time was that the Government shouldn't do this. We didn't think it was worth doing this. We were saying that if you were to do it, then doing it through regulation would have less fall-out in terms of the Government's international obligations, under the WTO and our free-trade agreements.

- Blumsky So at the end of the day that is the only one that comes out of the three you had listed. So two out of the three of those risks are still very relevant. But you didn't say that; I just wonder why you didn't say that.
- Corban I think in the main text it probably does say that.
- Blumsky I was looking for that; I couldn't quite find it, I'm sorry, in relation to your recommendation of the regulation. Certainly, in relation to the intervention through the Act, but not through the regulation, you've been very soft on—
- Corban Well, I don't know if this is an examination of Treasury's advice, which I was trying to get at before. But, just to be clear, our advice was not to do this, but to note that other alternatives would have less fall-out on our international obligations.
- Blumsky No—I hear your point.
- Worth I, too, don't want to focus on Treasury advice, but did you actually consider that proceeding by way of regulation carries with it a risk that changes of this type were more suitable for Parliamentary enactment?
- Corban Our judgement was that it was, on balance, appropriate for regulation.
- Worth And the time frames, of course, that you were faced with didn't really permit legislative change through Parliament, did they?
- Kwok I'm not quite sure that's necessarily correct, because we would have had a bill ready in much the same time frame. The issue would have been the length of time that that bill would have taken to go through the House.
- Hobbs Exactly. That's a different question again.
- Kwok That's a different question.
- Hobbs Just one thing. I'm sorry—I'm looking now at the actual regulation, and I'm going back to what you said, Mr Kwok. It says here: "Regulation 28 is amended "to maintain New Zealand control of strategically important infrastructure on sensitive land." What I'm hearing from you—I think I'm hearing—is that, almost, the "on sensitive land" is not as important as the "strategically important infrastructure".
- Kwok I think that is correct, but the regulation has been framed in that way to have both legs.
- Hobbs To have both legs?
- Kwok Both legs, yes. Generally, you would have to say that one would expect that in most cases of strategically important infrastructure, it will be on sensitive land. That is because of size, if nothing else, also because of a port being like foreshore and seabed. So this is a debate, I think, about some words. In

the end, the practical reality is that it probably doesn't matter—in the sense that almost those two things will go hand in hand. If it doesn't, it may well be a very good idea that it isn't strategically important enough.

- Hobbs So it almost anchors on the head of a pin—that's what it seems to me—because when I looked at it, Auckland airport, is it strategically important infrastructure? Yeah, right—that's straight forward.
- Worth Thank you very much. Does anyone from Business Roundtable want to make any concluding comment?
- Kerr Yes, please.
- Worth What we have also done as a matter of practice is give to all the parties the opportunity within 7 days of making any further written comment that they might wish to do. So, that's a time period running coincidentally with the Hansard report.
- Kerr Mr Chairman, we all have one or two points to make. A couple of introductory comments: I think Treasury's role in this exercise is a pretty disconcerting one. In reporting to the Government they advised against the open and transparent process that Dr Cullen wanted to follow, and said: "Look, you can run the blind side on this one and you might get away with it more easily, locally, and with respect to international scrutiny." I see that as very dubious advice. I see it as particularly dubious, given that the Government has decided to transfer the regulatory impact analysis unit of the MED to Treasury. The RIAU, somewhat like your committee, has a very important role in upholding the quality of regulation and overseeing proper process. If Treasury is to be entrusted with this, I would want to see much higher standards applied to their work than we see applied to this particular exercise.
- The next point that I'd like to make is that Jeremy opened by saying that John Burrows agreed with Treasury on two points, and disagreed with one. As I said, so far as I can see, Professor Burrows did not engage, at all, with two of the grounds of our complaint, under Standing Order 315(2) (b) and (d). So those two remain in front of you and we stand by what we've said about that, and Jeremy will say one or two further things.
- Perhaps we didn't respond very well to Marian on the issue of investors acknowledging that they are taking risks when they're investing in equities. Of course that's correct, but that's a matter of commercial risk. The whole point of the rule of law is to minimise the possibility of other kinds of risk—regulatory risk in this particular context—falling on them. Our whole thrust is that this action is inconsistent with a proper conception of the rule of law. Bad law does affect investment—both domestic and international—in New Zealand's capital markets, and that's a bad thing for business and the economy.

The last point I want to make is that Mr Kwok spoke about what he believed was a pretty clear-cut category of strategic assets. He reeled off ports, airports, and roads. Well, I don't see that it's clear-cut, at all. The Government has consistently declined to list what it sees as strategically important infrastructure. We are still none the wiser as to what this might mean. As Treasury itself talked about, it is an arbitrary process that occurred here, and we see exactly the same kind of risks going forward. Another reason why it is not at all clear-cut that these are strategic assets is that we have a New Zealand company—as you are well aware—Infratil, being the 100 percent and 90 percent owner of three airports in other jurisdictions. Obviously, those jurisdictions don't regard them as strategic assets that should be locked away from foreign investment. So, we don't think the definition is at all clear-cut, and that's not how we should make law in this country.

Now, I think Charles would like to make a point. Then Andy will reply to Mr Corban's comments about the use of "unusual or unexpected" and the issue of property rights and trespass, and "undue"—which I think was skating on pretty thin ice—and Andy might have some other points he'd like to make.

Finny

I will, again, be very brief, but just to say that what I've heard today from Treasury makes me all the more concerned about the processes that have been followed with regard to this regulation. As someone who has some expertise in this field, I'm not sure I can accept the judgement that Treasury made about international legal obligations—particularly given the definition from Mr Kwok as to what a strategic asset might actually be.

If you are looking at airports, ports, roading, transmission lines, etc., the international legal obligations are far more complex than were considered in terms of this review of the Auckland airport case in the advice that was tendered to Government. There is a whole can of worms there, which again seems to argue for this to be considered in detail, considered carefully, and considered in the context of changes to legislation. I would be particularly interested to see the advice that was tendered by the MFAT legal division, the Government's international legal advisors at the time this regulation was considered. I've not seen that documentation, and will seek it over the next few days.

Nichols

Two points have been thrown to me. Again, I will be brief. The first issue here is the "unusual or unexpected" power, and the exercise of that power, and the suggestion is that we draw back from this and just go to a general test of: does it sit comfortably with the policy behind the Act, which at the end of the day is the gut instinct that we've got to go with here. I think we all feel slightly uncomfortable, and the answer lies in that question: does this sit comfortably with the policy of the Act? Well, what we have got here is a regulation that is inconsistent with the Act. If strategic infrastructure is an issue, then we are regulating it in some instances and not others. We've heard Treasury guess about the likelihood or probability of whether it is a

strategic asset in one place and not another, but it sounds to me like nobody has checked. In 36 hours people can't be blamed for not checking, but to ask the question: does that kind of regulation consistent and sit comfortably with the policy behind the Act?

In substance, I keep coming back to the point that this regulation adds a third category to the framework of the Act. That's something that's done in the legislation and not in regulations. When we ask: does it sit comfortably with the policy behind the Act? I think we all know that this is an absolute factor that's been introduced to the regime. If there's a strategic infrastructure asset in play, the application will be turned down, however the regulation dresses up the consideration of a "relevant factor". So, I think in the question of: does this sit comfortably with the policy behind the Act, I think that's quite troubling.

On the issue of trespass, this could get dragged off into a lawyerly conversation, and the language is hard. Trespass must mean something other than what it normally means, because trespass is a tort and the legislation or regulation can't trespass under torts, so we are talking about something else. We are just talking about a basic interference—an interference with property rights—where you get a sense that something has gone wrong. I think here it's right to go back to the advice that Treasury did give—quite strong and courageous advice to the Minister — saying "Don't do this, and here's why." There are some quite firm words in its report about the impact that this move would have on the property rights of New Zealanders, the reputation of New Zealand as an investment location, and the impact that this would have on the cost of capital for New Zealand firms across the economy. All of that's in the Treasury advice.

Worth There is an interesting issue that I haven't really thought about before. This word "trespass", and you've just been talking about that. I think "trespasses" might mean "interfere", or "interferes with", or it might just mean "touches", mightn't it? I don't know if you have a view on that. I don't think "trespasses" necessarily means "interferes in a wrongful sense".

Nichols No, but the phrase can be read as a whole, as the phrase was "unduly trespasses". So we are in a conversation around the meaning of "unduly trespasses". All I am saying is that we don't want to get dragged off into a conversation about what trespass ordinarily means, because trespass is a tort. But clearly the sense here is: has something gone wrong in the way in which property rights were interfered with in this case?

Worth All right. Thank you very much. We will close the meeting, subject to those people who will seek an opportunity to have a review of the Hansard transcript...

conclusion of evidence