

13 July 2023

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Fair Digital News Bargaining Bill

Purpose

1. We have considered whether the Fair Digital News Bargaining Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 24917/14.0). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with:
 - a. Section 14: freedom of expression;
 - b. Section 17: freedom of association;
 - c. Section 21: freedom from unreasonable search and seizure;
 - d. Section 25(c): right to be presumed innocent until proven guilty; and
 - e. Section 27(3): right to civil litigation.
4. Our analysis is set out below.

The Bill

5. The Bill aims to create a fair bargaining environment between New Zealand news media entities (NMEs) and operators of digital platforms (operators), to facilitate commercial arrangements by which operators agree to pay NMEs fair value for the use of their content online. It does so by:
 - a. Promoting voluntary commercial agreements between NMEs and operators;
 - b. Creating a stepped bargaining process that can involve negotiation, mediation and arbitration to facilitate fair and equitable outcomes where voluntary agreement cannot be reached;
 - c. Providing for the Broadcasting Standards Authority (the Authority) to establish a bargaining code that facilitates fair and efficient bargaining and requires parties to engage with the process in good faith;
 - d. Providing for collective bargaining by NMEs; and

- e. Establishing civil and criminal penalties to address non-compliance with the legislation.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

6. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind and in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹
7. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is demonstrably justified in terms of section 5 of that Act. The s 5 inquiry asks whether the objective of the provision is sufficiently important to justify some limitation on the right or freedom; and if so, whether the limitation is rationally connected and proportionate to that objective and limits the right or freedom no more than reasonably necessary to achieve that objective.²
8. We have considered whether the overall policy of the Bill, by facilitating arrangements whereby operators contribute to the cost of producing the news content they make available, could have a chilling effect on the freedom of expression and thereby engage s 14. However, we note that the Bill's purpose of supporting sustainable production of New Zealand news content has the potential to promote freedom of expression and that key powers in the Bill must be exercised with reference to that purpose.³ In this context, we do not consider there is any clear basis on which to take the view that the overall policy of the Bill engages s 14. To the extent that s 14 may be engaged in this way, we consider the Bill's objective sufficiently important to justify some limit on s 14 and the overall approach reasonable and proportionate to achieve that objective.
9. A number of the Bill's provisions engage the right to freedom of expression in more specific ways.⁴ Several provisions require NMEs and operators to supply information to the Authority.⁵ In addition, cl 90 allows the Authority to require any NME or operator to whom it has issued a warning about potential non-compliance with the legislation to prominently disclose the warning online or include it in specified communications.
10. We consider that these provisions are rationally connected to objectives that are sufficiently important to justify some limit on the freedom of expression. The provisions requiring NMEs and operators to provide information to the Authority ensure it can oversee the bargaining environment established by the Bill and monitor parties' compliance with their statutory

¹ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

² *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

³ Clauses 49 and 50 regarding the selection of a final offer by the arbitration panel; cl 56 regarding exemptions from the bargaining process.

⁴ In addition, cl 115(1)(c) contemplates that the Authority's bargaining code (which will operate as secondary legislation and therefore must be consistent with the Bill of Rights Act in order to be valid) may impose obligations on NMEs and operators engaged in bargaining outside of the Bill's bargaining process to share information with each other.

⁵ For example, cl 65 requires parties that enter into a news content agreement to provide a copy of the agreement to the Authority; and cl 122 requires NMEs to give the Authority a copy of any proposed collective bargaining agreement before it is entered into. Clauses 67 and 68, which give the Authority information-gathering powers, are discussed separately below in relation to s 21 of the Bill of Rights Act.

responsibilities. Clause 90 creates an additional incentive to comply with the legislation and enables audiences to make informed choices about the news content they consume.

11. In addition, we consider that the requirements are no greater than reasonably necessary and proportionate to the importance of their objectives. In this respect, we note that a number of provisions limit the circumstances in which the Authority may use and disclose information that it receives in the exercise or performance of its powers, functions and duties under the Bill.⁶

Section 17 – Freedom of association

12. Section 17 of the Bill of Rights Act affirms that everyone has the right to freedom of association. The right to freely associate is directed towards the right to form or participate in an organisation and to act collectively, rather than simply to associate as individuals.⁷ The right recognises that everyone should be free to enter consensual arrangements with others and promote common interests in the group. By protecting the right of individuals to decide freely whether they wish to associate with others, it also includes the right not to associate.
13. The Bill's provisions engage the right to freedom of association by:
 - a. Regulating the ability of NMEs and operators to contract freely where a commercial arrangement cannot be entered into voluntarily;
 - b. Requiring operators of digital platforms to participate in the stepped bargaining process in good faith; and
 - c. Preventing an NME whose registration has been cancelled for contravening the Bill's requirements, or that is (or is materially supporting) a designated terrorist entity,⁸ from participating in the bargaining process (cl 16).⁹
14. The creation of a regulated bargaining process that is mandatory for operators is intended to account for the power imbalance that, in the absence of regulation, characterises the commercial relationship between them and the NMEs that produce the news content they make available. We consider that this objective is sufficiently important to justify limiting the right, that the limits are rationally connected to the Bill's objective, and that they impair the right no more than reasonably necessary to achieve the objective. In particular, the Authority can only register an operator to participate in the bargaining process if satisfied that there is likely to be a significant bargaining power imbalance in their favour between them and the NME who sought their registration.¹⁰
15. To the extent that cl 16 limits freedom of association by preventing certain NMEs from registering for bargaining, we similarly consider the limit to be justified. Clause 16 can be seen as rationally connected to the important objectives of encouraging compliance with the Bill's provisions and increasing public trust in the media by ensuring high quality news content and countering misinformation. An entity's registration as an NME can be cancelled only in the case of serious non-compliance with the legislation, and procedural safeguards apply.¹¹ To the extent that designated terrorist entities and their supporters may meet the definition

⁶ For example, see cll 71(2)(b), 74 and 82(2).

⁷ *Moncrief-Spittle v Regional Facilities Auckland Limited* [2021] NZCA 142, [2021] 2 NZLR 795 at [113].

⁸ The Bill defines a designated terrorist entity by reference to the Terrorism Suppression Act 2002.

⁹ We note that this provision could also be seen as limiting freedom of expression by, for example, making it harder for those entities to produce or publish material.

¹⁰ Clause 22(1).

¹¹ Clause 18.

of an NME, banning their registration is a reasonable approach to prevent such entities from benefiting from the bargaining process.¹²

Section 21 – Freedom from unreasonable search and seizure

16. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, correspondence or otherwise. The right protects an amalgam of values including property, personal freedom, privacy and dignity.¹³
17. There are two limbs to the s 21 right. First, the section is applicable only in respect of activities that constitute a search or seizure. Secondly, it protects only against those searches or seizures that are “unreasonable” in the circumstances.
18. Clause 67 of the Bill confers broad powers on the Authority to require a person to supply information, produce any document, reproduce information recorded or stored in any document, or appear before the Authority to produce any document. These powers and the Authority’s power to receive evidence under cl 68 can be exercised in the exercise or performance of the Authority’s own powers, functions and duties under the Act or, under cl 72, at the request of an overseas regulator. As the Bill allows for the use of these powers in an investigatory context, we consider that they constitute search powers that engage s 21 as well as s 14 of the Bill of Rights Act.
19. Ordinarily, a provision found to limit a particular right or freedom may be consistent with the Bill of Rights Act if it can be reasonably justified in terms of s 5 of that Act. However, the Supreme Court has held that an unreasonable search logically cannot be demonstrably justified and therefore the inquiry does not need to be undertaken.¹⁴ Rather, s 21 is self-limiting in that the assessment to be undertaken is whether the search and power is reasonable. The reasonableness of a search or seizure can be assessed with reference to its purpose and the degree of intrusion on the values which the right seeks to protect.
20. We consider the search power in cl 67 of the Bill is reasonable and therefore consistent with s 21 of the Bill of Rights Act. The availability of such powers will substantially assist the Authority to monitor and enforce compliance with the Bill and, thereby, to ensure that its objectives are met. Further, the Bill contains safeguards to ensure that powers in cl 67 are used appropriately. In particular, cl 67(1) specifies that information or documents can only be requested where the Authority considers it necessary or desirable for the purposes of performing or exercising its functions, powers, or duties under the Bill. Additional restrictions on the publication and use of information acquired through the exercise of powers under cl 67 apply where those powers are exercised by someone authorised by the Authority rather than the Authority itself.¹⁵ Under cl 72, the Authority retains a discretion to refuse to comply with a request from an overseas regulator that it inquire into any matter, after considering the matters set out in cl 73.

Section 25(c) – Right to be presumed innocent until proven guilty

21. Section 25(c) of the Bill of Rights Act affirms that anyone charged with an offence has the right to be presumed innocent until proven guilty according to the law. The right to be

¹² In this respect we are mindful that the Authority would need a reasonable basis upon which to take the view that an NME provides material support to a designated terrorist entity, and that any decision not to register an applicant on that basis could be challenged by way of judicial review proceedings.

¹³ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

¹⁴ *Ibid* at [162] per Blanchard J.

¹⁵ Clause 77.

presumed innocent requires that an individual must be proven guilty beyond reasonable doubt and that the state must bear the burden of proof.¹⁶

22. The Bill provides that it is a criminal offence to, without reasonable excuse:
 - a. Refuse or fail to comply with any conditions imposed by the Authority relating to the publication or disclosure of information or documents (cl 83(4)); or
 - b. Obstruct the exercise of the Authority's powers by refusing or failing to co-operate with the exercise of its powers under cl 67 (cl 112).
23. Each of these offences carries a maximum fine of \$500,000 in the case of an individual. In any other case, there is a maximum fine of \$10 million for obstructing the exercise of the Authority's powers.
24. By requiring defendants to demonstrate a reasonable excuse to avoid liability, the Bill creates strict liability offences that prima facie limit s 25(c) of the Bill of Rights Act. Strict liability offences have been found to be more likely to be justified under s 5 of the Bill of Rights Act where:
 - a. The offences are regulatory in nature and apply to persons participating in a highly regulated industry;
 - b. The defendant will be in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite, and
 - c. The penalty for the offence is proportionate to the Bill's objective.
25. On balance, we consider that the strict liability offences set out above are a justified limit on the right to be presumed innocent until proven guilty. Defendants are most likely to be participants in a regulated industry and will be best placed to justify any non-compliance. While the maximum financial penalties for strict liability offences in the Bill are significantly higher than those typically associated with strict liability offences, substantial penalties may be necessary to dissuade well-resourced parties from contravening their statutory obligations. A court retains the discretion to impose a lower penalty where to do so would be proportionate in the circumstances.

Section 27(3) – Right to civil litigation

26. Section 27(3) of the Bill of Rights Act affirms that everyone has the right to bring civil proceedings against the Crown and to have those proceedings heard according to law, in the same way as civil proceedings between individuals.
27. Clause 78 of the Bill provides protection from liability for persons exercising specified information-gathering powers in the Bill,¹⁷ unless the person acts in bad faith. This provision seeks to ensure that individuals authorised to exercise powers under the Bill are not constrained by fear of litigation.
28. Section 27(3) has been interpreted by the courts as protecting procedural rights, rather than as restricting the power of the legislature to determine what substantive rights the Crown is

¹⁶ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [26] and [27] per Elias J.

¹⁷ Clauses 67 and 77.

to have.¹⁸ We consider that cl 78 affects substantive law, and therefore does not fall within the ambit of s 27(3).

Conclusion

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



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¹⁸ *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC).