

7 June 2022

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: United Kingdom Free Trade Agreement Legislation Bill

Purpose

1. We have considered whether the United Kingdom Free Trade Agreement Legislation 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 24503/3.5). 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 s 14 (freedom of expression), s 21 (freedom from unreasonable search and seizure) and s 25(c) (right to be presumed innocent until proven guilty). Our analysis is set out below.

The Bill

4. The Bill is an omnibus bill that amends New Zealand law as part of implementing the Free Trade Agreement (FTA) between New Zealand and the United Kingdom of Great Britain and Northern Ireland (UK).
5. The Bill amends the Copyright Act 1994, the Dairy Industry Restructuring Act 2001, the Overseas Investment Act 2005, the Overseas Investment Regulations 2005, the Tariff Act 1988, the Tariff, and the Customs and Excise Regulations 1996. Part 5 of the Bill also creates a new regime required to administer a transitional apple export quota.
6. The Bill will enable:
 - a. the application of preferential tariff rates under the FTA;
 - b. provisional transitional safeguard measures to be applied, if necessary, under the FTA;
 - c. the implementation of transitional quotas on dairy products exported to the United Kingdom (the UK) that originate from New Zealand;
 - d. the division of New Zealand's country-specific World Trade Organization dairy quotas between the UK and the European Union that is required post-Brexit;
 - e. the extension of the scope of a performer's property rights in sound recordings of their performances under the Copyright Act 1994 to include the 'playing' in public of those sound recordings;

- f. the increase in the investment screening threshold from NZ\$100 million to \$200 million for non-government investors from the UK; and,
- g. the implementation of New Zealand's commitments to administer a 3-year transitional quota for apple exports.

Consistency of the Bill with the Bill of Rights Act

Section 14 - Freedom of Expression

- 7. 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 in any form. Section 14 has been interpreted as including the freedom not to be compelled to say certain things or to be compelled to provide certain information.¹
- 8. The Bill requires New Zealand Apples and Pears Incorporated (NZAPI) to provide information for a number of purposes related to the administration of the apple export quota regime.² Information required relates to such functions as public information provision on quota allocation and delivery, and decisions related to these functions. NZAPI also has reporting requirements to New Zealand and UK regulators on quotas and export certificates. These requirements to provide information engage the right to freedom of expression under s 14 of the Bill of Rights Act.
- 9. However, a limit on a right or freedom may be justified with relation to s 5 of the Bill of Rights Act. Justification under s 5 occurs where the limit is rationally connected to a sufficiently important objective; impairs the right or freedom no more than reasonably necessary to achieve the objective; and is otherwise in proportion to the importance of the objective.³
- 10. The reporting requirements within the Act are rationally connected to the important objective of the efficient and transparent administration of the quota system for apple exports under the FTA, and provide assurance that processes for quota allocation are fair. The reporting requirements are minimal and limited to information agreed to be necessary in the signing of the FTA. We consider that it is proportionate for NZAPI to undertake these requirements to receive preferential access to the UK market for their members.
- 11. For these reasons we consider that any limits within the Bill on the right to freedom of expression are justified under s 5 of the Bill of Rights Act.

Section 21 – freedom from unreasonable search and seizure

- 12. 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 a number of values including personal privacy, dignity, and property.⁴

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

² See, for example, cls. 41, 43, 46, 52 and 53

³ See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (SC).

⁴ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

13. The Bill contains a number of clauses that enable searches of places and documents, which engage s 21 of the Bill of Rights Act.
14. Clause 58 of the Bill allows for a person, authorised by NZAPI, to execute a search warrant and search:
 - a. any place where apples are held or are likely to be held; or
 - b. any place where documents relating to apples are held or are likely to be held; or
 - c. any vehicle, aircraft, or ship.
15. Clause 49 of the bill allows for NZAPI to request and use information from any person, including quota holders, quota applicants, and any other apple exporters. A person must comply with a request as soon as practicable or by the date specified in the request.
16. Additionally, under cl 51 of the Bill NZAPI can be required to provide information or documents to chief executives of New Zealand Customs or the Ministry of Primary Industries.
17. These powers constitute searches for the purposes of s 21 of the Bill of Rights Act.
18. Ordinarily, a provision found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of that Act. However, the Supreme Court has held that an unreasonable search logically cannot be reasonably justified and therefore the inquiry does not need to be undertaken.⁵
19. Rather, the assessment to be undertaken is first, whether what occurs is a search or seizure, and, if so, whether that search or seizure is reasonable. In assessing whether this search power is reasonable, we have considered the place of the search, the degree of intrusiveness into privacy, and the reasons why it is necessary.⁶
20. All searches within the Bill support the objective of monitoring compliance with export regime regulation or administering the regime.
21. An authorised person may only carry out a search under cl 58 at a place where apples, or documents relating to apples, are held or likely to be held, or any vehicle, aircraft or ship, following a warrant being issued by an issuing officer (as defined in the Search and Surveillance Act 2012). In issuing a warrant, the issuing officer must be satisfied that there are reasonable grounds to believe that a person has breached the rules of the quota system set out in cl 54. This means search powers can only be used to ensure that actors covered by the apple export regime regulatory processes are acting in accordance with the regulations. Warranted search powers have been held to be more easily justifiable due to their levels of accountability and oversight.
22. Information requests under cl 49 may only be made to assess an exporter's compliance with the regime, or to gather information relevant to setting export quotas. Information requests under cl 51 may only be made where the Director-General is satisfied that the information will be of assistance to the Minister in ensuring that New Zealand is fulfilling its obligations under the FTA.

⁵ Above n1 at [162].

⁶ At [172].

23. These conditions on the use of the search powers within the Bill ensure that they are minimally limiting and proportionate to supporting the administration of the export regime. Warranted search powers where there is reasonable grounds to suspect non-compliance are a regular and proportionate measure for the enforcement of a regulatory regime. Regulated operators will be aware that they must comply with the requirements of NZAPI under the quota system. NZAPI will also be accustomed to the requirement to provide information to regulatory agencies as part of standard operating practice.
24. On this basis, we regard searches under the Bill as being reasonable, and thus consistent with s 21 of the Bill of Rights Act.

Section 25(c) – presumption of innocence until proven guilty

25. 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 presumed innocent requires that an individual must be proven guilty beyond reasonable doubt, and that the State must bear the burden of proof.⁷
26. Clause 60 of the bill makes it an offence for an exporter to:
 - a. export apples to the UK as if under the quota system when no quota has been allocated to the person; or
 - b. export apples to the UK in breach of section 48 (related to export certificates)
27. The offences set out above are strict liability offences, which prima facie limit s 25(c) of the Bill of Rights Act. This is because a strict liability offence may be proved by a finding that certain facts occurred without proof of mens rea. The accused is then required to prove a defence (on the balance of probabilities), or disprove a presumption, to avoid liability; whereas, in other criminal proceedings an accused must merely raise a defence in an effort to create reasonable doubt.
28. A reverse onus may nevertheless be consistent with the Bill of Rights Act if the grounds for the offence are rationally connected to a sufficiently important objective; and the onus impairs the right or freedom no more than reasonably necessary to achieve the objective; and is otherwise in proportion to the importance of the objective.⁸ Strict liability offences have been found more likely to be justifiable 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 at the lowest end of the scale and proportionate to the importance of the Bill's objective
29. We consider that the offences in cl 60 are proportionate and justifiable. The offences rationally support the important objective of enforcement of legal export practices, in keeping with the grounds of the FTA. Exporters who may be prosecuted are engaging in a highly regulated industry, where they should expect to follow industry standards and

⁷ *R v Wholesale Travel Group* (1992) 84 DLR (4th) 161, 188 citing *R v Oakes* [1986] 1 SCR 103.

⁸ See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (SC).

restrictions. Additionally, the offences allow for defences where an exporter breaches requirements due to an event or cause beyond their control, or has taken all reasonable steps to avoid the breach. The penalty for the offence is reasonable and proportionate for the context of a regulated industry.

30. For these reasons we consider that any limits within the Bill on the right to be presumed innocent until proven guilty are justified under s 5 of the Bill of Rights Act.

Conclusion

31. 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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