

27 November 2017

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Taxation (Neutralising Base Erosions and Profit Shifting) Bill**

### **Purpose**

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1. We have considered whether the Taxation (Neutralising Base Erosions and Profit Shifting) 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 with the latest version of the Bill (IRD 20793/1.9). We will provide you with further advice if the final version of the Bill includes changes that affect the conclusions of 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) and s 25(c) (the right to be presumed innocent until proved guilty). Our analysis is set out below.

### **The Bill**

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4. The Bill amends the Income Tax Act 2007 and the Tax Administration Act 1994.
5. In recent years there has been significant global media and political concern regarding the tax avoidance strategies used by multinationals. New Zealand actively participated in the subsequent OECD/G20 project, which resulted in a 15 point action plan recommending a combination of domestic reforms, tax treaty changes, and administrative measures that countries can use to strengthen their domestic laws in a consistent manner to collectively combat this problem.<sup>1</sup> The Bill introduces measures which prevent multinationals from using artificially high interest rates on loans from related parties to shift profits out of New Zealand, hybrid mismatch arrangements that exploit differences between countries' tax rules, and transactions with related parties which effectively shift profits to offshore members of the multinational group.
6. Section 29 of the Bill of Rights Act provides that the rights and freedoms which apply to natural persons also apply to legal persons, as far as practicable. Section 15 of the Companies Act 1993 states that a company has a separate legal personality from its shareholders.

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<sup>1</sup> OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing. <http://dx.doi.org/10.1787/9789264202719-en>

## Consistency of the Bill with the Bill of Rights Act

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### 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. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.<sup>2</sup>
8. Clauses 50, 54, and 55 amend provisions within the Tax Administration Act 1994 and expand the powers of Inland Revenue to request information, to include information within the knowledge, possession, or control of another member of a multinational group. Clause 51 generally outlines what kind of information might be required to be provided by a large multinational group.
9. Clause 53 (new section 139AB) introduces a civil penalty for failing to provide information requested by the Commissioner. The application of a fine up to \$100,000 is decided by the Commissioner. However, the Commissioner's actions can be reviewed by the Taxation Review Authority or the High Court under the Taxation Administration Act 1994.
10. We note that the new information related powers in the Bill will come into effect on 1 July 2018. They can then be utilised in existing investigations relating to previous financial years. Inland Revenue advises it has considered transitional provisions, however decided they would be administratively undesirable. It notes this only affects people who are evading tax under the existing tax law.
11. 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 justifiable in terms of s 5 of that Act. The s 5 inquiry may be approached as follows:<sup>3</sup>
  - a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
  - b. if so, then:
    - i. is the limit rationally connected with the objective?
    - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
    - iii. is the limit in due proportion to the importance of the objective?
12. The Bill amends a regulatory Act, introducing provisions that, while new to New Zealand, are in line with international guidelines recommended by the OECD. As is common with regulatory Acts, the Act contains provisions compelling the provision of information, which prima facie engages the right to freedom of expression. However, we consider the restriction on the right to freedom of expression in the Bill is clearly justified to enable fair and effective taxation of multinational companies.

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<sup>2</sup> *RJR-MacDonald Inc. v Canada (Attorney General)* 1995 3 SCR 199.

<sup>3</sup> *Hansen v R* [2007] NZSC 7 at [123].

13. For these reasons, we consider that any limits to freedom of expression imposed by the Bill are justified under s 5 of the Bill of Rights Act.

### **Section 25(c) - Right to be presumed innocent until proved guilty**

14. Section 25(c) of the Bill of Rights Act affirms that everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to law.
15. Clause 54 amends s 143(2)(b) of the Tax Administration Act 1994. It is currently an offence to not provide information to the Commissioner when required to do so, unless the information is outside the person's knowledge, possession, or control, and outside the knowledge, possession, or control of any non-resident controlled directly or indirectly by the person.
16. The amendment expands the scope to include circumstances where the person is a member of a multinational group, and the information is under the knowledge, possession, or control of another member of the multinational group.
17. A multinational group comprises a number of separate legal entities in different jurisdictions which are consolidated for accounting purposes. The intention of Inland Revenue is to treat these separate entities as a whole entity when considering whether that entity holds or controls the required information. However, legally they remain separate legal persons, so the provision will hold one legal person (the New Zealand based company) liable for the inaction of the other non-resident company. The intention is to incentivise the non-resident member of the multinational company to provide Inland Revenue with the information by holding the New Zealand resident company liable if it does not.
18. The section heading at s 143 refers to absolute liability, but because subsection (2) provides what is essentially a defence, we therefore consider this to be a strict liability offence. In doing so, we note the Court of Appeal has confirmed that it is "a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted".<sup>4</sup>
19. Strict liability offences raise a prima facie issue of inconsistency with s 25(c) of the Bill of Rights Act by shifting the onus of proof onto a defendant. We have therefore considered whether this prima facie inconsistency can be justified under s 5 of the Bill of Rights Act.
20. We note the offence is limited in scope. It applies only to large multinational corporations as defined in the Bill and will have least EUR 750m of consolidated global turnover.
21. We consider cl 54 is rationally connected to a sufficiently important objective. The introduction of these powers will contribute to effective enforcement of New Zealand's tax laws. Further, Inland Revenue advise that some multinationals currently use aggressive tax practices to exploit gaps and mismatches in countries' domestic tax rules, which is referred to as 'base erosion and profit shifting'. These strategies distort investment decisions, allow multinationals to benefit from unintended competitive

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<sup>4</sup> *Civil Aviation Department v MacKenzie* [1983] NZLR 78 also reported as *MacKenzie v Civil Aviation Department* (1983) 1 CRNZ 38 (CA), at 81; 41 per Richardson J quoting: *Sweet v Parsley* [1970] AC 132, [1969] 1 All ER 347 (HL), at 149 per Lord Reid; *R v Strawbridge* [1970] NZLR 909 (CA).

advantages, and result in the loss of substantial corporate tax revenue from the country the multinational is conducting business in.

22. Further, we consider that the limitation is justified under s 5 of the Bill of Rights Act because multinational tax obligations are complex to enforce for jurisdictional reasons, and this offence aims to circumvent enforcement difficulties by holding the New Zealand based corporation responsible. In our view, the New Zealand based company is also best placed to establish absence of fault because the matters are peculiarly or primarily within its knowledge, namely the composition of the multinational group of which it is a part, and whether the requested information is held or controlled by a non-resident member of the multinational company.
23. We therefore consider that s 25(c) is impaired no more than is reasonably necessary to achieve this purpose, and that the limitation is therefore in due proportion to the importance of the objective. The Bill therefore appears to be consistent with the right to be presumed innocent until proved guilty affirmed in s 25(c) of the Bill of Rights Act.

## **Conclusion**

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24. 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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