

New Zealand Horticulture Export Authority Amendment Bill

11 November 2015

Hon Christopher Finlayson QC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: New Zealand Horticulture Export Authority Amendment Bill

Purpose

1. We have considered whether the New Zealand Horticulture Export Authority Amendment 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 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 section 17 (freedom of association) and section 19 (freedom from discrimination).

The Bill

3. The Bill amends the New Zealand Horticulture Export Authority Act 1987 ('the Act'). The Act provides an export licensing, quality standards and market coordination framework to promote the effective export marketing of horticultural products. The Bill clarifies that framework to make it more efficient and flexible, reflecting the modern business and trade environment.
4. Of particular relevance to this advice, the Bill:
 - introduces clearer processes and requirements for industries to enter and exit the Act's framework; and
 - allows the Horticulture Export Authority to charge fees and collect levies from product groups, and for product groups to recoup those costs from producers and exporters.

Consistency of the Bill with the Bill of Rights Act

Section 17 – Freedom of association

5. Section 17 of the Bill of Rights Act affirms the right to freedom of association. The right is generally interpreted to include not only a right to establish and enter into association with others, but also a right to refuse or cease to do so. [1] Section 17 has been held to be "undoubtedly broad and encompassing a wide range of associational activities" provided the elements of "joining or uniting" and "a common purpose" are present. [2]
6. Currently under the Act, the Governor-General, on the advice of the Minister for Primary Industries, can specify by Order in Council that a particular horticultural product ('prescribed product') is to be subject to export licensing requirements under the Act. Only licensed

exporters may export a prescribed product. All licensed exporters of the prescribed product must comply with an export marketing strategy as a condition of their licence, unless an exemption is granted. The export marketing strategy will be formulated by a designated association or body corporate ('product group') consisting of producers and/or exporters of that prescribed product.

7. Clause 15 of the Bill sets out new requirements that must be met before the Minister may recommend the making of such an Order in Council. In particular, the Minister must be satisfied that the product group has demonstrated the required level of support among producers and exporters for the product to be brought under the Act's export framework. To that end, the Bill requires the Minister to be satisfied that a properly and fairly conducted voting process has shown that the proposal is supported by:

- at least 60 percent of producers;
- at least 60 percent of exporters;
- producers of at least 60 percent of the product; and
- exporters of at least 60 percent of the product.

8. In effect this means a dissenting minority of producers and exporters who are not members of the product group would nevertheless have to comply with an export licensing regime, including adherence to an export marketing strategy developed by the product group. On its face, it could be argued that this may indirectly limit the right to freedom of association.

9. However, in our view, the Bill simply requires producers and exporters of a prescribed product to comply with certain licensing requirements, rather than to truly "join or unite" for the common purpose of exporting the product. We therefore do not consider the Bill can properly be said to limit the right to freedom of association affirmed in section 17 of the Bill of Rights Act.

Section 19 – Freedom from discrimination

10. Section 19(1) of the Bill of Rights Act affirms the right to be free from discrimination on the prohibited grounds of discrimination set out in the Human Rights Act 1993. Those grounds include personal characteristics such as sex, nationality, citizenship and age.

11. Clause 31 of the Bill inserts new section 62, which allows regulations to be made prescribing fees that may be charged by the Horticulture Export Authority or product groups. The Horticulture Export Authority may charge such fees to producers, exporters, or product groups, and product groups may charge producers or exporters. New section 62(2) allows exemptions to be specified by reference to a category of persons.

12. On its face, new section 62(2) may appear to allow exemptions to be granted on the basis of one or more of the prohibited grounds of discrimination in the Human Rights Act. However, section 6 of the Bill of Rights Act requires the Horticulture Export Authority to exercise its regulation-making power under new section 62 consistently with the rights and freedoms contained in that Act. We therefore consider clause 31 does not limit the right to freedom from discrimination affirmed in section 19(1) of the Bill of Rights Act.

Conclusion

13. 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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Footnotes

[1] *Lavigne v Ontario Public Service Employees Union* [1991] 2 SCR 211, 318 (SCC) (La Forest J); *Archibald v Canada* (1997) 146 DLR (4th) 499; *Young v United Kingdom* (1982) 4 EHRR 38; and *Abood v Detroit Board of Education* 431 US 209 (1977).

[2] *Turners and Growers Ltd v Zespri Group Ltd (No 2)* (2010) 9 HRNZ 365 (HC) at [72].