

# ***Taxation (Annual Rates, Business Taxation, Kiwisaver, and Remedial Matters) Bill***

11 May 2007

Attorney-General

## **LEGAL ADVICE**

### **CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:**

### **TAXATION (ANNUAL RATES, BUSINESS TAXATION, KIWISAVER, AND REMEDIAL MATTERS) BILL**

1. We have assessed whether the Taxation (Annual Rates, Business Taxation, KiwiSaver, and Remedial Matters) Bill ('the Bill'), (IRD 20070503/1) is consistent with the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). We understand that this Bill will be considered by Cabinet at its meeting on 14 May 2007.
2. In our view, the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching this conclusion, we considered a potential issue of consistency with section 19(1) of that Act (freedom from discrimination).

## **PURPOSE OF THE BILL**

3. The Bill introduces changes to current tax law contained in the Income Tax Act 2004, the Goods and Services Tax Act 1985, the KiwiSaver Act 2006 and the Tax Administration Act 1994 including amendments to:
  - Introduce a tax credit for research and development conducted predominantly in New Zealand by New Zealand businesses;
  - Accommodate taxpayers who adopt the new International Financial Reporting Standards;
  - Introduce a new withholding tax that can be applied to certain contributions to retirement savings schemes;
  - Enable life insurers to elect to have New Zealand and Australian-listed equity gains from investment-linked insurance products excluded from tax;
  - Enable shuttle stallions to qualify for the same write-down rates as other stallions that are new to New Zealand ownership;
  - Encourage taxpayers to voluntarily comply with their tax obligations;
  - Increase the tax relief for donations of money made by individuals, companies and Maori authorities to donee organisations; and
  - Encourage employees to join and continue with the KiwiSaver scheme.

4. The Bill also makes a number of remedial, minor or consequential amendments to the Income Tax Act 2004, the Income Tax Act 1994, the Tax Administration Act 1994, the KiwiSaver Act 2006, and the Goods and Services Tax Act 1985.

#### **CONSISTENCY WITH SECTION 19 OF THE BILL OF RIGHTS ACT**

5. Section 19(1) of the Bill of Rights Act protects the right to freedom from discrimination on the grounds of discrimination set out in section 21 of the Human Rights Act 1993, including age (which means any age of 16 years old and over).
6. Taking into account the various domestic and overseas judicial pronouncements as to the meaning of discrimination, the key questions in assessing whether discrimination under section 19(1) exists are:
  - Does the legislation draw a distinction based on one of the prohibited grounds of discrimination?; and
  - Does the distinction involve disadvantage to one or more classes of individuals?
7. If these questions are answered in the affirmative, we consider that the legislation gives rise to a *prima facie* issue under section 19(1) of the Bill of Rights Act.
8. Where a provision is found to be *prima facie* inconsistent with 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 section 5 of that Act. The section 5 inquiry is essentially two-fold: whether the provision serves an important and significant objective; and whether there is a rational and proportionate connection between the provision and the objective.<sup>[1]</sup>

#### *Compulsory employer contributions*

9. New section 101B of the KiwiSaver Act 2006 requires employers to make compulsory employee contributions to a KiwiSaver scheme or complying superannuation fund to match an employee's contributions deducted from their gross salary or wages. New section 101C requires employers to make compulsory contributions only in respect of employees who are aged 18 years and over. It therefore draws a distinction between persons who are aged 16 and 17 years old, and those over the age of 18 years for the purpose of compulsory employer contributions.
10. The result of new section 101C is that persons who are aged 16 or 17, and who are members of KiwiSaver, might not receive contributions from their employer. While an employer can choose to make voluntary contributions for employees aged 16 and 17, they are not required to do so. The lack of compulsion gives rise to a disadvantageous distinction on the grounds of age and, therefore, this provision gives rise to a *prima facie* issue of discrimination under section 19(1) of the Bill of Rights Act. This provision must therefore be justified in terms of section 5 of that Act.

*Is this a justified limitation under section 5?*

11. The KiwiSaver scheme was established to encourage in individuals a long-term savings habit and asset accumulation with the aim of increasing individuals' well being and financial independence, particularly in retirement. New section 101C contributes to the appeal of the KiwiSaver scheme with the promise of compulsory employer contributions to an employee's KiwiSaver fund.
12. The purpose of the age distinction is to avoid creating an incentive for those aged 16 or 17 to leave educational training and enter the workforce in order to obtain the benefit of compulsory employer contribution. In our view, this is an important and significant objective. High importance is placed on young people obtaining an education, with many young people actively encouraged to continue their education whether through remaining in secondary school or in other educational facilities. Ensuring that there is no financial incentive for young persons to leave educational training is also consistent with social security legislation. In addition, by encouraging young people to stay in educational facilities for longer, the provision is helping to ensure the greater earning power of those young people and hence improve their ability to save in the future. Accordingly, we consider that new section 101C meets the first limb in the inquiry under section 5 of the Bill of Rights Act.
13. While we acknowledge that a disadvantage exists for those aged 16 and 17, we consider the disadvantage would be minimal in practice. We note that the enrolment rules for the KiwiSaver scheme exclude many types of jobs that young persons are traditionally employed in – namely casual agricultural work and temporary employment of 28 days or less (see sections 10 through 12 of the KiwiSaver Act 2006). We further note that 16 and 17 year olds need to "opt in" to the KiwiSaver scheme as opposed to being compulsorily enrolled. This raises the question of affordability. People aged between 16 and 17 generally have a lower earning potential than those aged 18 and over, so the relative proportion of contributions made during that time are likely to be minimal compared to the rest of their working life. Finally, we note that 16 and 17 year olds are not barred from receiving employer contributions. An employer can choose to make voluntary contributions for employees aged 16 and 17, or the employees may negotiate for employer contributions as part of their terms of employment.
14. We consider that new section 101C is rationally and proportionately connected to its objective and is therefore justified in terms of section 5 of the Bill of Rights Act. In forming our view, we were guided by recent decisions in the European Court of Human Rights (ECHR). In a series of cases considering alleged discrimination in the United Kingdom Superannuation Scheme the ECHR re-affirmed the wide margin of appreciation to be afforded in the area of social and economic policy, including taxation. In such areas the ECHR will defer to the legislature unless it is established that the policy is "manifestly unreasonable".<sup>[2]</sup>
15. We also took account of the fact that age-based distinctions of this nature are transitory and non-stigmatizing in character. People aged 16 or 17 years old who do not receive voluntary employer contributions will feel the effect of the distinction for a limited period only, with the consequence that such effects are to some degree mitigated by the knowledge that they are temporary in character. More broadly, such distinctions may be justified as permitting fair distribution over time: that is, the payment of compulsory employer contributions to all employees but for only part of their working lives is acceptable given the financial implications of the KiwiSaver scheme for employers.

## *Employer contributions at New Zealand superannuation age*

16. Under new section 101C, entitlement to employer contributions ceases when a person becomes eligible for withdrawal from the KiwiSaver scheme: that is, the age of eligibility of New Zealand superannuation or 5 years of membership, whatever is the later. We note that this provision reflects the eligibility criteria for the KiwiSaver scheme, which is set out in section 10 of the KiwiSaver Act 2006. In our advice on the KiwiSaver Bill, dated 13 February 2006, we concluded that any disadvantage this distinction created for people over the New Zealand superannuation age was justified in terms of section 5 of the Bill of Rights Act.

## *Effect on Collective Agreements*

17. We also considered the effect new section 101B and 101C may have on the formation of collective agreements. Employers are generally prohibited from making distinctions between employees, who are in similar situations on the ground of age. In this situation, an employer will be able to differentiate his or her contributions to those employees aged between 18 and 65 from those employees outside that age group by virtue of section 21B of the Human Rights Act.

## **Conclusion**

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

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## Footnotes

1 In applying section 5, we have had regard to the guidelines set out by the Court of Appeal in *Ministry of Transport (MOT) v Noort* [1993] 3 NZLR 260 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9; and *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754 and Supreme Court of Canada's decision in *R v Oakes* (1986) 26 DLR (4th).

2 *Walker v United Kingdom* (Application no 37212/02), *Pearson v United Kingdom* (Application no 8374/03), *Barrow v United Kingdom* (Application no 42735/02)

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