

11 May 2004

ATTORNEY-GENERAL

LEGAL ADVICE
CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
TAXATION (DEPRECIATION, PAYMENT DATES ALIGNMENT, AND
MISCELLANEOUS PROVISIONS) BILL

1. We have considered whether the Taxation (Depreciation, Payment Dates Alignment, and Miscellaneous Provisions) Bill (the "Bill") (IRD 20050419/1) is consistent with the New Zealand Bill of Rights Act 1990 ("Bill of Rights Act"). We understand the Bill will be considered by Cabinet at its meeting on Monday, 16 May 2005.
2. The Bill does not appear to be inconsistent with the rights and freedoms affirmed by the Bill of Rights Act. However, the Bill does raise certain issues in relation to section 19(1) of that Act.

Summary and Objectives of the Bill

3. The Bill seeks to introduce a number of important changes to current taxation laws. In particular, the Bill will amend the Income Tax Act 2004 to align the three current provisional tax payment systems to GST due dates and provide an alternative method of calculating provisional tax by basing it on a percentage of GST taxable supplies. Changes are also proposed to tax depreciation rules (which will move the tax depreciation rates closer to estimates of economic depreciation) and Fringe Benefit Tax (which will reduce compliance costs and remove anomalies in the rules). Further amendments address the issue of corporate migration and reform the tax treatment of securities.
4. There are also a number of amendments to the Tax Administration Act 1994, which establish a framework to authorise subsidised payroll intermediaries to perform PAYE, and require New Zealand resident trustees of foreign trusts to disclose, amongst other matters, to the Inland Revenue Department prescribed financial records relating to foreign trusts for New Zealand tax purposes.

Right to freedom from discrimination

Section 19 of the Bill of Rights Act

5. We have considered whether certain clauses of the Bill could give rise to various issues of discrimination under section 19 of the Bill of Rights Act. Section 19(1) of that Act provides the right to freedom from discrimination on the grounds set out in section 21 of the Human Rights Act 1993 (the

'Human Rights Act'). These grounds include, *inter alia*, age (defined as any age commencing with the age of 16 years), and sexual orientation.

6. In our view, 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:
 - i. Does the legislation draw a distinction based on one of the prohibited grounds of discrimination?
 - ii. 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 of "discrimination" under section 19(1) of the Bill of Rights Act. Where this is the case, the legislation falls to be justified under section 5 of the Bill of Rights Act.

Provisions affording benefits to de facto partners

8. The Bill contains two provisions that accord rights and entitlements to a tax-payer based on the type of relationship they have with another person. New sub-clause CX17(2) of the Income Tax Act 2004 will allow an employee who is required to temporarily change their place of work to claim reimbursement of any travel costs incurred by the employee's spouse or partner for the purpose of visiting the employee in their new place of work. New sub-clause 91K(2)(e)(v) of the Tax Administration Act 1994 will specify that for the purposes of resident certificate eligibility a source deduction payment does not include a payment made to a person by his or her spouse, civil union partner or de facto partner. We consider that these provisions do not give rise to an issue of discrimination on the grounds of sexual orientation.
9. In reaching this conclusion, we note that new sub-clause CX17(2) of the Income Tax Act 2004 uses the phrase "spouse or partner" and thus avoids the restricted definition of de facto partner (which applies until 1 April 2007 to different sex de facto couples only) that was inserted into that Act as part of the Income Tax Amendment Act 2005. While new clause 91K(2)(e)(v) of the Tax Administration Act 1994 uses the term "de facto", we note that the definition contained in the Interpretation Act 1999 – which is inclusive of both same and different sex couples – will apply in this case.

Age Discrimination

10. New sub-clause 91K(5) of the Tax Administration Act provides that a natural person is eligible to hold a dependent resident certificate – which exempts the certificate holder from paying New Zealand tax on foreign sourced income for five years – if the person is less than 20 years of age, financially dependent on a person who is a certified employed resident (or certified general resident) and being maintained as a member of the family of the certified resident. This provision creates a distinction between

financially dependent persons less than 20 years of age and those who are 20 years or older that appears to be disadvantageous to individuals in the older age group.

11. While age limits of any kind are likely to involve a degree of arbitrariness or generalisation without regard for the particular circumstances of individuals within that age group, the choice of 16 as a starting point under the Human Rights Act means that any differential treatment based on an age over 16 that results in disadvantage is *prima facie* inconsistent with the right to freedom from discrimination. It is therefore necessary to consider whether the inconsistency in sub-clause 91K(5) can be justified in terms of section 5 of the Bill of Rights Act.
12. The Inland Revenue Department has advised that, by permitting persons under 20 years of age who are financial dependent on their parents and being maintained as a member of the family to hold a dependent resident certificate, sub-clause 91K(5) acknowledges that such persons are likely to have no real choice as to whether to move to New Zealand with their parents (whereas a person aged 20 years or older is more likely to have the emotional and financial maturity to continue to live outside New Zealand without their parents). The provision also recognises that despite being financially dependent on their parents, persons under 20 may earn a limited amount of foreign sourced income in their own right: for example, from a family trust and, consequently, ensures that they are not disadvantaged vis-à-vis their parents, who enjoy temporary tax exemption by virtue of their employment.
13. We consider that the identified discrimination appears to be justified in terms of section 5 of the Bill of Rights Act. In reaching this conclusion, we note that under new sub-clause 91K(1) a person aged 20 years or older who accompanies their parents to New Zealand will be eligible to hold a general resident certificate for three years.

Conclusion

14. We have concluded that the provisions of the Bill appear to be consistent with the rights and freedoms contained in the Bill of Rights Act.
15. In accordance with your instructions we attach a copy of this opinion for referral to the Minister of Justice.

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CC Minister of Justice

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