Taxation (Urgent Measures and Annual Rates) Bill

5 December 2008

Attorney-General

LEGAL ADVICE
CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
TAXATION (URGENT MEASURES AND ANNUAL RATES) BILL

1. We have considered the Taxation (Urgent Measures and Annual Rates) Bill (IRD 13479/2.1) (the 'Bill'), for consistency with the New Zealand Bill of Rights Act 1990 (the 'Bill of Rights Act'). We understand that the Bill is to be considered by Cabinet at its meeting on Monday, 8 December 2008.
2. The Bill seeks to provide for an income tax cut programme, an independent earner tax credit (the 'IETC'), the repeal of Research and Development tax credits, and changes to KiwiSaver.
3. For the purposes of our Bill of Rights Act analysis, the only issue of substance appears to be ineligibility of particular types of income earners to the tax credit individuals who are entitled to the Working For Families (WFF) tax credit, or those who receive income-tested benefits, superannuation or Veteran's Pension, and do not earn over $24,000.
4. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching this conclusion, we considered potential issues of inconsistency with section 19(1) of the Bill of Rights Act. Our analysis of these issues is set out below.
5. We have consulted with the Inland Revenue Department, the Ministry of Social Development, and the Crown Law Office in the preparation of this advice.

Purpose and effect of IETC

6. IRD advises us that the introduction of the IETC will provide an economic stimulus to New Zealand. It achieves this by providing a non-refundable tax credit for low-income earners who do not otherwise receive state benefits, encouraging them to enter and remain in the workforce.
7. The IETC is a non-refundable tax credit of $520 for natural persons with a net income of $24,000 to $44,000.
8. The threshold of $24,000 roughly exceeds a full-time annual income based on the minimum wage. A person is not eligible for the IETC if their net income is under $24,000. The IETC decreases if a person's net income exceeds $44,000, at a rate of 13 cents for each complete dollar of the excess.
9. Under clause LC13 of the Bill, a person meeting the income requirements is eligible for the IETC for the period in the tax year only when the person:

(a) is not receiving an income-tested benefit; and
(b) is not receiving a Veteran's Pension; and
(c) is not receiving New Zealand superannuation; and
(d) is not receiving a benefit, pension, or periodical allowance that is—

(i) granted outside New Zealand; and
(ii) in the nature of, and paid for similar purposes as, a benefit, pension, or superannuation payment described in paragraphs (a) to (c); and

(e) is not entitled to a WFF tax credit; and
(f) is not the spouse, civil union partner, or de facto partner of a person who is entitled to a WFF tax credit; and
(g) is resident in New Zealand.

10. A person is only ineligible to claim the IETC for the period of the tax year that the person is receiving an income-tested benefit. The amount of the benefit, however, is considered income for the purposes of the IETC threshold. In this case, the IETC would be prorated based on the period of the year the person is not excluded.
11. IRD estimates that the IETC will benefit between 600,000 and 700,000 people a year.

SECTION 19(1) OF THE BILL OF RIGHTS ACT

12. Section 19(1) of the Bill of Rights Act states:

> Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.

13. The key questions in assessing whether discrimination under section 19 exists are:

(a) does the legislation draw a distinction based on one of the prohibited grounds of discrimination; and if so
(b) does the distinction result in disadvantage to one or more classes of individual?

14. If these questions are answered in the affirmative, we regard the legislation as giving rise to a prima facie issue of discrimination under section 19 of the Bill of Rights Act. 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 reasonable and can be justified under section 5 of that Act. [1] A limitation on a right is considered justifiable where:

(a) the provision serves an important and significant objective; and
(b) there is a rational and proportionate connection between the provision and that objective.

15. We note, in applying this approach, that the respective roles of the elements of s 19 and of s 5 remain somewhat unsettled in New Zealand law. [2]

Discrimination on the basis of employment, disability, family status and / or age

16. We have considered the Bill for consistency with section 19(1) of the Bill of Rights on the grounds of discrimination of family status, disability, employment status and / or age.
17. In doing so, we have been mindful that this Bill effectively involves a targeted tax credit to a particular class of income earner. Differentiation between income earners according to their

personal circumstances is an inherent feature of tax and benefit regimes generally, and when considering the application of the Bill of Rights Act in this area we recognise that personal characteristics may be legitimate factors in tax and benefit decisions. Further, given the broad and complex economic and social purposes of tax and benefit systems, we necessarily accord Parliament a level of deference in identifying and addressing those purposes.

Is there a distinction on prohibited grounds?

18. Family status includes having, or not having, responsibility for the care of children or other dependents, or being a relative of a particular person. Employment status includes being unemployed or a recipient of a benefit under the Social Security Act 1964. Receipt of income-tested benefits, New Zealand superannuation, and Veteran's Pension all fall under the definition of employment status.
19. The Bill draws an arguable distinction based on employment, disability, and / or family status because it provides that a person is ineligible to receive the tax credit because they receive an income-tested benefit. While the vast majority of individuals currently receiving an income-tested benefit do not receive more than $24,000 in income annually, there are a small number of cases where people receive an income tested benefit may earn over $24,000:

- A single parent claiming the invalid's benefit;
- A couple claiming the invalid's benefit;
- Legally blind persons claiming the invalid's benefit.

The Bill also draws an arguable distinction based on family status for those who are ineligible to receive the tax credit because they are entitled to the WFF tax credit, or have a partner who is entitled to it.

Finally, it also draws an arguable distinction based on employment, disability, and / or age because it provides that a person is ineligible to receive the tax credit because they receive New Zealand superannuation or a Veteran's Pension.

Does the distinction result in a disadvantage?

We do not, however, think that these arguable distinctions give rise to a disadvantage to the income earners who are ineligible to receive the tax credit.

A core aim of the IETC is to provide a monetary incentive to a particular class of income earner. In similar terms, the WFF and income-related benefits can be seen, among other purposes, to encourage people to work, as they obtain a monetary incentive to enter and remain in the work force as a component of the benefit they receive. The financial value of this incentive will normally be much greater than the monetary incentive provided by the IETC. It follows that there is not a disadvantage to such people.

New Zealand superannuation and the Veteran's Pension provide a basic financial entitlement for particular classes of people who are not expected to enter and remain in the workforce, although that option remains open to them. Again, this entitlement is significantly greater than the monetary incentive provided by the IETC and no disadvantage follows.

More broadly, and across all of these cases, individuals receive some form of financial assistance from the state and/or differential treatment in respect of taxation based on their personal circumstances. It is arguable that a distinction is drawn based on employment status, disability, family status or age to determine eligibility for the IETC. However, we do not consider that inability to claim further financial assistance from the state in the form of an additional tax credit results in any disadvantage to these income earners.

Accordingly, and while it would appear at least open to argument that the recipients of the IETC and other government measures differ in their relevant circumstances such that they are not, in fact, directly comparable for the purpose of identifying relative disadvantage[3] and, further, that the purposes served by the targeting of the IETC and other measures would in any case justify differential treatment, it is not necessary to explore either of those points here.

CONCLUSION

We have concluded that the Bill does not appear to be inconsistent with the rights and freedoms affirmed by the New Zealand Bill of Rights Act 1990.

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Footnotes:

1. *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9
2. See, for example, the observations in *Air New Zealand Ltd v McAlister* [2008] NZCA 264 [40]-[44].
3. See, for example, *McAlister,* above, [68]ff.
