

27 April 2016

Hon Christopher Finlayson QC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Trans-Pacific Partnership Agreement Amendment Bill

Purpose

1. We have considered whether the Trans-Pacific Partnership Agreement 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 not yet received a final version of the Bill. This advice has been prepared with the latest version of the Bill (PCO 18742/2.0). We will provide you with further advice if the final version of the Bill includes amendments that affect the conclusions in 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 21 (security against unreasonable search and seizure). Our analysis is set out below.

The Bill

4. This is an omnibus Bill which makes amendments necessary to implement the Trans-Pacific Partnership free trade agreement ('the TPPA'). It amends the following enactments:
 - a. Tariff Act 1988 – to enable the preferential tariff rates, and safeguards and other procedures in the TPP Agreement;
 - b. Dairy Industry Restructuring Act 2001 and Dairy Industry Restructuring (Transfer of Export Licences) Regulations 2007 – to implement an export licence allocation system for country specific quota access;
 - c. Customs and Excise Act 1996 – to allow NZ Customs to issue advance rulings on valuation of imports;
 - d. Hazardous Substances and New Organisms Act 1996 – to provide a 60 day comment period on proposed regulations to be notified to the WTO;
 - e. Wine Act 2003 and Wine Regulations 2006 – to restrict the export of wine labelled as "ice wine" that does not meet the definition in the TPP Agreement;

- f. Overseas Investment Act 2005 – to provide regulation-making power for higher investment screening thresholds (increasing from \$100m to \$200m);
- g. Patents Act 2013 – to provide for a grace period for patent applications, and allow for extending patent terms where there have been unreasonable delays granting or approving the patent;
- h. Agricultural Compounds and Veterinary Medicines Act 1997 – to extend data protection for data provided in support of marketing approval applications;
- i. Copyright Act 1994 – to provide for: new rights for performers; border protection against infringing works; protections for rights management information, cable and satellite signals, and technological protection measures; and the extension of copyright terms;
- j. Trade Marks Act 2002 – to provide for border protection measures against infringing goods, and provide court authority to destroy counterfeit goods and to award additional damages for infringement; and
- k. Legislation Act 2012 – to enable publication of information about central government subordinate instruments, to comply with transparency obligations in the TPP Agreement.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

- 5. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression. This right includes commercial, artistic and political expression and has been held to be “as wide as human thought and imagination”.¹ Two aspects of the Bill raise freedom of expression issues.

Extending duration of copyright

- 6. Intellectual property law, such as the Copyright Act, limits freedom of expression. This is because the act of selecting another’s creative work, copying and distributing it falls within the ambit of expression.²
- 7. Clause 9 of the Bill amends section 22 of the Copyright Act to extend the general duration of copyright in literary, dramatic, musical or artistic works to 70 years after the author dies (from the current 50 years). Clause 10 extends the duration of copyright in sound recordings and films to 70 years after it was made, or published, whichever is later. The extension does not apply to works if their copyright has already expired.

Limits on derogatory treatment of performance

- 8. Clause 22 of the Bill amends the Copyright Act to insert new sections 170A-170I. These sections deal with performers’ moral rights, including the right to be identified as the performer and rights against derogatory treatment of a performance.

¹ *Moonen v Film & Literature Board of Review* [2000] 2 NZLR 9

² Butler & Butler, *The New Zealand Bill of Rights Act: A Commentary* (2nd edition), pp. 530-531

9. Comparable rights currently exist in the Copyright Act, in relation to authors of works and directors of films. The effect of the amendments is to give performers the same rights as these other copyright owners, in relation to sound recordings of their performances.
10. New sections 170E-170G provide that:
 - a. it is an infringement of a performer's rights if a person subjects their performance to derogatory treatment;
 - b. derogatory treatment is where the person exhibits or trades in the performance, whether live or through a sound recording, and there is distortion, mutilation or other modification of the performance that is prejudicial to the honour or reputation of the performer; and
 - c. there are exceptions for performances given for the purposes of reporting current events, for modifications consistent with reasonable editorial or production practice, and for acts done to comply with a duty or avoid an offence.
11. Section 196 of the Copyright Act 1994 provides that remedies for infringement of performers' rights are an injunction or damages. The Bill amends s 196 to replace "damages" with "either damages or an account of profits".

Are these limitations justified under section 5 of the Bill of Rights Act?

12. Limitations on rights and freedoms may still be consistent with BORA if they can be considered reasonable limits that are demonstrably justified under s 5 of that Act. The s 5 inquiry may be summarised as:³
 - a. does the objective serve a purpose 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?
13. To the extent that a longer term of copyright further limits freedom of expression, we consider this remains a justifiable limit under s 5 of the Bill of Rights Act. This is because, in accordance with the s 5 inquiry above:
 - a. Intellectual property law can be seen as enhancing or encouraging creative expression. Existing New Zealand law recognises the intellectual property interests of copyright holders as important and worth protecting. The Bill extends this existing protection to comply with the international obligations of the TPP Agreement. This also achieves a consistent regional minimum standard across TPP countries;

³ *Hansen v R* [2007] NZSC 7.

- b. There is a rational connection between the limitation and the above objectives;
 - c. Copyright law, in the ordinary case, is likely to constitute a reasonable limit since freedom of expression does not “carry with it the right to make free use of another’s work”⁴;
 - d. With regard to minimal impairment and proportionality of the limit, the Copyright Act’s existing provisions balance restriction of freedom of expression with exemptions for fair dealing with a work for the purposes of criticism, review, reporting and research. These will continue to apply in the amended Copyright Act; and
 - e. The TPPA National Interest Analysis notes a net economic cost of copyright extension estimated at NZ\$55 million annually.⁵ Advice from MBIE and MFAT is that this is the main cost to New Zealand of joining the TPPA and cannot be assessed in isolation as it is expected to be greatly outweighed by the other economic benefits of the TPPA. The limitation of freedom of expression is in due proportion to these benefits.
14. To the extent that a new protection for performers against derogatory treatment of their performance engages the right to freedom of expression, we consider the limitation is justified under s 5 of the Bill of Rights Act. This is because:
- a. The provision serves the purpose of offering performers statutory protection from treatment of their work that causes damage to their reputation, similar to defamation. It extends this existing protection for authors/directors to include performers. The limit has a rational connection to these objectives;
 - b. A performer will have no recourse for a distortion, mutilation, or other modification for the purpose of satire, or comment, if the alteration cannot be said to be prejudicial to the performer’s honour or reputation; and
 - c. With regard to the reasonableness and proportionality of the limit, the provision in the Bill requires actual modification of the performance and applies exemptions for editorial or production practice. Exemptions for fair dealing outlined above also apply.

Section 21 – Security against unreasonable search and seizure

15. Section 21 of the Bill of Rights Act provides that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise. Provisions in the Bill relating to border control raise s 21 issues.

Detention of suspected trade mark infringing or pirated goods

16. Clause 96 of the Bill amends the Trade Marks Act 2002 to insert new section 135A, which provides that the New Zealand Customs Service may detain goods that infringe, or are suspected of infringing, trademarks. This will constitute a search and/or seizure.

⁴ *Ashdown v Telegraph Group Ltd* [2001] 4 All ER 666 (CA) at [46]

⁵ This is due to the higher prices and licensing fees associated with copyright works, and because New Zealand is a net importer of copyright works.

17. The test, for the purposes of s 21 of the Bill of Rights Act, is whether the search or seizure is unreasonable.⁶ We consider that a search or seizure under new section 135A will not be unreasonable for the purposes of s 21. This is because the search or seizure is undertaken for a sufficiently important objective, namely border protection and to ensure compliance with the law.
18. The limit is rationally connected to that objective, and reasonable provisions are made for notification to both the owner of the goods and the owner of the trade mark, and for release of detained goods.

Conclusion

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

Jeff Orr
Chief Legal Counsel
Office of Legal Counsel

⁶ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [162]