

13 October 2022

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Business Payment Practices Bill

Purpose

1. We have considered whether the Business Payment Practices 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 in relation to the latest version of the Bill (PCO 21913/6.0). We will provide you with further advice if the final version 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), s 21 (freedom from unreasonable search and seizure) and s 25(c) (the right to be presumed innocent until proven guilty according to law). Our analysis is set out below.

The Bill

4. The Bill introduces a regime to bring transparency to business-to-business payment terms and practices in New Zealand. It is based on feedback from small business that late payments and lengthy payment terms harm their business, with potentially wider implications for economic efficiency.
5. The purposes of the Bill are to:
 - a. Improve transparency in certain business-to-business payment practices;
 - b. Enable members of the public and entities to make informed choices about whether to engage with certain large entities; and
 - c. Create a source of information to inform future policy work relating to business-to-business payment practices.
6. The Bill requires large businesses ('entities' in the Bill) to disclose payment practice information, including in relation to late and overdue payments made and payment terms, twice a year. The data is to be published on a publicly searchable register housed within the Ministry of Business, Innovation and Employment, and on entities' websites.
7. The Bill provides for infringements, civil pecuniary penalties and criminal offences for contraventions of the obligations prescribed by the Bill, as well as the establishment and appointment of a Registrar responsible for maintaining the register. The Bill further provides the Registrar with inspection powers as well as assurance, compliance and enforcement functions to support the integrity of the register.

Consistency of the Bill with the Bill of Rights Act

Section 14 – freedom of expression

8. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹
9. The Bill includes provisions that limit the right to freedom of expression by requiring entities to disclose certain information to the Registrar² and on their websites.³

Is the limitation justified and proportionate under s 5 of the Bill of Rights Act?

10. Where a provision is found to limit any 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 demonstrably justifiable in terms of s 5 of that Act. The s 5 inquiry is approached as follows:⁴
 - a. Does the provision serve an objective sufficiently important to justify some limitation on the right or freedom?
 - b. If so, then:
 - i. is the limit rationally connected to 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?
11. We consider that the limits referred to in paragraph 9 above are rationally connected to the sufficiently important objectives of bringing transparency to, and gathering evidence about, business-to-business payment practices and enabling the public and entities to make informed decisions.
12. We consider these provisions impair s 14 no more than is reasonably necessary and are in due proportion to the importance of the objectives, which require the provision of information. In reaching this conclusion, we note that:
 - a. The obligations apply only to larger organisations⁵;

¹ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

² Clauses 9 and 15 to 17.

³ Clause 13.

⁴ *Hansen v R* [2007] NZSC 7.

⁵ Clause 10 defines 'large' by reference to a slightly modified version of the definition in s 45 of the Financial Reporting Act 2013, under which an entity is large in respect of an accounting period if: a) as at the balance date of each of the 2 preceding accounting periods, its total assets together with those of any subsidiaries exceeds \$66 million; or b) in each of the 2 preceding accounting periods, its total revenue together with those of any subsidiaries exceeds \$33 million.

- b. The specific payment practices information that entities will be required to disclose and publish are to be prescribed in secondary legislation, which must be consistent with the Bill of Rights Act in order to be valid; and
 - c. The information to be disclosed and published is likely to be of limited expressive value.
13. In addition, cl 18(4) of the Bill allows the Registrar to refuse access to the register or otherwise suspend its operation, in whole or in part, if it considers that it is not practical to provide access. We have considered whether this provision, although we understand it to be intended for very limited use,⁶ could engage s 14 by limiting entities' or individuals' ability to seek and receive the information contained in the register. In our view, no issue of limitation arises given that the same information will remain accessible on entities' websites.
14. Overall, we consider that the limits imposed by the Bill on the right to freedom of expression are justified under s 5 of the Bill of Rights Act.

Section 21 – freedom from unreasonable search and seizure

15. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, correspondence or otherwise. The right protects a number of values including personal property, dignity, and privacy.⁷

Search and seizure powers

16. The Bill gives the Registrar powers of inspection that constitute search powers for the purposes of s 21 of the Bill of Rights Act.⁸ In particular, the Registrar may:⁹
- a. Require a person to confirm, in relation to information provided to the Registrar, that such information is correct or to correct the information;
 - b. Require a person to produce for inspection relevant documents within that person's possession or control;
 - c. Inspect and take copies of relevant documents (a relevant document is defined as a document containing information relating to an entity or its disclosures);
 - d. Take possession of relevant documents and retain them for a reasonable period to make copies, or for a longer reasonable period if the Registrar reasonably believes the documents are evidence of the commission of an offence; or
 - e. Require a person to provide the Registrar with the results of a qualified auditor's review of their payment practices information.

Are the search and seizure powers reasonable?

17. Ordinarily, a provision found to limit a particular right or freedom may be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of that Act. However, the Supreme Court has held that an unreasonable search logically cannot be

⁶ In particular, temporary closures for maintenance or where the continuation of operations or access may risk the integrity of the register (as in the case of a cyber attack).

⁷ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

⁸ *New Zealand Stock Exchange v Commissioner of Inland Revenue* [1992] 3 NZLR 1 (PCP).

⁹ Clause 25.

demonstrably justified and therefore the inquiry does not need to be undertaken.¹⁰ Rather, s 21 is self-limiting in that the assessment to be undertaken is whether the search power is reasonable. The reasonableness of a search and seizure can be assessed with reference to the purpose of the search and seizure and the degree of intrusion on the values which the right seeks to protect.

18. We consider the search and seizure powers in the Bill are consistent with its purposes and are reasonable in the circumstances. The powers can only be used where necessary to monitor compliance with the regime set up by the Bill. Any intrusion into privacy is minimal, and there will not be another viable way for the Registrar to obtain the information. We also consider that the search and seizure powers are appropriately limited in scope.
19. Accordingly, we consider that the search and seizure provisions of the Bill are reasonable, and therefore consistent with s 21 of the Bill of Rights Act.

Section 25(c) – right to be presumed innocent until proven guilty

20. Section 25(c) of the Bill of Rights Act affirms that anyone charged with an offence has the right to be presumed innocent until proven guilty according to the law. The right to be presumed innocent requires that an individual must be proven guilty beyond reasonable doubt, and that the state must bear the burden of proof.¹¹
21. Strict liability offences, which may be proved by finding that certain facts occurred without proof of mens rea, prima facie limit s 25(c) of the Bill of Rights Act. They may, nevertheless, be justifiable in terms s 5 of the Bill of Rights Act, especially where:
 - a. The offences are regulatory in nature and apply to persons participating in a highly regulated industry;
 - b. The defendant will be in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite; and
 - c. The penalty for the offence is proportionate to the importance of the Bill's objective.

Infringement offences

22. The Bill provides that a person who fails to comply with its reporting and publication obligations commits an infringement offence and is liable to an infringement fee of \$3,000 or a fine imposed by a court of \$9,000.¹² The infringement offences are strict liability offences, and accordingly they prima facie limit s 25(c) of the Bill of Rights Act.
23. The actions being punished by the infringement offences are of relatively low seriousness. As the offences seek to deter entities from circumventing the requirements in the Bill, we consider that they are rationally connected to the objectives of the Bill.
24. We consider the penalties are likely to be commensurate to affected entities' and individuals' ability to pay, and necessary to contribute to the purposes of the offence regime (including deterrence and punishment). In relation to proceedings commenced by filing a charging document, the court retains the discretion to impose a lower fine than the \$9,000 maximum.

¹⁰ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (SC) at [162] per Blanchard J.

¹¹ *R v Wholesale Travel Group* (1992) 84 DLR (4th) 161, 188 citing *R v Oakes* [1986] 1 SCR 103.

¹² Clause 31.

25. We consider that, as the infringement offences in the Bill relate to regulatory matters and result only in a monetary penalty and not a criminal conviction, the limit on the right can be justified under s 5 of the Bill of Rights Act.

Conclusion

26. 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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