

12 July 2023

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Digital Services Tax Bill

Purpose

1. We have considered whether the Digital Services Tax 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 (IRD 25649/6.2). 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). Our analysis is set out below.

The Bill

4. The Bill introduces a digital service tax, which would apply to large businesses with global digital services revenues above a specified threshold.¹ The tax would be imposed at a rate of 3 per cent on digital services revenues connected to New Zealand users or land. Taxable digital services revenues are revenues relating to intermediation platforms, social media and content sharing platforms, internet search engines, digital advertising and user-generated data.
5. The Bill would also consequentially amend the Tax Administration Act 1994, including to require representatives of a digital services entity to provide tax-related information and to provide for civil penalties if the information requirements are not met.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

6. 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 and 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.²
7. The Bill requires representatives of digital services entities to meet certain obligations, including keeping records that enable the Commissioner of Inland Revenue (the Commissioner) to ascertain their liability to pay the tax; providing a digital services tax

¹ The tax would apply to businesses with global digital services revenues of at least €750 million per revenue year and at least \$3.5 million of New Zealand digital services revenue per revenue year.

² See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

return; and registering specified information with the Commissioner.³ These provisions prima facie limit the right to freedom of expression.

8. A provision which limits a protected right or freedom may be consistent with the Bill of Rights Act if the limitation is reasonable and justifiable in a free and democratic society under s 5 of that Act. The s 5 inquiry may be approached as follows:
- a. Does the provision serve an objective 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?⁴
9. We consider the limits imposed by these provisions to be justifiable. The requirements appear to be rationally connected to the important objective of enabling effective administration of and compliance with the new tax. They also appear minimally impairing and proportionate, noting that they are designed to apply to large businesses in a regulatory context.

Conclusion

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



Edrick Child
Acting Chief Legal Counsel
Office of Legal Counsel

³ New s 22BA, new s 33G, and new s 226H of the Tax Administration Act 1994, respectively.

⁴ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.