

21 December 2023

Hon Judith Collins, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: European Union Free Trade Agreement Legislation Amendment Bill

Purpose

1. We have considered whether the **European Union Free Trade Agreement Legislation 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 in relation to the latest version of the Bill (PCO 25192/10.3). 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:
 - a. section 14: freedom of expression,
 - b. section 19: freedom from discrimination,
 - c. section 21: freedom from unreasonable search and seizure,
 - d. section 25(c): right to be presumed innocent until proven guilty,
 - e. Section 27(3): right to justice.
4. Our analysis is set out below.

The Bill

5. The Bill is an omnibus bill that seeks to align New Zealand's domestic law with obligations set out in the Free Trade Agreement between New Zealand and the European Union signed in Brussels on 9 July 2023 (NZ-EU FTA). The Bill introduces amendments to the following legislation:
 - a. the Consumer Information Standards (Country of Origin (Clothing and Foot-wear) Labelling) Regulations 1992, to allow goods from a Member State of the European Union (EU) to be labelled as 'made in the EU' or alternatively, as made in that Member State;
 - b. the Dairy Industry Restructuring Act 2001, to bring additional and revised dairy quotas under the existing quota system, and possible changes to the way in which dairy export quotas are allocated which may be desirable to maximise the new quotas from the NZ-EU FTA;

- c. the Act previously called the Geographical Indications (Wine and Spirits) Registration Act 2006, to protect in New Zealand, geographical indications (GI) from the European Union (EU GIs), including enforcement measures, to implement obligations in the agreement;
- d. the Overseas Investment Act 2005 and the Overseas Investment Regulations 2005, to increase from \$100 million to \$200 million the monetary threshold above which consent is required for investments by EU non-government investors in 'significant business assets' in New Zealand;
- e. the Tariff Act 1988, to provide for the agreement's bilateral safeguard mechanism under chapter 5 of the EU FTA;
- f. the Trade (Safeguard Measures) Act 2014, as an amendment consequential to the amendments to the Tariff Act 1988; and
- g. the New Zealand Tariff, to enable the application of the preferential tariff rates agreed, and to implement obligations relating to the tariff treatment of goods returned after repair or alteration;
- h. the Customs and Excise Regulations 1996, to implement the agreed rules of origin and product specific rules of origin for goods imported from the European Union.

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 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 to freedom of expression has also been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹
- 7. The Bill renames the Geographical Indications (Wines and Spirits) Registration Act 2006 as the Geographical Indications Registration Act 2006 (the Act), and replaces sections 57 to 64 of the Act with new sections 57 to 176, which provide a regulatory regime to protect geographical indications for the manufacture of wine, spirits, and other goods in compliance with the NZ-EU FTA. These amendments include numerous provisions which *prima facie* engage the right to freedom of expression. These provisions can broadly be split into the following two categories:
 - a. **Requirement to provide information:** Clause 84 of the Bill inserts a number of new sections into the Act that compel the provision of certain information and require record keeping. For example:
 - i. New sections 85 and 87 enable enforcement officers to require information about relevant goods and to require the personal details of a person engaged in trade in a relevant good, including; the person's full name and address, their email address, telephone numbers, date of birth, occupation, and employment status.

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

- ii. New section 102 requires any agency or person who discloses information to make and keep a record of the information that was disclosed, the agency or person to whom it was disclosed, and any conditions subject to which it was disclosed.
 - iii. New section 142 requires a claimant, or any other person appearing to have an interest in the goods, to provide any information that the chief executive considers reasonably necessary for the purposes of an investigation.
- b. **Requirements of registration and labelling:** A number of new sections inserted into the Act provide limits on the goods that may be registered and will affect how certain goods may be labelled to ensure they are compliant with the product specification of a registered geographical indication. For example:
- i. New section 64 provides that the Registrar must not register an EU FTA geographical indication if it is likely to offend a significant section of the community, including Māori;
 - ii. New section 73 provides that a person must not, in trade, use an EU FTA registered indication that identifies a good for a like good unless it meets the product specification of the geographical indication;
 - iii. New section 96 enables an enforcement officer to give a notice of direction requiring a person to cease further use of the registered geographical indication;
 - iv. New section 111 enables a court in the context of civil proceedings to make an order that requires the person to erase, remove, or obliterate the geographical indications from any infringing goods, material, or object.
8. Where a provision is found to limit a 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 justified in terms of section 5 of that Act. The section 5 inquiry asks whether the objective of the provision is sufficiently important to justify some limitation on the right or freedom; and if so, whether the limitation is rationally connected and proportionate to that objective and limits the right or freedom no more than reasonably necessary to achieve that objective.²
9. We consider that any limits on the freedom of expression contained within the Bill are justified under section 5 of the Bill of Rights Act for the following reasons:
- a. the requirements to provide information limit the right to freedom of expression no more than is necessary in order to determine a breach of a restriction or investigate a complaint, and are otherwise limited to persons engaged in trade;
 - b. the requirements for labelling and the provision of information are part of a regulatory regime that is required to ensure compliance with the NZ-EU FTA, the purpose of which is to protect the interests of consumers by providing assurance that a particular good using a registered geographical indication meets the specifications of the geographical indication;

² *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

- c. the court may only order the removal of the geographical indication from a product if a person has breached a restriction on use;
- d. geographical names and locations can have special significance to tangata whenua or other groups with spiritual, cultural, or historical ties to the land. Protection of those groups' interests is a sufficiently important objective to justify some limitation on freedom of expression. This also reflects the Courts' recognition of the Crown's obligations under the Treaty of Waitangi, in particular the duty to actively protect Māori interests.³ The clause also ensures the views of other significant sections of the community are considered;
- e. The overall objective of ratifying the NZ-EU FTA to grow New Zealand's real GDP by up to \$1.4 billion per year, and New Zealand exports to the European Union by up to \$1.8 billion per year is considered sufficiently important to justify some limit on the right to freedom of expression;
- f. The limit is rationally connected to these objectives, impairs freedom of expression no more than is necessary to achieve these objectives and is in due proportion to the importance of the objectives.

Section 19 – Freedom from discrimination

- 10. Section 19(1) of the Bill of Rights Act affirms the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993 (the Human Rights Act).
- 11. Two factors must be met for discrimination to be identified under section 19(1) of the Bill of Rights Act:⁴
 - a. there is a differential treatment or effect as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination; and
 - b. that treatment has a discriminatory impact (i.e., it imposes a material disadvantage on the person or group differentiated against).
- 12. Differential treatment will arise if the legislation treats two comparable groups of people differently on one or more of the prohibited grounds of discrimination. Whether disadvantage arises is a factual determination.⁵
- 13. We have considered clause 78 which inserts section 47F into the Act. Section 47F enables a Registrar to require a party to proceedings to give security for the costs of the proceedings if the party does not reside and does not carry-on business in New Zealand. This provision may engage the right to freedom from discrimination on the grounds of national origin. To the extent that it does engage the right, we consider that the provision is necessary in order to be able to enforce costs orders on unsuccessful foreign businesses. It is otherwise difficult and expensive for anyone trying to enforce such costs orders on foreign businesses (being beyond the jurisdiction of the New Zealand courts to enforce such orders). We therefore consider it is a justified limit on the right.

³ *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 at p 664

⁴ *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 CA at [55]; *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729.

⁵ See, for example *McAlister v Air New Zealand* [2009] NZSC 78, [2010] 1 NZLR 153 at [40] per Elias CJ, Blanchard, and Wilson JJ.

Section 21 – Right to be secure against unreasonable search or seizure

14. 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 an amalgam of values including property, personal freedom, privacy, and dignity. The touchstone of this section is the protection of reasonable expectations of privacy, although it does not provide a general protection of personal privacy.⁶
15. Clause 84 introduces new sections 88 and 89 into the Act which provide enforcement officers with the power of entry and inspection in certain circumstances.
16. While a provision found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonably justified, the Supreme Court has held that logically, an unreasonable search cannot be demonstrably justified and therefore the section 5 inquiry does not need to be undertaken.⁷ Rather, in order for a statutory power to be consistent with section 21, engagement of the right must not be unreasonable.
17. Whether a search will be unreasonable turns on a number of factors, including the nature of the place or object being searched, the degree of intrusiveness into personal privacy and the rationale for the search.⁸ The greater the degree of intrusiveness, the greater the need for justification and attendant safeguards.
18. We consider these powers to be reasonable given they are necessary to investigate potential breaches under the geographical indications regulatory regime and given the safeguards associated with the exercise of these powers, including:
 - a. an enforcement officer may only enter a place without a search warrant with the informed consent of the occupier;
 - b. the occupier can revoke their consent at any time at which point the officer must immediately leave the place;
 - c. the places an enforcement officer may enter are restricted to where a relevant good is traded, where the officer reasonably believes documents relating to trade will be found or where the officer reasonably believes that a relevant good is held for the purposes of trade or being traded in;
 - d. the officer may only seize things that the officer has reasonable grounds to believe is evidence of, or of significant relevance to the investigation of a breach of a restriction on use; and
 - e. sections 131 to 135, and subparts 5 and 6 of Part 4 of the Search and Surveillance Act 2012 apply to the exercise of the powers under section 89.
19. New sections 112, 113, and 152 of the Act enable the court to order that an infringing good, material or object be delivered up or forfeited to certain persons and disposed of as the court thinks fit. New sections 131 and 147 enable the detention of infringing goods

⁶ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

⁷ *Ibid* at [162] per Blanchard J.

⁸ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [172] per Blanchard J.

or suspected infringing goods that are in the control of Customs. On their face these provisions also constitute “seizure” for the purposes of s 21 of the Bill of Rights Act.

20. We note that the courts would be bound to exercise such powers in a manner consistent with the Bill of Rights Act, and before making an order for the disposal of infringing goods the court must consider the mandatory considerations in section 114.
21. We also note that Customs officers already have powers to detain items in a Customs-controlled area for the purposes of examination pursuant to the Customs and Excise Act 2018. New section 131 clarifies that the Customs officer or chief executive has powers to detain goods where the Customs officer has reasonable cause to suspect that the goods are infringing goods. Based on the length and nature of the detention of the items and the interests of Customs in control over items prior to entering the country, the seizure is reasonable in the circumstances.

Section 25(c) – Right to be presumed innocent

22. Section 25(c) of the Bill of Rights Act affirms the right of everyone charged with an offence to be presumed innocent until proven guilty according to law. The right to be presumed innocent requires the Crown to prove an accused person’s guilt beyond reasonable doubt.
23. Strict liability offences *prima facie* limit s 25(c) of the Bill of Rights Act. This is because a strict liability offence may be proved by a finding that certain facts occurred without proof of *mens rea*. The accused is required to prove a defence (on the balance of probabilities), or disprove a presumption, to avoid liability. This means that, where the accused is unable to prove a defence, they could be convicted even where reasonable doubt about their guilt exists.
24. Strict liability offences may nevertheless be justifiable limits on rights under s 5 of the Bill of Rights Act. They have been found to be more likely to be justifiable 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.
25. Clause 84 introduces new section 120 into the Act which provides that a person who fails to comply with a notice of direction within the time specified in the notice commits an infringement offence and is liable to an infringement fee prescribed in regulations, or a fine imposed by a court that doesn’t exceed the amount prescribed in regulations. New section 121 provides a discretion as to whether to pursue the infringement offence via an infringement notice or by filing a charging document in the District Court. This is a strict liability offence, and accordingly limits s 25(c) of the Bill of Rights Act.
26. We consider that the infringement offence can be justified under section 5 of the Bill of Rights Act because it is in the context of a regulatory regime, the maximum penalty that can be imposed by the court is \$3,000 and does not result in a conviction,⁹ and the

⁹ See section 375(1)(a) of the Criminal Procedure Act 2011

defendant will be best placed to explain the reasons for non-compliance with a notice of direction. We therefore consider that the offence is proportionate to the importance of the Bill's objective of implementing and enforcing the geographical indications regime.

Section 27(3) – Right to justice

27. Section 27(3) provides that every person has the right to bring civil proceedings against, and to defend civil proceedings by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.
28. New section 155 of the Act excludes specified persons from civil and criminal liability for acts or omissions in the performance of their functions and duties under the Act carried out in good faith and in the performance of a requirement of that Act.
29. Section 27(3) has been interpreted by the courts as protecting procedural rights, rather than as restricting the power of the legislature to determine what substantive rights the Crown is to have.¹⁰ We consider these provisions affect substantive law and do not fall within the ambit of s 27(3) which protects procedural rights.

Conclusion

30. 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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¹⁰ *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at 55.