



NEW ZEALAND  
LAW SOCIETY

NZLS EST 1869

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# Taxation (Business Tax, Exchange of Information, and Remedial Matters) Bill: Supplementary Order Paper 190

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*15/09/2016*

**TAXATION (BUSINESS TAX, EXCHANGE OF INFORMATION, AND REMEDIAL MATTERS) BILL:  
SUPPLEMENTARY ORDER PAPER 190**

**Regulation-making power introduced by SOP**

- 1 Supplementary Order Paper 190 (SOP) to the Taxation (Business Tax, Exchange of Information, and Remedial Matters) Bill (Bill) was introduced on 16 August 2016. The SOP inserts a provision amending the Tax Administration Act 1994 (Act), “to provide a regulation-making power to resolve any potential transitional issues arising during the period of co-existence of 2 Inland Revenue Department software platforms.”<sup>1</sup>
- 2 New clause 120B inserts new section 227B to provide the regulation making power and to include a requirement for the repeal within 3 years of any regulations made under the provision and for the repeal of the provision itself. The wording of new section 227B is set out in Appendix 1.
- 3 This transitional override power is a "Henry VIII" clause and is objectionable on rule of law grounds. As a fundamental point, laws including tax laws should not be able to be changed by regulation, even if temporarily. If such a power is deemed necessary it should only be used extremely sparingly, in a temporary and transparent manner, and following meaningful consultation, bearing in mind the importance of maintaining taxpayer perceptions of the integrity of the tax system, and the other obligations for the Minister and officials under section 6 of the Act.

**Scope of the transitional override powers**

- 4 The proposal involves an amendment to the Tax Administration Act 1994 to enact an empowering provision to provide for transitional regulations and exemptions to be made by Order in Council during Inland Revenue’s Business Transformation process. The exemption and regulation making power will enable the delegated legislation to, expressly or impliedly:
  - Amend, suspend or override a provision in the Act;
  - Define or amend a term in the Act;
  - Exempt a person from the application of a provision of the Act.<sup>2</sup>
- 5 The Act is fundamental to New Zealand's revenue collection. It covers a wide range of tax administration processes and rules including:
  - Rules relating to the establishment of the role of the Commissioner, and the obligations of the Commissioner, responsible Ministers, taxpayers and intermediaries;
  - Processes around information collection, record-keeping and tax returns;
  - Secrecy rules;
  - Disputes procedures;
  - Assessment processes and rules;
  - The processes for binding rulings and determinations;
  - The rules around the charging of interest, and both civil and criminal penalties;

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<sup>1</sup> SOP 190, explanatory note.

<sup>2</sup> Regulatory Impact Statement at [17].

- The process for challenging a tax assessment; and
- The rules for recovering and transferring tax.

### **Justification for the regulation making power**

6 IRD will be moving from its current, outdated, software system (FIRST) to a new software system (START). The explanatory note to the SOP states that the section is required to “resolve any potential transitional issues arising during the period of co-existence of 2 Inland Revenue Department software platforms.”

7 The Supplementary Departmental Disclosure Statement (SDDS) for the SOP envisages two situations where the regulation power under the SOP may need to be used:

The first situation is when a process aligned with the current computer system is examined and found to be inconsistent with the current law because of the limitations of the current system. A regulation could provide a bridge between the current process and the correct process in the new computer system. The second situation is when the new computer system offers a more efficient or different process to that currently legislated. A regulation may be able to reduce the delay in getting the law to line up with the new process, so as to provide a smooth transition from the old system to the new system.

8 The Regulatory Impact Statement (RIS) for the SOP states that it is “impossible to anticipate where any issues might arise” in relation to the business transformation.

9 The RIS and SDDS both claim there are a number of safeguards, namely that:

9.1 Any regulations and exemptions must be consistent with the policy intent of the primary legislation.

9.2 Any regulations and exemptions would be disallowable instruments under the Legislation Act 2012.

9.3 Any regulations and exemptions could be the subject of judicial review proceedings.

9.4 Any regulations and exemptions are subject to time limits.

9.5 Consultation would be necessary. This would be undertaken in line with the Generic Tax Policy Process.

9.6 Any regulations and exemptions would need to be published in the legislative instruments series.

### **Rule of law concerns**

#### *General concern over Henry VIII clauses*

10 The Law Society has previously expressed its concern over the use of Henry VIII clauses. Such clauses should be used only in exceptional circumstances,<sup>3</sup> and should be avoided unless

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<sup>3</sup> PA Joseph *Constitutional and Administrative Law in New Zealand* (4<sup>th</sup> ed, Brookers, Wellington, 2014) at 15.4.3.

demonstrably essential.<sup>4</sup> The Regulations Review Committee has recommended that the Government take steps to limit the use of transitional override powers in legislation.<sup>5</sup>

*Not exceptional circumstances and not demonstrably essential*

- 11 The Law Society questions whether the circumstances are sufficiently exceptional to justify the use of transitional override provisions in the present case.
- 12 The use of such clauses is constitutionally unobjectionable when used to deal with unforeseen contingencies arising from the introduction of new legislation,<sup>6</sup> although this is intended more for situations where there is an amalgamation of a large number of statutes rather than rewrites of an existing Act.<sup>7</sup>
- 13 Professor John Burrows QC's comments to the Regulations Review Committee that a regulation-making power is an acceptable way of dealing with an IT system that cannot yet cope with the new law are acknowledged.<sup>8</sup> However, the use of such clauses cannot be an acceptable substitute for a thorough and proper consideration of potential consequences from an IT upgrade and the use of tailored and appropriate regulations to address those particular potential consequences.
- 14 In addition, Professor Burrows' comments relate to an existing system that needs to be upgraded to meet the requirements of the new law. The present case is somewhat different. IRD put forward two situations where the transitional override powers may need to be used:
  - 14.1 The first situation – providing a bridge between the current process in the 'old' computer system and the correct process in the 'new' computer system – seems to fit within the scope of Professor Burrows' comments.
  - 14.2 The second situation – “when the new computer system offers a more efficient or different process to that currently legislated” – does not. This seems to be a situation where potential technological advantage is driving legislative change through delegated legislation. While that may be administratively convenient, it is not an exceptional circumstance nor demonstrably essential.
- 15 The Law Society is concerned that insufficient thought has been given to the specifics of the transition and the types of transitional override powers that are likely to be needed. Stating that it is impossible to anticipate where issues may arise in a transition is not an acceptable substitute for a thorough consideration of what may occur. The Law Society agrees with Treasury's concerns that the IRD regulatory analysis “does not appear sufficiently complete or convincing to give Ministers confidence in taking an informed decision on the appropriate scope of the exemption and regulation-making powers”.<sup>9</sup>
- 16 Proposing such a provision without providing sufficient justification reflects a lack of appreciation of the seriousness and import of using transitional override powers.

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<sup>4</sup> Regulations Review Committee *Regulation-making powers that authorise transitional regulations to override primary legislation* (I.16J, July 2014).

<sup>5</sup> Regulations Review Committee *Regulation-making powers that authorise transitional regulations to override primary legislation* (I.16J, July 2014).

<sup>6</sup> PA Joseph *Constitutional and Administrative Law in New Zealand* (4<sup>th</sup> ed, Brookers, Wellington, 2014) at 15.4.3.

<sup>7</sup> Regulations Review Committee *Regulation-making powers that authorise transitional regulations to override primary legislation* (I.16J, July 2014).

<sup>8</sup> Given in evidence before the Regulations Review Committee.

<sup>9</sup> Supplementary Departmental Disclosure Statement at [2.3.1].

*Insufficient weight given to the rule of law*

- 17 The regulatory analysis has assessed objectives against the following criteria:<sup>10</sup>
- 17.1 Compliance efficiency: the compliance costs on taxpayers should be minimised as far as possible;
  - 17.2 Administrative efficiency: administrative costs to the Government should be minimised as far as possible;
  - 17.3 Sustainability: the option should support the coherence and integrity of the tax system and the rule of law.

The criteria are given equal weighting, because all are considered equally important.<sup>11</sup>

- 18 The rule of law is a fundamental plank of New Zealand's constitutional system, and to say it is of equal importance to cost efficiencies is of serious concern. This adds to the concern that the IRD has failed to properly weigh the consequences of the transitional override powers.

*Not in most limited terms possible*

- 19 Regulations to override primary legislation should be drafted in the most specific and limited terms possible.<sup>12</sup> The proposed provision does not meet that principle.
- 20 The expressed reasons for the provision are in relation to resolving issues between two software platforms. However, the provision does not make any reference to resolving such issues, or even to the software platforms. If the provision is needed, it should be expressly limited to resolving issues arising from the transition between software platforms.

*Time limits*

- 21 The Regulations Review Committee has expressed a number of principles that ought to be followed concerning time limits on transitional override provisions. They are:<sup>13</sup>
- 21.1 Any such provisions should always have a limited lifespan of no more than 3 years, which should generally be sufficient to allow adequate time for addressing any technical difficulties that arise.
  - 21.2 Regulations made pursuant to such an empowering clause should also include a sunset provision not exceeding 3 years.
  - 21.3 Where an empowering provision contains a sunset clause with a life of more than 3 years, regulations made pursuant to such a provision should be subject to parliamentary confirmation.

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<sup>10</sup> Regulatory Impact Statement at [26].

<sup>11</sup> Regulatory Impact Statement at [27].

<sup>12</sup> Regulations Review Committee *Regulation-making powers that authorise transitional regulations to override primary legislation* (I.16J, July 2014).

<sup>13</sup> Regulations Review Committee *Regulation-making powers that authorise transitional regulations to override primary legislation* (I.16J, July 2014).

- 22 The provision expires on 31 December 2021, which is over the 3-year suggested lifespan. The presumed reason is that this is when the entire transition process should be completed. However, it is not clear why it is expected that there would still be issues between the two pieces of software right up until the last day of the proposed transition.
- 23 While regulations made under the provision would have a sunset period of 3 years, the principle is that the 3-year timeframe is an upper limit, not an aim. It is not clear that consideration has been given to whether the 3-year period is necessary or appropriate in this case.
- 24 Regulations made under the provisions do not appear to be subject to parliamentary confirmation.

### Consultation

- 25 There are two concerns about consultation.
- 26 First, the consultation relating to introduction of this regulation making power has been inadequate. Treasury officials criticised the "... inadequate level of consultation for a proposal that would create such a wide-ranging power to amend or override an Act".<sup>14</sup> A transitional override power is a matter of great concern, and should be given full consideration, including proper public consultation. It should not be introduced through supplementary order paper.
- 27 Second, the level of consultation for any exemptions or regulations made under the provision is not adequately defined. Given the potential impact of exemptions and regulations it is more appropriate that a more clearly defined consultation process be set out in the provision.

### Recommendations

- 28 The Law Society recommends that:
- 28.1 Proposed section 227B be removed from the Bill, on the basis that the purported rationale for its inclusion does not meet the threshold requirements for creating such powers.
  - 28.2 Alternatively, if section 227B is included in the Bill, its scope should be narrowed so that it:
    - 28.2.1 does not allow a regulation that has the effect of imposing or increasing a liability for tax, use of money interest or penalties not already imposed under the primary legislation;
    - 28.2.2 does not allow a regulation that alters a right of a taxpayer to dispute or to challenge a tax liability or decision of the Commissioner, or the application of the statutory time bar;
    - 28.2.3 does not allow a regulation that alters Part 2 of the Act (which contains the care and management provisions in sections 6 and 6A), or any of the provisions relating to the Commissioner's information gathering rights, privilege and non-disclosure in sections 16 – 21 (inclusive), or Parts 4 (Secrecy), 5 (Determinations) and 5A (Binding Rulings);

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<sup>14</sup> Supplementary Departmental Disclosure Statement, at [2.3.1].

28.2.4 requires regulations to be "necessary" for the implementation of business transformation, rather than "necessary or desirable" (proposed section 227B(3)(a)); and

28.2.5 specifies a minimum level of consultation, which must be meaningful (section 227B(3)(c)).

29 The Law Society wishes to be heard.

A handwritten signature in black ink, appearing to be 'K. Beck', written in a cursive style.

Kathryn Beck  
**President**  
15 September 2016

## **Appendix 1**

### **227B Regulations providing for transitional exemptions and other matters**

(1) The Governor-General may, by Order in Council on the recommendation of the Minister of Revenue, make regulations—

(a) providing transitional and savings provisions concerning the coming into force of new provisions of this Act that may be in addition to, or in place of, other regulations made under this Act:

(b) prescribing how the new provisions and the old provisions must be applied or modified in order to ensure the continued administration of the tax system:

(c) providing that, subject to such conditions as may be specified in the regulations, during a specified transitional period,—

(i) specified provisions of this Act, including definitions, do not apply, or apply with modifications or additions, or both:

(ii) specified terms have the meaning given to them by the regulations:

(iii) specified provisions repealed or amended or revoked by this Act are to continue to apply:

(d) specifying—

(i) categories of persons who may be exempted from some or all of an obligation under this Act:

(ii) the grounds for the grant of an exemption:

(e) providing for any other matters necessary for facilitating or ensuring an orderly transition from the provisions of any enactments replaced by this Act to the provisions of this Act.

(2) Regulations made under this section must include a date on which the regulations are repealed, and that date must be no later than 3 years after the date on which they are made.

(3) The Minister may recommend the making of regulations under this section only if satisfied that the regulations—

(a) are consistent with the purposes of this Act and are necessary or desirable for the orderly implementation of the business transformation process; and

(b) are consistent with the purposes of the specified enactments; and

(c) have been the subject of a consultative process.

(4) This section and any unexpired regulations made under this section expire and are repealed on 31 December 2021.