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Human Rights Commission
PO Box 6751
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Dear Ms

Complaint by of discrimination based on national origin

I refer to our email exchange on 31 January 2017.

I understand that was born in the United States of America ("the US") and holds dual citizenship for both the US and New Zealand. The US Foreign Account Tax Compliance Act 2010 ("FATCA") requires 's New Zealand bank to report her financial dealings (ultimately) to the US Government. has raised a concern that this requirement could be discriminatory on the basis of national origin.

Below I set out some background information on FATCA and some reasoning as to why Inland Revenue does not consider has suffered from discrimination, or in the alternative, why any discrimination is justifiable. Hopefully my comments below are clear. Please let me know if elaboration or clarification of any point would be helpful.

The Human Rights Act 1993 – No discrimination under section 21, complaint under Part 1A

We agree with your assessment that this matter is a complaint under Part 1A of the Human Rights Act 1993 ("HRA"). In case it is helpful to , below I have briefly tracked through why we think Part 1A HRA applies and what application of that part means.

Section 21 (1) (g) of the HRA prohibits discrimination on the grounds of ethnic or national origins, which includes nationality or citizenship.

Section 21B (1) of the HRA qualifies section 21 (1) by stating that an act or omission is not unlawful within the meaning of section 21 (1) if it is authorised or required by an enactment.

On 12 June 2014, the New Zealand Government signed an Intergovernmental Agreement ("IGA") with the US Government to assist New Zealand financial institutions (such as Ms s bank) to comply with FATCA. Doing so was consistent with other OECD countries. On 30 June 2014, the New Zealand legislation enabling New Zealand Financial Institutions to meet their FATCA obligations became law.[1]

Given section 21B (1) of the HRA, in our view, and as noted in your letter of 27 January 2017, the only option to is a claim that Part 1A of the HRA has been breached.

[1] This legal framework is contained in Part 11B of the Tax Administration Act 1994.

Section 79 (2) of the HRA provides that:

"If the complaint or part of it concerns an ... act or omission that is authorised or required by an enactment, the complaint or relevant part of it must be treated only as a complaint that the enactment is in breach of Part 1A."

We note for completeness that if this matter were to be brought before the Human Rights Tribunal, the only remedy available, if was successful, is a declaration that the reporting requirements of concern to are inconsistent with the right to freedom from discrimination under the New Zealand Bill of Rights Act 1990. Such a declaration does not affect the validity, application, or enforcement of the New Zealand legislation enabling the FATCA requirements. However, such a declaration will mean that the matter will be brought to the attention of the House of Representatives for their consideration.

Inland Revenue does not accept that Part 1A has been breached for the reasons set out below.

The Foreign Account Tax Compliance Act 2010

FATCA was enacted by the United States in 2010. The aim of FATCA was to combat tax evasion by US taxpayers. FATCA requires overseas financial institutions (for instance, New Zealand banks), to provide the US Internal Revenue Service ("IRS") with information about the accounts and investments they hold for US persons. If the financial Institutions do not comply with FATCA they will be sanctioned by a 30% US withholding tax on all of its US sourced payments.

For the purposes of FATCA, US persons is defined as including US citizens, US residents and certain entities that are controlled by US citizens or residents. So those covered by the FATCA reporting requirements are wider than just US citizens.

Under the IGA, Inland Revenue essentially acts as an intermediary between New Zealand financial institutions and the IRS. The purpose of this is to try and alleviate some of the reporting burdens on the financial institutions.

The US tax system is a little unusual by international standards in that it taxes all US citizens and individuals granted permanent residency whether they live in the US or not. It is not appropriate for Inland Revenue officials to comment on the merits or otherwise of tax policy decisions made by foreign governments. We note though that it is generally recognised that, with the benefits of citizenship of any country comes an obligation to abide by the laws of that country.

FATCA relates to information provision only. It does not increase or otherwise alter a person's actual tax liability in the US. What it does do is make it more likely that the US will be able to locate people to meet any current or historic US tax obligations they may have. US tax obligations can generally be discounted by tax paid in New Zealand under a US-New Zealand double taxation agreement.

FATCA doesn't make US taxpayers worse off financially because, if there is a tax liability, it will exist independent of the FATCA information exchange mechanism.

Policy Justifications for NZ legislation allowing FATCA information provision

FATCA is part of a major global initiative to combat international tax evasion. FATCA is based on the idea of global automatic exchange of certain information by financial

institutions. Previously such exchanges of information have either occurred on an ad hoc basis or annually as part of double tax treaties between tax authorities.

Automatic exchange of information between jurisdictions is the new international standard endorsed by the G20 and the Organisation for Economic Cooperation and Development ("OECD"). The OECD has devised a common reporting model for financial accounts based on the FATCA model. This model is seen as complementing the OECD's base erosion and profit shifting ("BEPS") work. The BEPS initiative is aimed at ensuring that entities and individuals that operate in numerous jurisdictions pay an appropriate amount of tax. Automatic information exchange and transparency in tax affairs is seen as an important compliance tool for this programme.

Under the IGA, the US provides a commitment to pursue equivalent levels of reciprocal automatic information exchange, so it is anticipated that New Zealand will benefit from information exchanges in relation to New Zealand tax residents that have undeclared US bank accounts. This information will assist in ensuring that all New Zealanders also pay the correct amount of tax on their worldwide income.

We note that a number of concerns were raised in submissions before the signing of the IGA with the US and the passing of NZ legislation allowing for the exchange of information. Possible breaches of privacy were one issue raised. Officials examined this issue and reached the view (with the input of the Privacy Commissioner) that on balance, the concerns were outweighed by other public interest considerations. The Privacy Commissioner's office has published an FAQ document about FATCA which may be of interest (https://www.privacy.org.nz/news-and-publications/guidance-resources/fatca-faqs/).

In terms of public interest considerations, we note that, in particular, not entering into the IGA would mean that NZ financial institutions would effectively be faced with a choice of:

- Complying with FATCA and breaching the privacy principles relating to the collection and disclosure of client information; or
- Complying with privacy law and suffering the imposition of a 30% withholding tax on investments into the US – the world's largest capital market. Such an imposition, or avoiding it by not investing into the US at all, would have obvious flow-on effects to our wider financial system.

Discrimination on the basis of nationality was another issue raised and considered. As noted above, "US Person", for the purposes of the IGA and FATCA, is not synonymous with "US Citizen". We note also that, like all tax bills, the bill establishing the framework for the transmission of information under FATCA was vetted for consistency with the New Zealand Bill of Rights Act by the Ministry of Justice.

Summary

For the reasons set out in this letter, we do not consider FATCA reporting discriminates on the basis of nationality. Alternatively, any distinction on grounds of nationality with respect to the obligations under FATCA is justified under section 5 of the New Zealand Bill of Rights Act. The provisions are therefore not discriminatory.

You have drawn our attention to the Commission's dispute resolution services. Inland Revenue simply administers FATCA and is acting lawfully.

Generally the point of mediation is to reach some sort of settlement. Inland Revenue will not be in a position to exempt I or her financial institutions from compliance with FATCA, nor is there any other issue that the parties could "settle" in mediation. While we are prepared to attend mediation if that would be of assistance, it seems unlikely that we would have anything to add to the information set out in this letter.

Having said that, please do let me know if there are any points I have raised which you or would like me to elaborate on.

Yours sincerely

Amanda Rapley
Corporate Counsel