

9 May 2023

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Fuel Industry (Improving Fuel Resilience) Amendment Bill

Purpose

1. We have considered whether the Fuel Industry (Improving Fuel Resilience) 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 24586/4.3). 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 s 21 (right to be secure against unreasonable search or seizure) and s 14 (freedom of expression). Our analysis is set out below.

The Bill

4. The Bill amends the Fuel Industry Act 2020 (the principal Act).
5. The Bill provides a statutory framework for implementing the Government's fuel resilience policy package announced in November 2022. It aims to take an adaptive approach to ensuring that New Zealand has adequate fuel stocks to mitigate the risk of plausible fuel disruptions arising from international or domestic events. Specifically, the Bill:
 - a. Introduces a minimum fuel stockholding obligation (MSO) on fuel importers with the right to draw fuel from bulk storage facilities in New Zealand (obliged persons). Obligated persons will be required to hold prescribed levels of stocks of diesel, petrol, and aviation kerosene (obligation fuels).
 - b. Sets out a framework for exempting obliged persons from the MSO, reflecting that there will be exceptional circumstances (such as a natural disaster) in which it would not be reasonable or beneficial to expect fuel wholesalers to comply with the MSO.
 - c. Provides for regulation-making powers on various matters, including to amend the definition of obliged persons and obligation fuels, and to prescribe information disclosure requirements.
 - d. Provides for the imposition of civil pecuniary penalties for the contravention of the MSO or an information disclosure requirement, and a discretion to accept enforceable undertakings from obliged persons.

Consistency of the Bill with the Bill of Rights Act

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

6. 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.¹
7. Clause 62 of the Bill requires fuel industry participants² to comply with any requirements to disclose information about the resilience of engine fuel supplies in New Zealand to the government as may be prescribed by regulation (as set out in cl 63). A person who contravenes an information disclosure requirement may be ordered to pay a civil pecuniary penalty of up to:
 - a. \$500,000 in the case of an individual, or
 - b. in any other case, the greater of \$5 million or either:
 - i. three times the value of any resulting commercial gain, or
 - ii. ten percent of turnover in each accounting period in which the contravention occurred.
8. We consider that these powers could constitute a search under s 21 of the Bill of Rights Act.
9. Ordinarily, 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 in terms of s 5 of that Act.³ However, the Supreme Court has held that logically, an unreasonable search cannot be demonstrably justified under s 5 of the Bill of Rights Act.⁴ Rather, in order for a statutory power to be consistent with s 21, engagement of the right must not be unreasonable. This assessment 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 of the search.⁵
10. We consider that the information disclosure requirements in the Bill are reasonable for the purposes of s 21 of the Bill of Rights Act:
 - a. Requiring disclosure of information about the resilience of engine fuel supplies is clearly connected to the purpose of promoting resilience of such supplies. The

¹ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

² Defined in the principal Act as a person that purchases, or sells and supplies, engine fuel other than as an end user or an incidental part of the hiring, leasing, or selling of motor vehicles.

³ The s 5 inquiry asks whether the objective of the provision is sufficiently important to justify some limitation on the right; and if so, whether the limitation is rationally connected and proportionate to that objective and limits the right no more than reasonably necessary to achieve that objective: *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

⁴ Above n 1 at [162] per Blanchard J.

⁵ *Ibid* at [172] per Blanchard J.

requirements apply to those participating in the fuel industry and appear unlikely to involve intrusion into personal privacy.

- b. Regulations requiring the disclosure of information cannot be made unless the Minister has had regard to the need for information about fuel stockholding levels; has consulted any fuel industry participants likely to be significantly affected by the regulations; and is satisfied as to the necessity or desirability of regulations, having regard to the purpose of promoting fuel resilience and to the costs and benefits.
11. We are mindful that the obligation to comply with any information disclosure requirement could also be considered to engage s 14 (freedom of expression) of the Bill of Rights Act. In this event, we consider that any limit on s 14 is justified under s 5 of that Act for similar reasons. The information required to be disclosed is likely to be of limited expressive value. The requirement to provide information is rationally connected to the important objective of providing clearer government oversight of fuel stocks and vulnerabilities; and appears proportionate to that objective.
 12. We also note for completeness that secondary legislation must be consistent with the Bill of Rights Act, otherwise there is a risk it will be ultra vires (go beyond the authority of the primary legislation).

Conclusion

13. 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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