

Major Events Management Bill

20 November 2006

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: MAJOR EVENTS MANAGEMENT Bill

1. We have considered whether the Major Events Management Bill ('the Bill') (PCO 7465/7) is consistent with the New Zealand Bill of Rights Act 1990 ('Bill of Rights Act'). We understand that the Bill is likely to be considered by the Cabinet Legislation Committee on 23 November 2006. This advice is based on the latest version of the Bill that we have received.
2. We have concluded that the Bill appears to be consistent with the Bill of Rights Act. In reaching this conclusion, we considered potential issues of inconsistency with the right to freedom of expression (s 14), the right to be secure against unreasonable search and seizure (s 21), the right to be presumed innocent until proved guilty (s 25(c)) and the right to protection against double jeopardy (s 26(2)).

What the Bill does

3. Under the Bill appropriate events may be declared to be major events for the purposes of the Act. Representations that suggest persons, brands, goods, or services have an association with a major event will be prohibited when they do not have such an association. The Bill would also prohibit advertising from intruding on a major event activity and the attention of the associated audience, as well as prohibiting the use of certain emblems, names, and words relating to Olympic Games and Commonwealth Games without appropriate authorisation.

The purpose of the Bill

4. The Bill's primary purpose is to provide certain protections for designated 'major events' with the aim of obtaining maximum benefits from the major event for New Zealanders as well as preventing unauthorised commercial exploitation of the event at the expense of the major event organiser or sponsor.

Issues of inconsistency with the Bill of Rights Act

Clauses containing limitations on the right to freedom of expression (section 14)

5. The Bill contains several proposals that limit the freedom of expression:
 - (a) Clause 9 (No representation of association with major event)
 - (b) Clause 17 (No advertising in clean zone without authorisation)
 - (c) Clause 18 (No advertising that is clearly visible from clean zone)

(d) Clause 19 (No advertising in clean transport route without authorisation)

(e) Clause 52(2) (Order to disclose information or publish advertisement)

6. **Clause 9** proposes to prohibit a person from making a representation in a way likely to suggest to a reasonable person an association between the major event and goods or services; a brand of goods or services; or a person providing goods or services. An 'association' is defined as a 'relationship of connection, whether direct or implied, such as approval, authorisation, sponsorship, or commercial arrangement and includes offering, giving away, or selling a ticket to a major event activity in connection with the promotion of goods or services.' The prohibition in clause 9 applies only during the major event's protection period.
7. **Clause 11** includes several exceptions to the prohibition in clause 9 (and the presumption in clause 10, see paragraph 25 below). Clause 9 does not, for example, apply to expressly authorised representations and representations that in accordance with honest practices in industrial or commercial matters concern the characteristics of goods or services; or are necessary to indicate the intended purpose of a product or service; are for the purpose of reporting (on television or radio, film, internet and other means) by a person who ordinarily engages in the business of reporting; or – in the case of a word – comprises the whole or part of an existing registered trade mark.
8. **Clauses 17 and 19** prohibit unauthorised advertising in areas that have been declared by notice to be clean zones (e.g. the venue where a major event takes place) or clean transport routes (transport hubs and routes leading to that venue). These clauses do not require an association of the advertising with the event. Furthermore, they only apply during the clean period (i.e. the time period that has been declared to be a clean period in relation to a particular clean zone or clean transport route).
9. **Clause 18** prohibits unauthorised advertising that is clearly visible from anywhere within the clean zone during a clean period, including advertising on an aircraft (exceptions apply). The terms 'clearly visible' are defined as 'visible to an extent that a reasonable person would consider the content, subject, message, or purpose of the advertisement to be able to be determined without the use of visual apparatus other than contact lenses or glasses'.
10. **Clause 21** provides some exceptions to the proposed prohibitions in clauses 17, 18 and 19. These exceptions include advertising done in accordance with honest practices in industrial or commercial matters by an existing organisation continuing to carry out its ordinary activities. Also excluded are articles of clothing and other personal items (e.g. bags and pushchairs) worn, carried or used by members of the public (unless that item is being worn, carried, or used in co-ordination with other persons with the intention of intruding on a major event activity or the attention of the associated audience); or by participants in, or persons officiating at, a major event activity; or volunteers engaged in the management or conduct of a major event activity.
11. **Clause 52(2)** provides that the Court, on the application of a major event organiser and if it is satisfied that a person has breached any of section 9, may make an order (a) requiring that person (or any other person involved in the breach) to disclose information, as specified in the order, to the public, to a particular person or to a particular class of persons, or (b) requiring that person to publish corrective statements as specified in the order.

Section 14: the right to freedom of expression

12. We have considered whether clauses 9, 17, 18, 19, and 52 are inconsistent with section 14 of the Bill of Rights Act which provides:

"Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form."

13. The right to freedom of expression in section 14 extends to all forms of communication that attempt to express an idea or meaning,^[1] and extends to commercial speech (such as advertising).^[2] Overseas case law suggests that not all forms of expression are equally deserving of protection and commercial expression is considered to reside within the periphery of the right.^[3] Courts in similar jurisdictions to New Zealand have held the view that commercial expression is of less importance than political or artistic expression and consequently limitations on the right in this context are easier to justify.^[4] The right to freedom of expression also includes the right to say nothing or the right not to say certain things.^[5]

Justification under section 5 of the Bill of Rights Act

14. A limit on a right contained in the Bill of Rights Act can be justified in terms of section 5 of the Bill of Rights Act where it meets a significant and important objective, and where there is a rational and proportionate connection between the limitation on the right and that objective.

A Significant and Important Objective

15. The Bill's primary purpose is to prevent unfair commercial exploitation of an event at the expense of the major event organiser or an official sponsor of the event. The Ministry accepts that this is a sufficiently important and significant objective for the purposes of this advice.

Rational and Proportionate Connection

Clauses 9, 17, 18 and 19

16. In our analysis, there is a rational and proportional connection between the limitations on the freedom of expression in clauses 9, 17, 18 and 19, and the objectives pursued by the Bill, because:
- existing legislation insufficiently addresses the need to protect major event organisers and major event sponsors from ambush marketing. The proposals in clauses 9, 17, 18 and 19 are necessary to effectively combat these practices;
 - the prohibition in clause 9 only applies for the declared protection period for each major event and the prohibitions in clauses 17, 18 and 19 will only apply during the designated clean period, which will be less than the overall protection period;
 - the Bill sets a high threshold for declaring an event as a major event;

- the impact of the proposed restrictions on the freedom of expression of individual spectators has been minimised as spectators remain entitled to wear clothing, or carry flags and banners that express their opinions (e.g. supporting the teams or players of their preference) where that does not amount to advertising. If a banner has a small logo in the corner, this would not be covered by the Bill (as opposed to a large and clearly visible name or logo of a non-sponsor company).
17. For these reasons, we conclude that the limitations these clauses place on the right to freedom of expression are justified under section 5 of the Bill of Rights Act.

Clause 52

18. The proposal in clause 52 amounts to compulsion to provide information and is therefore *prima facie* inconsistent with section 14 of the Bill of Rights Act. On top of the overall purpose of the Bill, clause 52 is designed to offset the impact of representations that could deceive or confuse the public. Similar provisions also exist under the Fair Trading Act 1986 and the Defamation Act 1992.
19. Correction of a deceptive or misleading representation will only be effective if it reaches an audience on a similar scale to the original representation or advertisement. Clause 52 is one of a range of civil remedies available under the Bill, and would be ordered by a court only where appropriate. We therefore consider the limitation on the freedom of expression in clause 52 to be justifiable under section 5 of the Bill of Rights Act.

Section 21: the right to be secure against unreasonable search and seizure

20. Clauses 38 (Functions of enforcement officer) and 40(1) (Power of enforcement officer to seize of cover property) raise issues under section 21 of the Bill of Rights Act, which affirms the right to be secure against unreasonable search and seizure.
21. The Bill also contains clauses that authorise the delivery up, forfeiture, retention, destruction, disposal, erasure of goods that have been seized:
- Clause 51 (Order for erasure)
 - Clause 53(1) (Order for delivery up of goods, material, or object)
 - Clause 54 (Order for disposal or retention of goods, material, or object)
 - Clause 73(1) (Disposal of documents, articles, or things seized)
22. In assessing the substantive "reasonableness" of any power of search and seizure, we are of the view that section 5 (Justified limitations) of the Bill of Rights Act is of limited application. It would appear difficult to use section 5 to justify a search that has already been assessed as unreasonable in terms of section 21.
23. However, a number of the considerations which are normally relevant in the context of a section 5 inquiry will also be material in assessing the "reasonableness" of a power of search and seizure. In order to assess the reasonableness of the search, seizure and other monitoring powers, we assess:

- why these powers are necessary for the investigation and enforcement of the Act;
 - whether the objectives can be achieved by less intrusive means;
 - how the powers are to be exercised;
 - where the powers can be exercised (does it include a dwelling or marae);
 - what exceptions will apply; and
 - which safeguards will be provided.
24. In our analysis the search and seizure powers proposed in this Bill are not unreasonable and are therefore not inconsistent with section 21 of the Bill of Rights Act because:
- the proposed powers are provided in order to ensure compliance with the Act and establish a regime that is considered to be the least intrusive possible;
 - the clean zones will only exist for limited periods of time, not for the entire protection period, and enforcement officers will only have these powers during these time periods;
 - the powers of enforcement officers under the Bill are tailored to the infringement provisions and the types of harms that they will be required to address. As such, the right to enter property is limited to those situations where the place to be entered is part of the clean zone or the officer has a search warrant.
 - the powers provided for in the Bill must be granted by the Court, either by granting a search warrant or by making an order under clauses 51, 53, 54 and 73.
 - the infringer must first be given the opportunity to address the infringement before an enforcement officer takes any action (see clause 40(2)).
 - provision is also made in clause 43 for the return of seized property within an appropriate timeframe.

Clauses raising issues regarding the right to be presumed innocent until proved guilty (section 25(c))

25. Clause 9 prohibits a person from making an unauthorised representation suggesting an association with a major event. Clause 10 contains the presumption that a representation is in breach of clause 9 if it includes (a) a major event emblem, (b) a major event word or major event words, or (c) a representation so closely resembling a major event emblem or a major event word or words that is likely to deceive or confuse a reasonable person.
26. According to clause 12 a person commits an offence if he or she knowingly breaches clause 9, or if he or she (a) imports into New Zealand for the purpose of trade or manufacture; (b) sells or exposes for sale; or (c) has in his or her possession for the purpose of trade or manufacture, any goods to which that person knows a representation that breaches clause 9 is applied. Every person who commits this offence is liable on summary conviction to a fine not exceeding \$ 150,000.

27. The presumption in clause 10 places an evidential burden on the defendant to disprove the breach of clause 9 and therefore raises an issue under section 25(c) (presumption of innocence) of the Bill of Rights Act.

Section 25(c): the right to be presumed innocent until proved guilty

28. Section 25(c) provides:

"Everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to law."

29. The right to be presumed innocent until proved guilty implies that an individual must not be convicted where reasonable doubt as to her or his guilt exists. This means that the prosecution in criminal proceedings must prove, beyond reasonable doubt, that the defendant is guilty. Presumptions give rise to an issue of inconsistency with section 25(c) because the defendant is required to disprove (on the balance of probabilities) the presumption to escape liability; whereas in other criminal proceedings a defendant must merely raise a defence in an effort to create reasonable doubt. Where a defendant is unable to disprove a presumption, she or he could be convicted even though reasonable doubt exists as to her or his guilt.
30. We consider that the presumption in clause 10 can – on balance - be considered a reasonable limit on the right to be presumed innocent until proved guilty by law in terms of section 5 of the Bill of Rights Act, because:
- the offence in clause 12 is a regulatory offence rather than a truly criminal offence, which involves the punishment of acts involving moral fault, an element largely lacking in regulatory offences;
 - it contributes to achieving the aim of the Bill, which is – among other things – to prevent unfair commercial exploitation of an event at the expense of the major event organiser or an official sponsor of the event;
 - the Order in Council designating the words or emblems to be protected as major event words or emblems will be published, and thus businesses and advertisers will be on notice which words and emblems are protected. It is therefore particularly within the realm of the defendant to rebut the presumption that a representation is in breach of clause 9 if it includes a major event emblem, word or words, or a representation so closely resembling a major event emblem or a major event word that is likely to deceive or confuse a reasonable person;
 - under clause 12 the prosecution still has to prove that the defendant ‘knowingly’ breached clause 9. Furthermore, clause 11 contains several exceptions (see paragraph 7 above) to the prohibition in clause 9 and the presumption in clause 10;
 - clause 13 of the Bill contains some defences in case of prosecution for a breach of clause 9 that override the presumption in clause 10;
 - the penalty provided for in clause 12 (a fine not exceeding \$150,000) - although not at the lower end of the scale - is in line with similar provisions in the Trades Marks Act 2002 and the Copyright Act 1994. It thereby takes into account that the Bill covers a wider range of

conduct than those Acts and could potentially have greater impact on everyday business activity. The penalties imposed under the Bill do therefore not include a term of imprisonment, as provided for in those other Acts.

The right to protection against double jeopardy (s 26(2))

31. Clause 34 of the Bill provides that any right of action or other remedy available under this Act (whether civil or criminal) may be taken, proceeded with, or heard in conjunction with any other action or remedy available under this Act. We have considered whether this provision infringes upon the protection against double jeopardy affirmed in section 26(2) of the Bill of Rights Act. The purpose of clause 34 is to ensure that event organisers will still be able to seek civil remedies before a court even where a criminal prosecution has been brought by the Crown. It therefore appears to be procedural only and does not subject individuals to potential double jeopardy.

Conclusion

32. Overall, we have formed the view that the Major Events Management Bill appears to be consistent with the Bill of Rights Act. In reaching this conclusion, we have given particular emphasis to the purpose of this legislation.

Melanie Webb
Manager, Ministerial Advice
Office of Legal Counsel
Cc Minister of Justice
Minister for Economic Development

Margaret Dugdale
Policy Manager
Bill of Rights/Human Rights Team

Footnotes

1 *R v Keegstra* [1990] 3 SCR 697,729,826.

2 *Irwin Toy Ltd v A-G (Quebec)* (1989) 58 DLR (4th) 577 (SCC).

3 *RJR-MacDonald Ltd v Attorney General of Canada* (1995) 127 DLR (4th) 1; see on this point the dissenting judgment of La Forest J.

4 Richard Claydon & Hugh Tomlinson *The Law of Human Rights* (Oxford University Press, Oxford, 2000), Vol.1, 15.171 – 15.176

5 *RJR MacDonal v Attorney-General of Canada* (1995) 127 DLR (4th)1

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