

19 June 2020

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Fuel Industry Bill

Purpose

1. We have considered whether the Fuel Industry 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 with the latest version of the Bill (PCO 22620/4.0). We will provide you with further advice if the final version of the Bill 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 this conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression) and s 21 (unreasonable search and seizure) of the Bill of Rights Act. Our analysis is set out below.

The Bill

4. The Bill introduces a new regulatory framework for the fuel industry in response to the Commerce Commission's report on its market study into the retail fuel sector. The purpose of the Bill is to promote competition in engine fuel markets for the long-term benefit of consumers. It does this by providing for:
 - a. a terminal gate pricing regime, requiring wholesale fuel suppliers to publicly post the prices they sell specified engine fuel to wholesale customers at storage terminals;
 - b. a regime governing contractual terms between wholesale suppliers and their wholesale customers (excluding commercial customers);
 - c. requirements for the display of information relating to the price of fuel at retail fuel sites;
 - d. requirements for fuel industry participants to collect and disclose certain information to enable monitoring of the fuel market, assessment of the regulatory regime and enforcement of the regulatory regime;
 - e. a disputes resolution scheme for disputes in relation to the terminal gate pricing and wholesale contract provisions; and
 - f. enforcement powers for the Commerce Commission and civil pecuniary penalties based on those in the Commerce Act 1986.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of Expression

5. Section 14 of the Bill of Rights Act affirms that 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. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹
6. Several clauses in the Bill require fuel industry participants, in particular wholesale suppliers and retailers, to disclose certain information or otherwise regulates how information must be imparted:
 - a. clause 8 of the Bill requires wholesale suppliers to set and publicly post a price for each specified engine fuel it has the right to draw at the facility at which resellers may request supply (known as terminal gate pricing); and
 - b. clause 20 of the Bill requires that a retailer or person responsible for displaying information at a retail fuel site complies with consumer information requirements to be prescribed in regulations.
7. 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. The s 5 inquiry asks whether the objective of the provision is sufficiently important to justify some limitation on the freedom of expression; and if so, whether the limitation is rationally connected and proportionate to that objective and limits the freedom of expression no more than reasonably necessary to achieve that objective.²
8. We consider that the limitations on s 14 of the Bill of Rights Act are rationally connected to the important objective of promoting competition and transparency in the fuel market for the long-term benefit of consumers.
9. The terminal gate pricing regime will provide for greater transparency in the wholesale fuel market, and reduce barriers to entry and expansion for entrants in the retail fuel market by providing a source of fuel supply. Improving transparency at retail fuel outlets will assist consumers and promote competition. Furthermore, under cl 21 of the Bill, the Minister may only recommend regulations if satisfied they are needed to provide transparency of retail fuel prices to facilitate informed purchasing by consumers.
10. For these reasons, we conclude that any limits to the freedom of expression imposed by the Bill are justified under s 5 of the Bill of Rights Act.

Section 21 – Freedom from unreasonable search and seizure

11. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search and seizure, whether of the person, property or correspondence,

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

² *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [123].

or otherwise. The right protects a number of values including “property, personal freedom, privacy and dignity”.³

12. Clause 24 of the Bill creates an obligation for all fuel industry participants to comply with the information disclosure requirements prescribed by regulation. The information disclosure requirements may be prescribed by regulation as set out in cl 25. We consider these powers could constitute a search under s 21 of the Bill of Rights Act.
13. A search is consistent with s 21 of the Bill of Rights Act if it is “reasonable”. The Supreme Court has held an unreasonable search cannot, logically, be demonstrably justified under s 5 of the Bill of Rights Act.⁴ In assessing whether the information gathering power in the Bill is reasonable, we have considered the importance of the objective and whether the provisions are rationally connected and proportionate to that objective.
14. We consider that the information gathering powers in the Bill are reasonable for the purposes of s 21 of the Bill of Rights Act. The obligation of fuel industry participants to disclose information is reasonable and necessary for the effective administration of the Bill and monitoring of the engine fuel market. Furthermore, the regulations in cl 25 (which will set out the information disclosure requirements) may only be recommended if the Minister is satisfied that they are needed to enable the monitoring of the performance of the fuel markets and ensure that the regulator has sufficient information to assess whether the purpose of the Bill is being met.
15. We therefore consider that the information disclosure obligation is not unreasonable for the purposes of s 21 of the Bill of Rights Act.

Conclusion

16. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

Jeff Orr
Chief Legal Counsel
Office of Legal Counsel

³ See, for example, *Hamed v R* [2012] 2 NZLR 305 at [161] per Blanchard J.

⁴ *Ibid* at [162].