

30 April 2021

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Maritime Transport (MARPOL Annex VI) Amendment Bill

Purpose

1. We have considered whether the Maritime Transport (MARPOL Annex VI) 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 23362/11.0). 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 14 (right to freedom of expression) and s 21 (right to be secure against unreasonable search and seizure). Our analysis is set out below.

The Bill

4. The International Maritime Organization adopted the International Convention for the Protection of Pollution from Ships (MARPOL) in 1973. MARPOL aims to prevent and minimise ship pollution in the marine environment and is the primary international regulation for addressing the impacts of climate change on shipping. There are six annexures categorised by pollution type.
5. New Zealand's international obligations under MARPOL are largely implemented through the Maritime Transport Act 1994 (the MTA), and maritime and marine protection rules made under the MTA.
6. At the end of 2019, Cabinet agreed that New Zealand would accede to Annex VI of MARPOL, which specifically deals with emissions to air from ships. Annex VI seeks to address:
 - a. the impact of air pollution from shipping activities on human health and the environment; and
 - b. the impact of emissions from shipping activities on climate change and ozone layer depletion.
7. Before New Zealand can accede to Annex VI, minor amendments to the MTA are needed to ensure that the provisions relating to rule-making powers and enforcement provide the authority to fully implement the legal obligations of Annex VI.

8. This Bill amends the MTA and secondary legislation, and provides powers for:
- the Minister to make marine protection rules in relation to Annex VI substances;
 - the Director of Maritime New Zealand (the Director) to conduct inspections and audits in relation to MARPOL Annex VI requirements; and
 - the Director to detain ships and seize marine protection products that are likely to be in contravention of MARPOL Annex VI requirements.

Consistency of the Bill with the Bill of Rights Act

Section 14 - Right to freedom of expression

9. Section 14 of the Bill of Rights Act protects the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind and any form. The right to freedom of expression has also been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹
10. Clause 13 of the Bill inserts new s 396A, which gives the Director the power to require inspections and audits in relation to Annex VI of MARPOL. The new s 396A(3) allows the Director to carry out inspections and audits as they consider necessary in the interests of facilitating and reviewing trials of ship emission reduction and control technologies, and monitoring compliance with conditions of exemptions. In doing so, the Director can, under the new s 396A(4)(a) require that persons provide such information as the Director considers relevant to the inspection or audit.
11. This provision *prima facie* limits freedom of expression under s 14 of the Bill of Rights Act.
12. 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
13. To the extent that the provisions of the Bill engage the right in s 14, we consider that the requirements are rationally connected to the objective of the Bill, which is to protect human health and the environment by ensuring compliance with the provisions of Annex VI.
14. We also consider that the provision is proportionate and limits the right no more than reasonably necessary. The information required under this provision is regulatory in nature, for a specific purpose and is of limited expressive value. The provision applies only to persons in the marine and shipping industry, as specified in the new s 369A(2). Those persons are part of an already regulated industry who have obligations to ensure the marine environment is protected. We also note that a similar provision already exists in s 369 of the MTA.

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

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

15. 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 - Right to be secure against unreasonable search and seizure

16. 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, or correspondence or otherwise.
17. The reasonable justification test, set out in s 5 of the Bill of Rights Act, does not apply to s 21 of the Bill of Rights Act as the Supreme Court has held that an unreasonable search cannot logically be demonstrably justified in a free and democratic society.³
18. Whether a search will be reasonable 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.⁴ The greater the degree of intrusiveness, the greater the need for justification and attendant safeguards.
19. As outlined at paragraph 10 above, the new s 396A gives the Director the power to require inspections and audits in relation to Annex VI requirements and in some instances the Director may, in writing, require certain information or samples of a ship's fuel oil. While the new s 396A does not explicitly authorise entry, we note that the MTA already provides for a general power of entry. Under s 453(1) of the MTA, generally⁵ every person duly authorised by the Director may, at any reasonable time or times, go on board a ship or enter any building or place for the purpose of carrying out his or her functions, duties, or powers under the MTA.
20. Clause 14 of the Bill amends s 397 of the MTA, which gives the Director the power to do a number of things including detain ships and seize marine protection products. The amendment specifically allows the Director to exercise that power where they believe on clear grounds that, following an inspection or audit under the new s 396A, there is likely to be a contravention of the Annex VI requirements, and where the master or crew are not familiar with essential shipboard procedures relating to prevention of air pollution from ships and implementation for the purposes of implementing Annex VI.
21. We consider that the search and seizure powers contained in these provisions appear to be for legitimate and appropriate purposes and are therefore reasonable in terms of s 21 of the Bill of Rights Act. In particular, these powers are necessary to monitor compliance with the provisions of Annex VI, MTA and rules and regulations made under the MTA.⁶ Individuals and organisations that operate within such a regulated industry can expect to be subject to scrutiny to ensure compliance with the law.

³ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [162].

⁴ At [172].

⁵ No such duly authorised person shall enter a dwellinghouse, a marae, or a building associated with a marae, except with the consent of an occupier, or with a warrant issued under s 454 of the MTA.

⁶ Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [18.25.19].

Conclusion

22. 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