

6 August 2021

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Land Transport (Clean Vehicles) Amendment Bill

Purpose

1. We have considered whether the Land Transport (Clean Vehicles) 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 23381/14.0). 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 21 (right to be secure from unreasonable search and seizure) and s 25(c) (right to be presumed innocent until proven guilty). Our analysis is set out below.

The Bill

4. The policy objective underpinning the Bill is to achieve a rapid reduction in carbon dioxide emissions from light vehicles imported into New Zealand to assist New Zealand in meeting its 2050 target and emissions budgets under the Climate Change Response Act 2002, and our domestic and international climate change ambitions and commitments.¹
5. The Bill is an omnibus Bill that:
 - a. Amends the Land Transport Act 1998 to create a clean vehicle standard for vehicle importers of new and used light vehicles, including by establishing targets for reducing carbon dioxide emissions and imposing charges payable for failure to comply with the targets;
 - b. Amends the Land Transport Management Act 2013 to create a clean vehicle discount scheme,² to be administered by the New Zealand Land Transport Agency (NZTA), designed to incentivise the purchase of zero and low emission vehicles by consumers through the issue of rebates or the imposition of charges in relation to the carbon dioxide emissions of a vehicle;

¹ See proposed s 170 in cl 7 of the Bill.

² Note that, for the purpose of clean vehicle discount scheme, the empowering provisions for regulations to impose fees and charges to be paid on the first New Zealand registration of imported new and used light vehicles are contained in proposed s 167A of the Land Transport Act 1998 (cl 5 of the Bill).

- c. Amends the Energy Efficiency and Conservation Act 2000 to provide that regulations may be made that prescribe vehicle labelling requirements to inform consumers about vehicle carbon dioxide emissions levels and rebates receivable or charges payable in relation to light vehicles offered for sale; and
 - d. Amends the Income Tax Act 2007 to ensure that if an employer receives a payment under the clean vehicle discount scheme for a vehicle they provide for private use (and therefore subject to fringe benefit tax), the cost of the vehicle for fringe benefit tax purposes is net of the amount of the payment; and
 - e. Amends the Land Transport (Motor Vehicle Registration and Licensing) Regulations 2011 to prohibit NZTA from issuing a certificate of registration for a vehicle if there are charges payable for the vehicle under the clean vehicle discount scheme and those charges have not been paid.
6. The targets for vehicle importers under the clean vehicle standard are set beginning on 1 January 2023. The standard applies to new and used imported light vehicles (being vehicles under 3,500 kilograms). The charges payable by vehicle importers if the targets are exceeded are set out in proposed ss 177 and 182 of Part 13 of the Land Transport Act 1998 (cl 7).
7. Every vehicle importer will be required to hold a carbon dioxide account with the Director of Land Transport (Director) operated in the manner prescribed by regulations, and containing information also to be prescribed in regulations.³ On and after 1 January 2023, no light vehicle may be issued, for the first time, with evidence of vehicle inspection unless the carbon dioxide account number of the vehicle importer has been provided to the Director, and the carbon dioxide emissions value of the vehicle has been recorded in the vehicle importer's carbon dioxide account.⁴
8. The policy intention of the clean vehicle discount scheme is to require consumers who purchase high emission vehicles to pay a charge in recognition of the environmental and economic costs of that vehicle, and the revenue from that charge will be used to reward consumers who purchase vehicles that will contribute to lowering carbon dioxide emissions.

Consistency of the Bill with the Bill of Rights Act

Section 21 – Freedom from unreasonable search and seizure

9. 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 a number of values including personal privacy, dignity, and property.⁵ A search or seizure which is unreasonable in terms of s 21 cannot be justified in terms of s 5 of the Bill of Rights Act.⁶ Whether a search will be reasonable turns on a

³ Proposed s 185 of the Land Transport Act 1998 (cl 7 of the Bill).

⁴ Proposed s 187 of the Land Transport Act 1998 (cl 7 of the Bill).

⁵ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

⁶ *Ibid* at [162], per Blanchard J.

number of factors, including the nature of the place or object being searched, the degree of intrusion into personal privacy, and the rationale for the search.

10. There are two provisions in the Bill that we consider constitute a search power under s 21 of the Bill of Rights Act as they require information or documents to be produced, and one of these powers also contemplates removal of records for inspection which we consider amounts to a seizure.
11. The power to require a person to appear before a specified person to give evidence,⁷ either orally or in writing, *prima facie* also engages the right to freedom of expression guaranteed under s 14 of the Bill of Rights Act. This right has been interpreted to mean the right not to be compelled to say certain things or provide certain information.⁸ As the information or documents are sought primarily for the purpose of regulatory compliance and enforcement of the clean vehicle standard, we have considered them through the lens of s 21 for the purpose of this advice.

Requirement to produce for inspection any records or other information

12. Proposed s 197 of the Land Transport Act 1998 provides that the Director may, for the purpose of establishing compliance with the requirements and obligations of the clean vehicle standard, require a vehicle importer to produce for inspection any records or other information in the person's possession or control that the Director reasonably considers necessary to establish compliance with the requirements and obligations of the clean vehicle standard.
13. The Director may inspect and make copies of, or take extracts from, the records or other information. Where a vehicle importer chooses to produce the records or other information at their premises or any other place of inspection, the Director may make copies of or remove the records or other information at the place of inspection.⁹ If the Director removes any records or other information, the Director must issue a receipt, return the records as soon as practicable, and allow the person from whom the records were taken to inspect or copy the records. This is accompanied by an offence for failing to refuse or comply with a requirement made under proposed s 197.
14. The power in proposed s 197 of the Land Transport Act 1998 for the Director to require a vehicle importer to produce for inspection any records or other information is limited to records or information that the Director 'reasonably considers necessary' to establish compliance with the requirements and obligations of the clean vehicle standard. We consider that this is an appropriate threshold for a search power in order to assist with monitoring compliance with the clean vehicle standard, for example, to ensure that the requirement to collect and keep data and information in proposed s 194 is being complied with by a vehicle importer.

⁷ Proposed s 197A(4) of the Land Transport Act 1998 (cl 7 of the Bill) defines 'specified person' as an employee of the NZTA or person to whom the Director has delegated the power to receive documents or evidence to.

⁸ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

⁹ There is no power to enter a vehicle importer's premises provided in the Bill.

15. The content of the information that may be required to be provided by vehicle importers appears to relate to information about the vehicles themselves (although may conceivably capture some personal details of purchasers), and is therefore not likely to contain highly personal information, such that the intrusion into personal privacy is limited.
16. Accordingly, we consider that the search and seizure powers contained in s 197 are reasonable.

Requirement to supply information, produce documents or give evidence

17. Proposed s 197B of the Land Transport Act 1998 provides that the Director may require, by written notice, a person to supply information, produce documents or give evidence to a specified person if the Director considers it 'necessary or desirable' for the purposes of performing or exercising the Director's functions, powers or duties in relation to the clean vehicle standards under proposed Part 13 of the Land Transport Act 1998. Failing or refusing to comply with a notice given under proposed s 197B is an offence (see proposed s 197C).
18. We consider that the search powers contained in s 197B are reasonable for the following reasons.
19. We understand the power in proposed s 197B relates to the Director's ability to require information from a person who may hold information that is necessary to establish a vehicle importer's compliance with the clean vehicle standard. The information and documents the Director seeks must be 'necessary or desirable' for the purpose of performing or exercising the Director's functions, powers, or duties under proposed Part 13.
20. The Director has specific responsibilities under proposed Part 13 including to determine whether to close a carbon dioxide account,¹⁰ verify vehicle importation, charges payable and charges paid,¹¹ determine the carbon dioxide emissions value of an imported vehicle (if the manufacturer has not determined an amount),¹² and determine whether a vehicle importer may defer their obligation to meet a target.¹³ To that extent, we consider the power to require such information and documents, and give evidence, while significant powers, appear appropriate and proportionate to give effect to the clean vehicle standard, on the basis that such information may not be held by the vehicle importer or that a third party may hold information necessary to establish a vehicle importer's compliance with the standard.
21. Further, we consider that there appear to be adequate safeguards provided to regulate the Director's powers under proposed s 197B.
 - a. First, proposed s 197D provides any person given notice by the Director has the same privileges in relation to providing information and documents to, and

¹⁰ Proposed s 192 of the Land Transport Act 1998 (cl 7 of the Bill).

¹¹ Proposed s 193(1)(c) of the Land Transport Act 1998 (cl 7 of the Bill).

¹² Proposed ss 174(4) and 176A(3)(d) of the Land Transport Act 1998 (cl 7 of the Bill).

¹³ Proposed s 189 of the Land Transport Act 1998 (cl 7 of the Bill).

answering questions before the Director (or employee or authorised person), as witnesses in proceedings before a court.¹⁴

- b. Second, proposed s 197F provides that any information obtained by the Director under proposed s 197B that is found by a court to have been unlawful exercise of power must be destroyed and will not generally be able to be used in civil proceedings, criminal proceedings or in connection with other powers conferred by the Land Transport Act 1998.¹⁵

22. On this basis we consider that any search and seizures authorised by the Bill are reasonable for the purposes of s 21 of the Bill of Rights Act.

Section 25(c) – Right to be considered innocent until proven guilty

23. Section 25(c) of the Bill of Rights Act affirms the right of everyone charged with an offence to be presumed innocent until proved guilty according to law. The right to be presumed innocent requires the Crown to prove an accused person's guilt beyond reasonable doubt.

24. The Bill adds a number of offences into the Land Transport Act 1998 which are strict liability offences. These are:

- a. proposed s 195 that introduces an offence for, without reasonable excuse, failing to comply with the requirements in proposed s 194 to collect data and keep records for the purposes of the clean vehicle standard;
- b. proposed s 197A that creates an offence for, without reasonable excuse, failing or refusing to comply with a requirement made under proposed s 197 in relation to an inspection or audit; and
- c. proposed s 197C(1)(a) that creates an offence for, without reasonable excuse, failing or refusing to comply with a notice given under proposed s 197B to supply information, produce documents or give evidence.

25. Strict liability offences prima facie limit s 25(c) of the Bill of Rights Act because the accused is required to prove a defence, or disprove a presumption, in order to avoid liability. A provision found to limit a particular right or freedom may nevertheless be justified in terms of s 5 of the Bill of Rights Act. The s 5 inquiry asks whether the objective of the provision is sufficiently important to justify some limitation on the right or freedom; and if so, whether the limitation is rationally connected and proportionate to that objective

¹⁴ We understand this provision means that if a person could, in a proceeding, assert a privilege under sections 54 to 57 of the Evidence Act 2006 in respect of certain communication or information, the person is taken to have the same privilege for the purposes of a requirement to supply the information under new 197B of the Bill. Sections 54 to 57 relate to privilege for communications with legal advisers, solicitors' trust accounts, preparatory materials for proceedings, and settlement negotiations, mediation, or plea discussions.

¹⁵ Unless the court hearing the proceeding in which the evidence is sought to be adduced is satisfied that there was no unfairness in obtaining the evidence (proposed s 197G(4) of the Land Transport Act 1998).

and limits the right or freedom no more than reasonably necessary to achieve that objective.¹⁶

26. We consider that the limits on the presumption of innocence created by the strict liability offences are justified under s 5 of the Bill of Rights Act because:
- a. the offences are regulatory offences and not “truly criminal” in nature;
 - b. the alleged offender is in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite; and
 - c. the penalties are solely financial in nature and the maximum penalty of \$15,000 for an individual and \$75,000 for a body corporate is proportionate in the circumstances. We also note that the parties to which the offence provisions apply are commercial actors and body corporates engaged in a regulated industry.
27. On this basis we consider that any limits on s25(c) within the Bill on the right to be presumed innocent until proved guilty are justified in terms of s 5 of the Bill of Rights Act.

Conclusion

28. 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

¹⁶ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.