

5 May 2022

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Forests (Legal Harvest Assurance) Amendment Bill

Purpose

1. We have considered whether the Forests (Legal Harvest Assurance) 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 23235/13.4). 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 that conclusion we have considered the consistency of the Bill with s 14 (freedom of expression), s 21 (freedom 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 Bill amends the Forests Act 1949 (the principal Act) to establish a new regulatory system to provide legal harvest assurance for the forestry and wood-processing sector, both for assurance to export markets about the legality of the harvested New Zealand wood, and for assurance about the legality of harvest of imported wood. The legal harvest system will apply to exotic timber and specified timber products. It will generally not apply to a person trading in New Zealand indigenous timber, with some exceptions.
5. The regime is expected to operate in a manner that will assist in the prevention of international trade in illegally harvested timber; strengthen the international reputation of the New Zealand forestry and wood-processing sector; safeguard and enhance market access for New Zealand forestry exports; and reduce the risk that imported timber is sourced from illegally harvested timber.
6. The Bill inserts new parts 5, 6, 7 and new Schedule 3 into the principal Act and makes a number of other consequential amendments. New part 5 relates to legal harvest assurance. It establishes a regulatory system for legal harvest, which;
 - a. requires a person who is responsible for harvesting regulated timber to provide legal harvest information about timber, keep the legal harvest information up-to-date; and keep records of any legal harvest information they have provided;

- b. requires a person to be registered for legal harvest before acting as a log trader or carrying out the first processing of New Zealand logs, importing or exporting any specified timber product (in trade);
 - c. requires those registered for legal harvest to have a due diligence system to eliminate or mitigate the risk of them dealing in timber that is not legally harvested;
 - d. requires the due diligence system to be assessed by an assessor or a recognised agency;
 - e. provides for the registration of assessors and recognised agencies; and,
 - f. enables the Secretary to issue exporter statements and impose export requirements.
7. New Part 6 relates to log traders and it:
- a. establishes a regulatory system for log traders; and,
 - b. imposes obligations on registered log traders to ensure logs grown in New Zealand are bought and sold in a way that is transparent and professional.
8. New Part 7 contains provisions relating to cost recovery.

Consistency of the Bill with the Bill of Rights Act

Section 14 - freedom of expression

9. 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. Section 14 has been interpreted as including the freedom not to be compelled to say certain things or to be compelled to provide certain information.¹
10. The Bill requires the provision of information by operators within the forestry sector in a large range of circumstances.² The requiring of information in these circumstances *prima facie* engages the right to freedom of expression.
11. However, a limit of a right or freedom may be justified with relation to s 5 of the Bill of Rights Act. Justification under s 5 occurs where the limit is rationally connected to a sufficiently important objective; impairs the right or freedom no more than reasonably necessary to achieve the objective; and is otherwise in proportion to the importance of the objective.³
12. The information required from operators in the forestry sector within the Bill serves the important objective of supporting efficient regulation of the timber trade, and preventing the global trade in illegally harvested timber products. The information

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

² See, for example, new sections 79, 86, 87, 93, 95, 103, 108, 119, 129, 135, 138, 176A, 181, 187, 187A, 198 and 201 of new parts 5 and 6 of the principal Act.

³ See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (SC).

that may be collected is restricted to information relevant to assuring the legal operation of businesses. We consider the information provision required within the Bill to be minimally limiting and proportionate to the Bill's objective because;

- a. operators captured within the Bill have chosen to engage in a regulated activity, with an expectation of following appropriate standards of practice and reporting;
 - b. the information gathered is commercial and regulatory in nature, and of limited expressive value; and,
 - c. the Bill provides exception regimes for many of the classes of information that may be required, allowing an operator to be excepted from providing information where that information would not be relevant to the Bill's purpose, for example because of the operator's size.
13. For these reasons we consider that any limits within the Bill on the right to freedom of expression are justified under s 5 of the Bill of Rights Act.

Section 21 – freedom from unreasonable search and seizure

14. 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.⁴

Power to compel information

15. New ss 138 and 176A provide the Secretary⁵ with the power to require information by notice from a person who has obligations under new Part 5 or new Part 6 respectively. Failure to provide information under s 138 when required is a strict liability offence under new s 144.
16. The power to compel information is a search for the purposes of s 21 of the Bill of Rights Act.
17. 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. However, the Supreme Court has held that an unreasonable search logically cannot be reasonably justified and therefore the inquiry does not need to be undertaken.⁶
18. Rather, the assessment to be undertaken is first, whether what occurs is a search or seizure, and, if so, whether that search or seizure is reasonable. In assessing whether this search power is reasonable, we have considered the place of the search, the degree of intrusiveness into privacy, and the reasons why it is necessary.⁷

⁴ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

⁵ Defined in s 2 of the principal Act as the Chief Executive of the Ministry for Primary Industries.

⁶ Above n1 at [162].

⁷ At [172].

19. Requiring a person to provide information serves the important objective of supporting efficient regulation of the timber trade, and preventing the global trade in illegally harvested timber products. There are also several safeguards on the exercise of the information gathering power. The Secretary may only require information from persons who have obligations under new Part 5 or new Part 6 (for example those registered for legal harvest or registered log traders) and not from other persons. The Secretary may only compel information if satisfied it is required for certain purposes relevant to determining whether a person is 'fit and proper' (in relation to new s 138 only), verifying whether they are complying with their obligations, or gathering statistical information on the forestry supply chain or the legal harvest system.
20. For these reasons we consider the power to compel information is reasonable.

Power of entry and inspection

21. New s 139 provides a power for an officer to enter and inspect a place (other than a dwelling house or a marae) without a search warrant for the purpose of determining whether a person is complying with provisions relating to legal harvest in the primary legislation, secondary legislation or notices given under the Bill.
22. This constitutes a search for the purposes of s 21 of the Bill of Rights Act. In assessing whether this search power is reasonable, we have considered the place of the search, the degree of intrusiveness into privacy, and the reasons why it is necessary.⁸
23. The purpose of the power is to monitor compliance with the legal harvest regime. This monitoring serves the important objective of supporting efficient regulation of the timber trade, and preventing the global trade in illegally harvested timber products. We understand that the power is intended to be used where there is indication of potential non-compliance. For example, an indication that a registered person is not complying with due diligence obligations relating to legal harvest.
24. The warrantless power of entry and inspection cannot be used to enter a dwelling house or marae, so those places where the expectation of privacy is greater cannot be accessed under this provision. Entry and search of those places requires a warrant (see new s 140).
25. The places that may be entered are further qualified in new s 139(3) to be tied to places where the activities regulated under the Bill are undertaken. The "places" are:
 - a. a place where a responsible person, person registered for legal harvest, or assessor operates; or
 - b. any land, premises, vehicle, conveyance, ship, aircraft, railway, railcar, or bulk cargo container, or other area or thing where the officer reasonably believes any of the following will be found:
 - i. timber that results from the harvest of New Zealand logs; or
 - ii. specified timber products:

⁸ At [172].

- iii. documents, records, or other information that relate to carrying out a regulated activity.
26. The places that may be entered are workspaces of a regulated industry and have a lesser expectation of privacy. Regulated operators will be aware that their activities will periodically be subject to inspection.⁹ The entry and inspection must also take place at a “reasonable time” (see s 139(2)).
27. On this basis, we regard the warrantless entry and inspection power under the Bill as being reasonable, and thus consistent with s 21 of the Bill of Rights Act.

Section 25(c) – presumption of innocence until proven guilty

28. Section 25(c) of the Bill of Rights Act affirms that anyone charged with an offence has the right to be presumed innocent until proven guilty according to the law. The right to be presumed innocent requires that an individual must be proven guilty beyond reasonable doubt, and that the State must bear the burden of proof.¹⁰
29. In order to give full recognition to this right, which is also a fundamental principle of criminal law, the legal burden of proving every element of an offence to the required standard of proof, and the onus for disproving any potentially available defence, must remain on the prosecution.

Strict liability offences

30. New ss 143(1)(b), 144(1) and 193(1) contain a number of strict liability offences relating to requirements not to provide false information, and other aspects of the legal harvest and log traders. Some statutory defences are provided. For example, if the defendant can show they did not know information was false, and took reasonable precautions and exercised due diligence to ensure it was not false, or if the defendant can show the commission of certain offences was due to the act or omission of another, an accident or some other circumstance outside their control.¹¹ The maximum penalty for an offence under any of these provisions is a fine not exceeding \$40,000 for an individual, or not exceeding \$100,000 in any other case.
31. Strict liability offences prima facie limit s 25(c) of the Bill of Rights Act. This is because a strict liability offence may be proved by a finding that certain facts occurred without proof of *mens rea*. The accused is required to prove a defence (on the balance of probabilities), or disprove a presumption, to avoid liability. This means that, where the accused is unable to prove a defence, they could be convicted even where reasonable doubt exists as to their guilt.

Justification

32. A reverse onus may nevertheless be consistent with the Bill of Rights Act if the grounds for the offence are rationally connected to a sufficiently important objective; the onus impairs the right or freedom no more than reasonably

⁹ See Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 18.24.20 and 18:29.5.

¹⁰ *R v Wholesale Travel Group* (1992) 84 DLR (4th) 161, 188 citing *R v Oakes* [1986] 1 SCR 103.

¹¹ See new ss 143(2), 144(2) and 193(2).

necessary to achieve the objective; and is otherwise in proportion to the importance of the objective.¹²

33. As mentioned above, the Bill serves the important objective of supporting efficient regulation of the timber trade, and preventing the global trade in illegally harvested timber products.
34. We consider that the strict liability offences limit the right no more than necessary and are proportionate because:
 - a. the offences are regulatory in nature and apply to persons participating in a highly regulated industry;
 - b. the defendant will be 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 penalty for the offence in each instance is a fine and is proportionate to the importance of the Bill's objective.
35. Accordingly, we consider that the limits the Bill places on the right to be presumed innocent until proven guilty are justified under s 5 of the Bill of Rights Act and therefore consistent with s 25(c) of the Bill of Rights Act.

Conclusion

36. 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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¹² See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (SC).