

16 March 2020

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Building (Building Products and Methods, Modular Components, and Other Matters) Amendment Bill

Purpose

1. We have considered whether the Building (Building Products and Methods, Modular Components, and Other Matters) 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 21914/4.11). We have spoken with the Ministry of Business, Innovation, and Employment ('MBIE') and they have agreed to make the following amendments to the Bill:
 - a. amend new s 207BB to make it clear that the powers of entry and inspection only apply to members of the certification scheme and remove subsection (1)(c) which enables the power of entry and inspection to be used for the purpose of taking of enforcement action;
 - b. enable the same conditions for entry and inspection that are afforded to household units in new s 207BC to also apply to marae; and
 - c. amend new s 272T(6) and s 272ZE(6) to clarify that the chief executive may only take investigative or enforcement action in accordance with the Building Act 2004.
3. We have written the advice on the basis that these agreed amendments will be included in the introduction version of the Bill. We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
4. 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 (unreasonable search and seizure) and s 25(c) the presumption of innocence. Our analysis is set out below.

The Bill

5. The Bill amends the Building Act 2004 ('the principal Act') in order to address the challenges faced by the building sector such as low productivity, inefficient practices and processes, skills and labour shortages, financial vulnerability and poor health and safety practices. The Bill is expected to improve trust and confidence in the building regulatory system and sector and reduce the risk to New Zealand's reputation from product and building defects.
6. Key features of the Bill include:
 - a. introducing minimum requirements for information about building products so that members of the industry know their obligations under the scheme;

- b. creating a specialist framework for modular components (a building product of a certain kind e.g. a prefabricated section of a building) by establishing a voluntary certification scheme;
 - c. providing the chief executive of MBIE ('the chief executive') with new powers of entry and inspection for investigative purposes in relation to ensuring compliance with the building product certification scheme, the modular component scheme and the building product information requirements;
 - d. new strict liability offences, and increased maximum penalties (including penalties that now distinguish between individuals and body corporates);
 - e. strengthening the building product certification scheme by creating new certification requirements; and
 - f. widening of the building levy to fund the chief executive's monitoring, oversight, and performance improvement of the building industry.
7. The Bill also makes changes to some public notification requirements and includes consequential amendments to the Search and Surveillance Act 2012 and the Building (Definition of Restricted Building Work) Order 2011.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

8. 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.
9. A number of clauses in the Bill propose new sections that require the provision of information by persons who have voluntarily signed up to participate in the product certification or the modular component certification scheme ('certification scheme'). These provisions *prima facie* engage the right to freedom of expression.
10. The objective of the certification scheme is to create trust and confidence that building products meet the specified requirements and can be considered safe.¹ The requirements to provide information in the proposed new sections are rationally connected to the objective of establishing the certification scheme. The certification body requires information to register participants in, and effectively manage, the certification scheme. As the certification scheme is voluntary in nature and is similar to other schemes like it, the requirements for information are proportionate and limit the right to freedom of expression no more than is reasonably necessary.
11. 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.

¹ Hansen v R [2007] NZSC 7 at [123]

Section 21 – Unreasonable search and seizure

12. Section 21 of the Bill of Rights Act affirms the right of everyone to be secure against unreasonable search and seizure, whether of the person, property, correspondence or otherwise. The right protects a number of values including personal privacy, dignity, and property.²
13. Clause 55 proposes to add new s 207BB that will enable the chief executive, or a person with written authorisation from the chief executive, to enter any premises in order to inspect the following:
 - a. a place at which building work is, or is proposed to be, carried out;
 - b. building work that has been, or is being, carried out; or
 - c. any building or building product.
14. The chief executive may exercise the power of entry and inspection for the following investigative purposes in so far as they apply to members of the certification scheme:
 - a. determining whether a provision in subpart 7 and 7A of Part 3 and Part 4B ('relevant provisions') have been complied with; and
 - b. determining whether there are any grounds for taking enforcement action to enforce a duty or obligation under the relevant provisions, and deciding whether to do so.
15. We consider that the proposed power of entry and inspection constitutes a search for the purpose of s 21 of the Bill of Rights Act.
16. 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 the Bill of Rights Act. However, the Supreme Court has held that, logically, unreasonable search or seizure cannot be reasonably justified and therefore the inquiry does not need to be undertaken.³
17. 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 the search powers in the Bill are reasonable, we have considered the place of the search, the degree of intrusiveness into privacy, and the reasons why it is necessary.
18. Entry under the Bill may take place at any premises for investigative purposes prescribed in new s 207BB. The degree of intrusiveness is high as the chief executive or their representative may enter property that is private, without providing any prior notice. However, entry to household units and marae may only be made with consent of the occupier or in accordance with a warrant issued under the Search and Surveillance Act 2012 (see new s 207BE).
19. The privacy expectation in a public welfare regulatory context is lower than in other contexts. The power of entry and inspection may only be used for the following prescribed investigative purposes: monitoring compliance of members of the certification scheme

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

³ *Cropp v Judicial Committee* [2008] 3 NZLR 744 at [33]; *Hamed v R* [2012] 2 NZLR 305 at [162].

and for determining whether there are grounds for taking enforcement action. It is voluntary to participate in the certification scheme and members will be aware of their obligations in volunteering to participate in the scheme. Enforcement action does not involve criminal charges but is focussed on enforcing members' duties and obligations under the relevant provisions by way of undertaking an investigation and suspending or revoking registration and/or accreditation.

20. The purpose of the power is to ensure compliance with the building product certification scheme, the modular component manufacturing scheme and the building product information requirements. This is an important objective because significant harm could result from unsafe buildings and building products, which the Bill aims to mitigate.
21. Therefore, the powers in new s 207BB are rationally connected to the objective of preventing harm from unsafe buildings and building products, as the effectiveness of the scheme relies on the ability of the regulator (MBIE) to determine whether duties and obligations under the scheme are being complied with, and whether they need to be enforced.
22. We therefore conclude that a search conducted pursuant to new s 207BB is reasonable, and therefore does not conflict with s 21 of the Bill of Rights Act.
23. For completeness, we note that new s 207A of the Bill provides the chief executive with a broad power to require information or documents from any person. This power currently exists in s 207A of the principal Act. The Bill proposes to extend the existing power for the purpose of exercising the chief executive's powers under s 26 with regard to issuing a warning in respect of a product or banning a product. We do not consider that this amendment changes the search powers already in the principal Act which are regarded as reasonable and proportionate to the objectives of the principal Act.
24. We also note that cl 53 proposes to amend s 204 which creates powers for entry, inspection, and seizure of information. Clause 53 extends the powers in s 204 for the purpose of monitoring the performance of a registered product certification body and a registered modular component manufacturer certification body. We do not consider that this amendment changes the power already in the principal Act, which we previously assessed as being consistent with the Bill of Rights Act.⁴

Section 25(c) – Right to be presumed innocent until proved guilty

25. Section 25(c) of the Bill of Rights Act affirms that everyone who is charged with an offence has the right to be presumed innocent until proved guilty according to the law. This requires the prosecution to prove beyond reasonable doubt, that the accused is guilty.
26. Strict liability offences give rise to a prima facie issue of inconsistency with s 25(c) because the accused is required to prove a defence (on the balance of probabilities) to avoid liability (in other criminal proceedings an accused need merely raise a defence in an effort to create reasonable doubt). 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.

⁴ See Preliminary Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Building Bill (Ministry of Justice, 12 August 2003), paragraphs 11 and 18.

27. Section 388 of the principal Act provides that all offences are strict liability offences, except as otherwise provided. The following new strict liability offences are proposed by the Bill:
- a. cl 70 of the Bill proposes new ss 272G and 272H that relate to misrepresentations under the product registration scheme;
 - b. cl 71 of the Bill proposes new ss 272ZI and 272ZJ that relate to misrepresentations under the modular component manufacturer scheme; and
 - c. cl 83 of the Bill that proposes new ss 362VB – VC, and s 362VF that relate to building product information requirements, false or misleading representations, and compliance with notices to take corrective action. The new s 362VD provides defences for offences against s 362VB and s 362VC.
28. In the specific context of strict liability offences, considerations especially relevant to the reasonableness of limits on s 25(c) are the nature and context of the conduct being regulated, the ability of the defendants to exonerate themselves, and the penalty levels.
29. Overall, we consider that the *prime facie* limits to the right under s 25(c) of the Bill of Rights Act proposed by the Bill are justified in the circumstances. In particular:
- a. strict liability offences are considered more justifiable where they arise in relation to activities that are regulated in the public welfare and where people choose to engage in that regulated activity.⁵ The strict liability offences created in the Bill arise in the context of the sale and trade in building products. This industry is clearly regulated in the public interest – to ensure that building products are fit for the purposes for which they are sold, safe, and do not result in widespread economic loss;
 - b. people exercise choice in choosing to enter this regulated field and where they misrepresent that they are part of it they undermine the core function of the scheme;
 - c. the matters of justification and excuse (the defences) are more likely to be in the defendant’s knowledge. The Bill, in the proposed new s 326VD, and in the existing defences in the principal Act (s 388), enumerates several defences to the strict liability offences. These defences are open-ended in nature and more likely to be in the defendant’s knowledge – e.g. the breach was due to the reasonable reliance on information supplied to the defendant by another person, or the defendant took reasonable precautions and exercised due diligence to avoid the failure.
 - d. the penalties, while large in some instances (e.g. misrepresentation of status as product certification body or in relation to product certification can result in a fine of up to \$300,000 in the case of an individual and \$1,500,000 in the case of a body corporate), are solely financial in nature. No terms of imprisonment can be imposed. We also note that the parties to which the offence provisions apply are commercial actors and body corporates engaged in a regulated industry.
30. Accordingly, we have concluded that the proposed new offences referred to above are justified under s 5 of the Bill of Rights Act.

⁵ *Civil Aviation Authority v MacKenzie* [1983] NZLR 78; *R v Wholesale Travel Group* (1992) 84 DLR (4th) at 213.

Conclusion

31. 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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