

5 May 2020

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Forests (Regulation of Log Traders and Forestry Advisers) Amendment Bill

Purpose

1. We have considered whether the Forests (Regulation of Log Traders and Forestry Advisers) 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 21865/6.8). 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 and the Forests Amendment Act 2004 to establish a registration system for log traders and forestry advisers with the objective of strengthening the integrity of the forestry supply chain and supporting a continuous, predictable, and long-term supply of timber for domestic processing and export. This system will help the industry to operate in a manner that increases the transparency and professionalism of log buying, selling, and trading activities, improves the long-term sustainability of plantation forestry, contributes to the development of New Zealand wood processing and manufacturing, enhances the resilience of local communities reliant on forestry, timber and wood processing related employment, and contributes to improved environmental and climate change conditions for New Zealand.
5. Specifically, the Bill provides for:
 - a. compulsory registration of individual forestry advisers providing one or more specified services related to the management, harvesting, or sale of forest resources or forest land;
 - b. compulsory registration of entities seeking to purchase, process, or export logs grown in New Zealand;

- c. the Ministry of Primary Industries (MPI) to act as the Forestry Authority responsible for administering the registration system, with some delegable powers to a suitable industry body or person outside the Public Service; and
- d. regulated parties to meet certain requirements and codes of practice to become registered and retain their registration;
- e. an arbitration and compliance system to support system accountability; and
- f. powers, sanctions, and regulation-making powers to give effect to the regulatory system.

Consistency of the Bill with the Bill of Rights Act

Section 14 - freedom of expression

6. 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
7. Clause 63F of the Bill gives the Forestry Authority power to issue a notice requiring registered log buyers or forestry advisers to provide the information or class of information specified in the notice, where the Forestry Authority considers that that information is necessary or desirable to assist the Forestry Authority in carrying out its functions under the Bill. Clauses 63O, 63R, 63Y and 63ZH provide for further circumstances where the Forestry Authority may require information from registered parties, or where parties are required to provide the Authority with specific information, in connection with registration processes and with Forestry Authority decision making review processes. These requirements *prima facie* limit the freedom of expression of registered log buyers and forestry advisers.
8. However, under s 5 of the Bill of Rights Act, a limit of a right may be justifiable where the limit serves an important objective, and where the limits on the right are rationally connected to achieving that objective, and proportional to its importance.
9. Empowering the Forestry Authority to collect information relevant to registering and educating registered parties and to assess compliance with obligations under the regime, is rationally connected to the Bill's objective of improving standards of practice within the forestry industry.
10. The information which may be requested by the Forestry Authority is only that relevant to the efficient operation of the regime. Information may only be collected from registered parties who choose to operate as log buyers and forestry advisers in the knowledge of the industry's regulatory requirements. We consider that the

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

information that may be collected is proportionate to the importance of the establishment of the regulatory regime and in keeping with other similar regulatory regimes.

11. 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

12. 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.²
13. Clause 63E of the Bill provides that where MPI has delegated any function of the Forestry Authority to a person outside of the Public Service, MPI may conduct periodic audits of the person's performance and require information from that person. An audit may also involve an inspection of the person's place of business. This constitutes a search for the purposes of s 21 of the Bill of Rights Act.
14. 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.³
15. 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.⁴
16. The purpose of the search in clause 63E is to ensure accountability of private agents in fulfilling the functions of the Forestry Authority. The search allows only for an inspection of a place of business and of specified documents. The agent must be notified of the frequency of the audits and given at least 3 months' advance notice of an audit. A notice to provide information must be complied with within 10 working days after the date of the notice. We consider that such a search constitutes only a moderate intrusion into personal privacy, which is appropriate for the purposes and in keeping with inspections that may be undertaken in a regulatory context.
17. On this basis, we regard searches under the Bill as being reasonable, and thus not in conflict with s 21 of the Bill of Rights Act.

Section 25(c) - Right to be presumed innocent until proven guilty

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

³ Above n1 at [162].

⁴ At [172].

18. Section 25(c) of the Bill of Rights Act affirms that everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proven guilty according to law. The right to be presumed innocent requires the prosecution to prove beyond reasonable doubt that the accused is guilty.
19. Clause 63ZA of the Bill contains a number of offences which are strict liability offences. Strict liability offences *prima facie* limit s 25(c) of the Bill of Rights Act 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.
20. The offences listed at clause 63ZA are for:
 - a. acting or purporting to act as a registered log buyer or a registered forestry adviser while unregistered;
 - b. failing to comply with the obligations for registered log buyers or forestry advisers set out within the Bill; or
 - c. making a false or misleading statement in an application for registration, or renewal of, registration as a log buyer or forestry adviser under the regime
21. Clause 63ZA(2) provides defences in respect of these offences.
22. 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.
23. We consider the limits proposed by the Bill to the right to be presumed innocent are justified in the circumstances. In particular, the offences are rationally connected to protecting and enforcing the new regulatory regime. Strict liability offences have been considered more proportionate and justifiable where, as is the case here:
 - a. the offence is a regulatory offence and does not result in a criminal conviction;
 - b. the defendant 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, are at the lower end of the scale and proportionate to the seriousness of the offence. No terms of imprisonment can be imposed.

We also note that the offence provisions apply to persons who have chosen to engage in a regulated industry.

24. For this reason, we consider any limits within the Bill on the right to be presumed innocent until proven guilty to be justified under s 5 of the Bill of Rights Act.

Conclusion

25. 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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