Climate Change Response (Emissions Trading and Other Matters) Amendment Bill

13 August 2012

ATTORNEY-GENERAL

Legal Advice

Consistency with the New Zealand Bill of Rights Act 1990: 
Climate Change Response (Emissions Trading and Other Matters) Amendment Bill

1. We have considered whether the Climate Change Response (Emissions Trading and Other Matters) Amendment Bill (PCO 16099/3.0) (‘the Bill’) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (‘the Bill of Rights Act’). We understand that the Bill is likely to be considered by the Cabinet Legislation Committee at its meeting on 16 August 2012.

2. The Bill amends the Climate Change Response Act 2002. It modifies the emissions trading scheme (ETS), provides further powers to make regulations, and makes technical and operational changes. The stated objectives of the Bill are to ensure that ETS more effectively supports the Government’s economic growth priorities and is flexible enough to cater for a range of international outcomes in the period 2013 to 2020; and to establish a levy on synthetic green house gases.

3. The Bill’s reporting requirements and powers to compel information could engage section 14 (freedom of expression) of the Bill of Rights Act. However, these limits are clearly justified under section 5 of that Act. In regard to the powers to compel information, we note that if a person is required to appear to give evidence before the Environmental Protection Authority, an enforcement officer, or a District Court Judge, this cannot be used in evidence against the person in criminal proceedings.

4. The Bill confers upon enforcement officers the power to enter land or premises to investigate whether a person is complying with the synthetic greenhouse levy scheme established in Part 7 of the Bill. During an investigation, an enforcement officer may require the production of documents, take samples of water, air, soil, organic matter or any other thing, and demand from the occupier any other information that the enforcement officer may reasonably require for the purpose of determining whether a person is complying with the scheme. These powers may engage section 21 (unreasonable search and seizure) of the Bill of Rights Act.

5. 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. We consider that entry powers are necessary to
monitor compliance with the Act and, therefore, are ‘reasonable’ in terms of section 21 of the Bill of Rights Act.

6. The Bill also contains strict liability offences. These engage section 25(c) (presumption of innocence) of the Bill of Rights Act because an accused person is required to prove a defence or disprove a presumption to escape liability, instead of merely raising a defence in an effort to create reasonable doubt. This means a person may be convicted despite reasonable doubt existing.

7. In determining whether or not the strict liability offences can be justified we have considered:

   a) the nature and context of the conduct to be regulated (The offences relate to various reporting requirements, which are important to maintaining transparency and accountability in commercial activities);

   b) the ability of the defendant to exonerate themselves and the risk of conviction of an innocent person (There are defences based on the reasonableness of the person’s actions); and;

   c) the penalty level (The maximum penalties for these offences are fines of $8,000 to $50,000, which are within a reasonable range for commercial regulatory offences).

8. In view of these factors, we consider that the strict liability offences, and the consequent limits on the right in section 25(c) of the Bill of Rights Act, are clearly justified under section 5 of the Act.

9. This advice has been prepared by the Public Law Group and the Office of Legal Counsel.

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