National War Memorial Park (Pukeahu) Empowering Bill

15 August 2012

ATTORNEY-GENERAL

Legal Advice

Consistency with the New Zealand Bill of Rights Act 1990:
National War Memorial Park (Pukeahu) Empowering Bill

1. We have considered whether the National War Memorial Park (Pukeahu) Empowering Bill (PCO 16606/1.47) (‘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 will be considered by LEG at its meeting on Thursday, 16 August 2012. We also understand that the Bill may be subject to further amendments before it is introduced to the House. We will provide you with advice on these amendments should this prove necessary.

2. 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 possible inconsistencies with s 21 (unreasonable search and seizure) and s 27(1) (natural justice). Our analysis under these sections is set out below.

PURPOSE OF THE BILL

3. The purpose of the Bill is to empower the creation of a National War Memorial Park (Pukeahu) (‘the Park’) adjacent to the National War Memorial, Carillon, and Hall of Memories in Wellington. The Bill will provide the certainty necessary for the completion of the Park by April 2015, the centenary of the Gallipoli Campaign of the First World War, while ensuring the integration of the Park and roading networks with the wider city of Wellington.

4. To achieve this purpose the Bill grants to the New Zealand Transport Agency and Chief Executive of the Ministry for Culture and Heritage, statutory authorisations and property rights modelled on those under specified enactments: the Resource Management Act, the Historic Places Act, the Building Act, and the Public Works Act. The statutory authorisations are set out in schedules to the Bill. Clause 24 of the Bill enables the Governor-General to amend or add to these statutory authorisations by Order in Council.1

CONSISTENCY WITH SECTION 21 (UNREASONABLE SEARCH AND SEIZURE)

1 Clause 24(2) lists nine enactments that the Order in Council may grant any statutory authorisation or other permission or right under the: Building Act 2004; Historic Places Act 1993; Land Transfer Act 1952; Local Government Act 1974; Local Government Act 2002; Public Works Act 1981; Reserves Act 1977; Resource Management Act 1991; and the Wildlife Act 1953.
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. The analysis under s 21 is a two-step process:
   a) does the activity constitute a search or a seizure?
   b) if so, is that search or seizure unreasonable?

6. If these questions are answered in the affirmative, the provision is inconsistent with s 21.

7. Clause 16 of the Bill provides that the New Zealand Transport Agency and the Chief Executive of the Ministry for Culture and Heritage are authorised to exercise the powers of entry specified in schedules 8 and 9 of the Bill, subject to conditions in these schedules. Authorities granted have the same force and effect as if they had been granted by the Minister for Land Information under s 111 of the Public Works Act 1981. The authorisations in schedule 8 and 9 are modelled on those that could have been obtained under the Public Works Act and are subject to the conditions normally associated with such authorisations.

8. Our view is that cl 16, when read with schedules 8 and 9, does not limit the right to be secure against unreasonable search and seizure because:
   · The power to search has a valid stated purpose (the identification, quantification and mitigation of any adverse effects of the project); and
   · The power to search is limited by appropriate safeguards (in particular, the requirement to give advance written notice to property owners and the restriction on searching to “reasonable times”).

CONSISTENCY WITH SECTION 27(1) – RIGHT TO NATURAL JUSTICE

9. Section 27(1) of the Bill of Rights Act affirms that every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

10. Clause 24 of the Bill allows the Governor-General to (on the recommendation of the Minister of Transport and the Minister for Arts, Culture and Heritage), through Order in Council, to grant any statutory authorisation or other permission or right under nine enactments specified in cl 24(2). The statutory authorisation may be to take or grant any licence, land or easement; and amend the statutory authorisations and property rights provided in the schedules to the Bill. Clause 24 could limit the right to natural justice because the authorisations or grants can be made by Order in Council without engaging the participatory process under these enactments that would otherwise apply (cl 24(3)(b)).

11. Where a provision is found to pose a limit on a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is demonstrably justified in terms of s 5 of that Act. Following
the guidance of the New Zealand Supreme Court decision in Hansen v R, the s 5 inquiry may be summarised as:

a) Does the objective serve a purpose sufficiently important to justify some limitation of the right or freedom?
b) If so, then:
   i) is the limit rationally connected with the objective?
   ii) does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
   iii) is the limit in due proportion to the importance of the objective?

12. The Bill appears to serve a purpose sufficiently important to justify some limitation of the right to natural justice and is rationally connected with that purpose. Without the Bill there is a significant risk that the Park and its related roading network will not be completed by April 2015. The power to be exercised under cl 24 is necessary because all the authorisations, permissions or rights that may be needed are not foreseeable. The limitation is no more than is reasonably necessary given the purpose of the Bill.

13. It is significant that the Bill does not remove the requirement to observe natural justice in developing an Order in Council (as opposed to the participatory process under enactments, which may be overridden), and nor does it remove the right to seek judicial review. We also note that while the Order in Council may override participatory process under the relevant enactments, it does put in place its own processes. Clause 36 of the Bill provides for a community forum to provide the Minister with information or advice in relation to the Park. The Minister and the Chief Executive must have regard to any information or advice he or she is given by the forum relating to the Park. Participants in the forum will include representatives from various organisations, a number of which appear to have been selected because they are affected by the Park. They include, for example, a group that the Minister is satisfied represent the interests of local residents.

14. Clause 26 of the Bill provides for a National War Memorial Park Review Panel (‘the Panel’) to advise the Minister of Culture and Heritage or the Minister of Transport on Orders in Council under the Bill. All draft Orders in Council must be reviewed by the Panel before they are recommended under cl 24. Although the Bill does not specify that the Panel must consider natural justice in its advice, it is not precluded from doing so. In our view natural justice considerations may be relevant to an Order in Council. In this regard we consider it relevant that one of the three persons on the Panel that has “relevant expertise or appropriate skills” (cl 26(1)) must be a former or retired Judge of the High Court or a lawyer.

Conclusion

2 [2007] NZSC 7
15. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. This advice has been prepared by the Public Law Group and the Office of Legal Counsel.

Melanie Webb
Acting Chief Legal Counsel

Office of Legal Counsel

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