

19 August 2011

ATTORNEY-GENERAL

## **LEGAL ADVICE**

### **CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: EXCLUSIVE ECONOMIC ZONE AND CONTINENTAL SHELF (ENVIRONMENTAL EFFECTS) BILL**

1. We have considered whether the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill (PCO 13242/12.0) ('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 will be considered by Cabinet at its meeting on Monday, 22 August 2011.
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 ss 14 (freedom of expression), 21 (unreasonable search and seizure), 25(c) (presumption of innocence) and 27(1) (right to natural justice). Our analysis under those sections is set out below.

#### **PURPOSE OF THE BILL**

3. The purpose of the Bill is to establish an environmental management regime for New Zealand's Exclusive Economic Zone ('EEZ') and continental shelf. It regulates activities associated with the exploration, use and conservation of the natural resources of the exclusive economic zone or continental shelf where those activities may have effects on the environment and on existing interests.
4. The Bill gives effect to New Zealand's obligations under the United Nations Convention on the Law of the Sea to manage and protect the natural resources of the EEZ. The Bill aims to achieve a balance between economic development and the protection of the environment and existing interests. It also includes a general duty for adverse effects to be avoided, remedied, or mitigated.
5. The Bill sets up a consent regime to regulate activities. Regulations may classify activities as permitted, discretionary, or prohibited. For discretionary activities, persons will need to apply for a marine consent. The Environmental Protection Authority ('the EPA') will be the decision-maker for all marine consents. An impact assessment will form the basis of an application and will allow the EPA to assess the effects on the environment and existing interests.

#### **CONSISTENCY WITH THE BILL OF RIGHTS ACT**

##### **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. The Courts in Canada and the United States

have held that freedom of expression necessarily entails the right to say nothing or the right not to say certain things.<sup>1</sup>

7. Clause 55(4) of the Bill empowers the EPA to require information that is relevant and reasonably necessary to decide an application from:
  - a) a person who reviewed the impact assessment, and
  - b) a person who is heard or represented at the hearing.
8. Clause 55(4) could limit the right to freedom of expression by compelling a person to supply information that could be expressive in nature.
9. 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*,<sup>2</sup> 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?
10. The purpose of cl 55 is to assist the EPA to obtain information necessary to perform its functions. This appears to be a sufficiently important objective. The provision appears to be rationally and proportionately connected to that objective because it is limited to “information that is relevant and reasonably necessary”. It is also restricted to individuals who have chosen to participate in the hearing process and can expect to be required to supply relevant information.
11. Clause 132 of the Bill empowers an enforcement officer to require a person, whom the officer reasonably suspects of committing an offence against the Bill, to supply that person’s name, address and date of birth. It is arguable that this information is not truly expressive in nature, in which case it does not raise any issues of concern with respect to the Bill of Rights Act. However, even if the right to freedom of expression is limited, the limitation appears to be justifiable because the information is necessary to ensure that enforcement officers are able to perform their duties and the type of information is narrowly prescribed.

### **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. There are two limbs to the s 21 right. First, s 21 is applicable only in respect of those activities that constitute a ‘search or seizure’. Secondly, where certain actions do constitute a search or seizure, s 21 protects only against those searches or seizures that are “unreasonable” in the

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<sup>1</sup> *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

<sup>2</sup> *Hansen v R* [2007] NZSC 7.

circumstances. A request for information or documents constitutes a search for the purposes of s 21 of the Bill of Rights Act.<sup>3</sup>

#### *Power of entry to comply with enforcement order*

13. Clause 121(2)(a) of the Bill enables a person to comply with an enforcement order on behalf of a person who has failed to comply, and to enter onto any land, or enter any structure, for that purpose.
14. We have concluded that the power of entry under cl 121(2)(a) appears to be reasonable in the circumstances. It must be exercised for a legitimate, and narrowly defined, purpose under the Bill (compliance with an enforcement order). Furthermore, the person must have the consent of an Environment Court judge and, if the structure is a dwellinghouse, be accompanied by a constable.

#### *Regulatory inspection powers*

15. Clause 133 of the Bill empowers an enforcement officer to enter and inspect:
  - a) a place, vehicle, vessel, or structure in New Zealand territory or the exclusive economic zone, except a dwellinghouse or marae
  - b) a structure located on the continental shelf in connection with the exploration of the continental shelf or the exploitation of its natural resources, or
  - c) a vessel in the waters above the continental shelf that is beyond the exclusive economic zone.
16. Clause 2 of the Schedule to the Bill authorises the enforcement officer to: take a sample of any substance; conduct examinations, tests, inquiries, demonstrations, and inspections; require the production of, inspect, and copy any documents; and take photographs, sound and video recordings, and drawings.
17. We have concluded that the inspection powers set out in cl 133 and the Schedule appear to be reasonable. Their purpose is to determine compliance with the Bill, any regulations, a marine consent or an enforcement order. That purpose is consistent with a regulatory inspection regime. Individuals and organisations that operate within a regulated industry can expect to be subject to scrutiny to ensure compliance with the law.
18. Furthermore, the power to enter and inspect may only be exercised if the enforcement officer is expressly authorised to do so by the EPA in writing. The inspection officer must carry evidence of their identity. The power must be exercised at a reasonable time and cannot be exercised in respect of a dwellinghouse or marae.

#### **Presumption of Innocence**

19. 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 proved guilty according to law. The right to be presumed

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<sup>3</sup> *New Zealand Stock Exchange v Commissioner of Inland Revenue* [1992] 3 NZLR 1 (PC).

innocent requires that an individual must be proven guilty beyond reasonable doubt, and that the state must bear the burden of proof.<sup>4</sup>

### *Strict Liability Offences*

20. Clause 127 of the Bill specifies that offences against s 15 of the Bill are strict liability offences. Section 15 places restrictions on certain activities in the EEZ or the continental shelf, unless the activity is a permitted activity or is authorised by a marine consent.
21. Strict liability offences raise a *prima facie* issue of inconsistency with s 25(c) of the Bill of Rights Act because, once the prosecution has proven the defendant committed the act in question, the defendant must *prove* the defence (or disprove a presumption) on the balance of probabilities to escape liability. In other criminal proceedings a defendant must merely *raise* a defence in an effort to create reasonable doubt. In the case of strict liability offences, a defendant who is unable to prove the defence, or disprove a presumption, could be convicted even if reasonable doubt exists as to her or his guilt.
22. We have considered the following factors in assessing whether a departure from s 25(c) can be justified under s 5 of the Bill of Rights Act:
  - the nature and context of the conduct to be regulated
  - the ability of the defendant to exonerate themselves, and
  - the penalty level.
23. A reversal of the onus of proof is generally considered to be more easily justifiable for "regulatory" offences such as those set out in the Bill. Those who choose to participate in regulated industries should be expected to meet certain expectations of care and accept the enhanced standards of behaviour.<sup>5</sup>
24. Strict liability offences can also be justified where the offence turns on a particular matter that is *peculiarly* within the knowledge of the defendant. In such cases, it is easier for the defendant to explain why he or she took (or failed to take) a particular course of action than it is for the Crown to prove the opposite. For the specified offences in this Bill, we consider the defendants to be in a better position to explain why they failed to comply with the necessary regulatory requirements, than for the Crown to prove the opposite.
25. A reversal of the burden of proof is less of a concern where the penalty is relatively low and therefore has a less significant impact on the accused. As a general principle, strict liability offences should carry penalties at the lower end of the scale. The penalty for a contravention of s 15 is a fine not exceeding \$300,000 for a natural person and \$600,000 for a non-natural person. We are satisfied that a maximum fine of this magnitude is appropriate for a strict liability offence given the nature of commercial activities undertaken in the EEZ and the continental shelf.

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

<sup>5</sup> *R v Wholesale Travel Group* (1992) 84 DLR (4th) at 213.

### *Principal/Agent Relationship*

26. Clause 128 of the Bill makes a principal liable for offences committed by an agent. Subclause (4) makes it a defence to prove that the principal:
- i) did not know nor could reasonably be expected to have known that the offence was to be or was being committed
  - ii) took all reasonable steps to prevent the commission of the offence, and
  - iii) took all reasonable steps to remedy any effects of the act or omission giving rise to the offence.
27. Arguably, cl 128 could limit the presumption of innocence because, once the prosecution has proved that the agent has committed the offence, the principal must make out the defence in subcl (4), on the balance of probabilities, to escape liability.
28. In our view, the provision can be justified under s 5 of the Bill of Rights Act. It is important that those ultimately responsible for regulated activities undertaken in the EEZ or the continental shelf cannot escape liability for offending simply by claiming that they had no knowledge that it was taking place. It is reasonable to expect that principals will know what their agents are doing when the agent is acting on their behalf. Furthermore, the defendant will be best placed to make out the defence, especially by showing the reasonable steps taken to prevent the offending from occurring.

### **Right to Natural Justice**

29. For completeness, we note that cl 58 of the Bill imposes some restriction on information provided at a hearing of the EPA. Clause 58(4) of the Bill empowers the EPA to direct a person at a hearing not to present any part of a submission if it is irrelevant or not in dispute. Clause 58(5) of the Bill empowers the EPA to direct that parts of submissions be struck out if they are frivolous or vexatious, disclose no reasonable or relevant case, or would constitute an abuse of process to hear them.
30. We have considered whether cl 58 could limit s 27(1) of the Bill of Rights Act, which affirms the right of everyone to the observance of the principles of natural justice. The right to be heard is one aspect of the right to natural justice. In our view, s 27(1) is not limited because the matters which the EPA can refuse to hear are not substantive.

### **CONCLUSION**

31. 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.

Jeff Orr  
**Chief Legal Counsel**  
**Office of Legal Counsel**

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