

# Climate Change Response (Emissions Trading) Amendment Bill

9 November 2007

Attorney-General

## LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:

CLIMATE CHANGE RESPONSE (EMISSIONS TRADING) AMENDMENT BILL

**Note: this Bill 2007 was renamed as the Climate Change (Emissions Trading and Renewable Preference) Bill following submission of this advice to the Attorney-General.**

1. We have assessed whether the Climate Change Response (Emissions Trading) Amendment Bill (PCO 8246/11) ('the Bill') is consistent with the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). We understand that the Bill will be considered by the Cabinet Legislation Committee (LEG) at its meeting on 15 November 2007. The Ministry for the Environment has informed us about minor changes to be made to the Bill prior to its consideration by LEG and we have prepared our advice on that basis. We will provide you with further advice if any changes to the Bill raise additional Bill of Rights issues.
2. In our view, the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching this conclusion, we considered potential inconsistencies with section 14 (freedom of expression), section 21 (unreasonable search and seizure), and section 25(c) (presumption of innocence) of that Act. Our analysis under those sections is set out below.

## PURPOSE OF THE BILL

3. The Climate Change Response Act 2002 ('the Act') implements New Zealand's international obligations under the Kyoto Protocol to the United Nations Framework Convention on Climate Change. The purpose of the Bill is to enable New Zealand to meet its obligations to:
  - retire Kyoto units equal to the number of tonnes of carbon dioxide equivalent of human-induced greenhouse gases;
  - report to the Conference of Parties under Article 7 of the Protocol and Article 12 of the Convention; and
  - create a greenhouse gas emissions trading scheme in New Zealand.
4. Clause 40 of the Bill inserts new Parts 4 and 5 into the Act. The provisions of the Bill that are relevant to this advice are all in clause 40 so this advice refers to new sections of the Act rather than the relevant clauses of the Bill.

## POSSIBLE INCONSISTENCIES WITH THE BILL OF RIGHTS ACT

### Freedom of Expression

5. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression. 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.[\[1\]](#)
6. New section 82(1) empowers the chief executive of the Department responsible for the Act ('the chief executive') or an enforcement officer to require a person to provide any information that is reasonably necessary to ascertain compliance with the Act. The chief executive can require the person to appear before the chief executive or an enforcement officer to give evidence and produce documents (new section 83) or refer the matter to a District Court judge for a similar examination (new section 84). It is arguable whether the information in question is truly expressive in nature but there is a clear element of compulsion because new section 117 makes it an offence not to comply. We have therefore considered justifications under section 5 of the Bill of Rights Act.
7. Where a provision is prima facie inconsistent with a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonable and can be justified under section 5 of that Act.[\[2\]](#) A limitation on a right might be justifiable where:
  - i) the provision serves an important and significant objective; and
  - ii) there is a rational and proportionate connection between the provision and that objective.
8. The Ministry for the Environment has advised us that the powers contained in new sections 82 to 84 are necessary because the emissions trading scheme relies on accurate information being available. Some of the information needed to assess compliance with the Act is only available from the person carrying out the activity and a participant could frustrate the scheme simply by refusing to provide any information about their activities.
9. We have concluded that the provision is rational and proportionate in that it is restricted to information that is reasonably necessary for the enforcement of the Act. We also note that, although a person would not be excused from answering a question that could incriminate that person, new section 85(2) makes the testimony inadmissible in criminal proceedings against that person except on a charge of perjury in relation to that testimony. New section 87 requires anyone carrying out the functions and powers of the chief executive or an enforcement officer under Part 5 of the Act to maintain confidentiality.

10. For these reasons, we have concluded that to the extent that these provisions limit the freedom of expression, they are justified for the purposes of section 5 of that Act.

### **Unreasonable Search and Seizure**

11. Section 21 of the Bill of Rights Act affirms the right of everyone to be secure against unreasonable search or seizure.

12. New section 88 in the Bill empowers an enforcement officer to enter land or premises (except a dwellinghouse or marae) in order to determine compliance with the Act. The enforcement officer may:

a) require the production of, inspect and copy, any documents;

b) take samples of water, air, soil, or organic matter;

c) carry out surveys, investigations, tests, inspections, or measurements; and

d) demand any other information that the enforcement officer may reasonably require to determine compliance with the Act.

13. We consider the inspection powers in the new section 88 to be reasonable because the purpose is limited to ensuring compliance with the Act. Individuals and organisations operating within a regulated industry can expect to be subject to scrutiny to ensure compliance with the law. Such inspection regimes do not usually require the authorised person to obtain a warrant if the primary purpose of the inspection is to monitor for compliance with a regulatory regime. We also note that the Bill includes the following safeguards:

- the right of entry is restricted to ordinary hours of business;
- the enforcement officer must give the occupier or owner reasonable notice unless doing so would defeat the purpose of the entry;
- the enforcement officer must produce his or her warrant of authorisation and evidence of identity on entry and if asked at any time afterward;
- the power is subject to the privilege against self-incrimination;
- if the person is not present, the enforcement officer must leave a notice that shows the time and purpose of the inspection as well as the contact details of the enforcement officer; and
- the enforcement officer must leave a notice that lists any items taken, where those items are being held; and the procedure that the person must follow to have those items returned.

14. New section 89 empowers enforcement officers to conduct inspections of dwellinghouses or marae as well as execute searches of any property on suspicion of an offence. The inspection and search powers in new section 89 appear to be reasonable for the purpose of section 21 of the Bill of Rights Act. In addition to the safeguards described above (except notice), the powers set out in section 89 are subject to a warrant issued by a District Court Judge. In the case of a dwellinghouse, the enforcement officer must also be accompanied by a police officer.

### **Presumption of Innocence**

15. Section 25(c) of the Bill of Rights Act provides 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 innocent requires that an individual must be proven guilty beyond reasonable doubt, and that the state must bear the burden of proof.<sup>[3]</sup>
16. Strict liability offences raise a *prima facie* issue of inconsistency with section 25(c) because, once the prosecution has proved 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. Where a defendant is unable to prove the defence, or disprove a presumption, then she or he could be convicted even if reasonable doubt exists as to her or his guilt.

### *Strict Liability Offences in the Bill*

17. New section 115 makes it an offence to fail, without reasonable excuse, to collect data, calculate emissions, or keep records in accordance with specified sections of the Act. New section 117(1)(a) makes it an offence to fail, without reasonable excuse, to provide information, appear before the chief executive or an enforcement officer, or fail to produce any document or documents, when required to do so under the Act. These offences appear to be strict liability offences because, once the prosecution has proved that a person has failed to do any of the things set out in new sections 115 or 117(1)(a), that person must make out a reasonable excuse in order to escape conviction.
18. We have concluded that the strict liability offences in new section 117 appear to be justifiable. First, the offences can be described as regulatory in nature rather than "truly criminal" offences. Those who choose to participate in regulated industries should be expected to meet certain expectations of care and accept the enhanced standards of behaviour required of them.<sup>[4]</sup>
19. Secondly, strict liability offences can be justifiable where the offence turns on a particular matter that is *peculiarly* within the knowledge of the defendant. In this case, the defendant is the only one who knows why he or she failed to appear or provide the information. Therefore it is more appropriate for the defendant to provide this information than require the Crown to prove the opposite.

20. Finally, as a general principle, strict liability offences should carry penalties at the lower end of the scale. The penalties set out in new sections 115 and 117(1)(a) appear to be set at an appropriate level. For example, the maximum penalties in new section 117(1)(a) are \$12,000 for individuals and \$25,000 for bodies corporate. By comparison, that section contains similar offences with an element of wilful non-compliance or obstruction with maximum penalties of \$25,000 for individuals and \$50,000 for bodies corporate.

## CONCLUSION

21. Based on the analysis set out above, 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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## Footnotes

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

2 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9

3 *R v Wholesale Travel Group* 84 DLR (4th) 161, 188 citing *R v Oakes* [1986] 1 SCR 103

4 *R v Wholesale Travel Group* (1992) 84 DLR (4th) at 213

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