

Land Transport Bill

19 March 2004

Attorney-General

Legal Advice

Consistency With The New Zealand Bill Of Rights Act 1990:
Land Transport Bill

1. We have considered whether the Land Transport Amendment Bill ("the Bill")(PCO 5366/ 15) is consistent with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act").

2. We understand that the Bill will be considered by the Cabinet Legislation Committee at its meeting on Thursday 25 March 2004. We note that we have not yet seen the version of the Bill that will be considered by the Cabinet Legislation Committee. We expect to receive a LEG version of the Bill on Friday 19 February 2004. This advice is therefore based on the latest version of the Bill that we have received. We will provide further advice in the event of issues of consistency arising in subsequent versions.

3. We have concluded that the Bill achieves overall consistency with the Bill of Rights Act 1990. However, in view of previous issues of Bill of Rights Act consistency relating to vehicle impoundment regimes, our analysis of the extended impoundment regime for recidivist drink driving offenders and unlicensed transport service operators is set out in this advice.

Purpose of the Bill

4. The Bill seeks to refine the existing land transport safety framework to support more efficient and effective enforcement, operation and administration in the land transport sector. These changes are sought in order to improve the safety and personal security of all road users, including transport service users. The changes reflect the objectives contained in the Government's New Zealand Transport Strategy and the Road Safety to 2010 Strategy Goals.

Vehicle Impoundment Provisions

5. The Bill sets out a proposed extension of impoundment powers in two situations:

- Where a person is convicted of a second or subsequent offence of carrying on any transport service without the appropriate current licence (clause 79A)
- Where an officer believes on reasonable grounds that a person drove the vehicle on a road and the person had :

- Breath or blood alcohol in excess of prescribed limits or failed or refused to undergo a blood test having been so required under the Act, and
- Had been convicted of two or more specific offences under the Land Transport Act relating to driving while under the influence of drink or drugs (clause 42).

6. We note that one of the vehicle impoundment provisions in the Land Transport Bill 1997 was the subject of a section 7 report on the basis that it inconsistent with the protection against double jeopardy set out in section 26(2) of the Bill of Rights Act.

7. In 2002 the issue was reconsidered in relation to the Land Transport (Street and Illegal Drag Racing) Amendment Bill. In the light of subsequent case law we advised you that the proposed vehicle impoundment was not inconsistent with the protection against double jeopardy contained in section 26(2) of the Bill of Rights Act.

8. However, you did form the view that the vehicle impoundment regime in the Land Transport (Street and Illegal Drag Racing) Amendment Bill was inconsistent with the protection from unreasonable search and seizure set out in section 21 of the Bill of Rights Act. The section 7 report tabled in relation to this matter concluded that there was not a rational connection between the objective of the Bill (the deterrence of "boy racer" behaviour) and the power to seize and impound vehicles for 28 days (proposed clause 8), and nor was the impoundment power considered proportionate to the objective of the Bill.

Section 21: Right to be secure from unreasonable search and seizure

9. Section 21 of the Bill of Rights Act provides the right to be secure against unreasonable search and seizure. There are two limbs to this right. First, section 21 is applicable only in respect of those activities that constitute a "search and seizure". Second, where certain actions do constitute a search and seizure, section 21 protects only against those searches or seizures that are "unreasonable" in the circumstances.

Is impoundment under clauses 42 and 79A a "seizure" within the meaning of section 21 of the Bill of Rights Act?

10. In New Zealand there has been limited judicial consideration of the issue. The matter was considered by Williams J in *Wilson v New Zealand Customs Service*^[1]. That case concerned the seizure and continued detention of a vehicle by Customs officers in the context of a suspected evasion of customs duties. Williams J observed:

If property owned by a person or company or in which that person or company has an interest is seized, the reasonableness or unreasonableness of that seizure can be challenged under section 21.^[2]

11. The New Zealand position was further clarified in *Westco Lagan v Attorney-General*.^[3] That case related to the cancellation of contractual rights by statute. After accepting that intangible contractual rights could be viewed as "property", the

Court held that, as section 21 fell within the context of search, arrest and detention rights within the Bill of Rights Act, it could not have been intended for this section to apply generally to the seizure of property without compensation. 10. As was noted in the 2002 section 7 report discussed above, an appropriate approach would seem to be that section 21 captures searches and seizures that arise in the context of offending. This maintains the linkage of section 21 to criminal process, as required by Westco Lagan, and is consistent with our view that section 21 does not create a general property right.

12. On that basis we consider that the proposed seizure and impoundment powers in the current Bill come within the scope of section 21 of the Bill of Rights Act.

Do the proposed impoundment powers constitute a "reasonable" seizure?

Clause 79A

13. The impoundment powers proposed in clause 79A seek to re-enact the existing section 5(6) of the Transport Services Licensing Act. That section provides that a second or subsequent offence of carrying on a transport service without a license may lead to a Court Order for "surrender" of any vehicle being used in the service. The existing provision is considered ineffective because few offenders voluntarily "surrender" vehicles. The proposed change empowers the Court to order the impoundment of transport service vehicles.

14. The aim of the proposed clause is to prevent transport services being unlawfully operated by persons who have been convicted of the same offence for a second or subsequent time. It relates to the overall objective of this part of the Bill which is to enhance the accountability of transport service operators, thereby improving public safety and the personal security of service users.

15. The Ministry of Transport has indicated that there have been 935 prosecutions over a five-year period for persons operating an unlicensed transport service for a second or subsequent time. This demonstrates that the present regime for addressing the problem of repeat unlicensed operators is not particularly effective.

16. Impoundment of vehicles is considered an effective way of significantly reducing further repeat offending. Police report that the current impounding regime for disqualified, unlicensed and suspended drivers has seen a reduction of at least 30% in the number of subsequent offences. The current proposal is expected to produce similar results in relation to transport service operators.

17. We note that clause 79A of the Bill proposes an impoundment period "not exceeding 90 days". All the other impoundment provisions within the Land Transport Act are for a period of 28 days.

18. The Ministry of Transport has emphasised that this is a maximum penalty, intended to be reserved for the most serious repeat offenders. It is considered necessary to provide a sufficiently strong penalty for those who continue to operate unlicensed transport services even after previous convictions for the same offence.

This differs from other impoundment provisions in the Land Transport Act where impoundment may occur for first time offenders.

19. Furthermore, it is relevant to note that the sanction in clause 79A is to be imposed at the discretion of the Court. By way of contrast, the other impoundment provisions provide for a mandatory administrative sanction to be imposed prior to any formal conviction. Clause 79A also specifies that the impoundment is not to exceed the period of 90 days and may therefore be for a shorter period. The appeal provisions in the Land Transport Act that currently relate to the impoundment of vehicles will also apply to the proposed new impoundment powers.

20. Having considered the overall objectives of the Act we consider that the proposed impoundment provisions are rationally and proportionately connected to those objectives. We also believe that the Court's ability to exercise discretion as to whether impoundment occurs and for what time period, together with the existing appeal provisions, provides adequate protection against unreasonable impoundment.

21. On balance, we consider that the power to seize and impound vehicles under clause 79A is reasonable and thus consistent with the right to be free from unreasonable search and seizure contained in section 21 of the Bill of Rights Act.

Clause 42

22. The objective of clause 42 (section 96 impoundment) is to provide a more effective penalty for recidivist drink driving offenders who have at least two previous convictions for such offences. In this way the Bill aims to target serious traffic offenders and improve the safety and security of road users in line with the overall objectives of the Act. We accept that deterring recidivist drink driving offenders is an important and significant objective.

23. Enforcement statistics indicate that in the year 2000 there were 1030 alcohol convictions for drivers with three or more drink driving offences in the preceding five years. As noted above, Police report that the current impounding regime has seen a significant reduction in the number of disqualified, unlicensed and suspended drivers re-offending and it is expected that the proposed powers will produce a similar reduction.

24. On that basis we consider that the power to impound vehicles under clause 42 of the Bill is reasonable and therefore consistent with the right to be free from unreasonable search and seizure contained in section 21 of the Bill of Rights Act.

Conclusion

25. We consider that the provisions in the Bill do not appear to be inconsistent with the rights and freedoms contained in the Bill of Rights Act.

26. In accordance with your instructions, we attach a copy of this opinion for referral to the Minister of Justice. A copy is also attached for referral to the Minister of Transport, if you agree.

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CC: Minister of Justice
Minister of Transport Copy for your information

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Footnotes

1. (1999) 5 HRNZ 134.
2. Above note 1 at page 142.
3. [2001] 1 NZLR 40.