

Meat Board Restructuring Bill

17 November 2003

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: MEAT BOARD RESTRUCTURING BILL 2003

1. We have considered whether the Meat Board Restructuring Bill 2003 (5504/6) (the "Bill") is consistent with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). We understand that the Bill is to be considered by the Cabinet Legislation Committee on Thursday, 20 November 2003.

2. The Bill does not appear to be inconsistent with the rights and freedoms affirmed by the Bill of Rights Act. However, the Bill does raise a number of issues in relation to sections 14, 21 and 25(c) of that Act.

3. The following summary provides you with:

- A brief overview of the contents of the Bill,
- A note on the provisions of the Bill which appear to raise issues under one of the sections of the Bill of Rights Act, and
- Our conclusion as to the Bill's consistency with the Bill of Rights Act.

4. This summary is followed by a fuller analysis which discusses each of the issues raised under the Bill of Rights Act noting, where relevant, the justificatory material in each instance.

SUMMARY

Overview of the Bill

5. The Bill would restructure the New Zealand Meat Board established under section 4(1) of the Meat Board Act 1997 enabling the Board to establish and operate meat export quota management systems and to provide for compliance audits in relation to those systems. The Bill also makes provision for the ownership and use of the Board's assets and provides for certain tax consequences in relation to the transfer of funds and other assets between the Board and an "industry-good organisation". Further, the Bill sets out the transition arrangements to affect this change.

Issues of Inconsistency with the Bill of Rights Act

Section 14: the right to freedom of expression

6. The Bill contains a number of provisions that compel individuals to provide information that can be described as containing expressive content in certain instances. We are of the opinion that these provisions constitute "justified limitations" on the right to freedom of expression, which includes the right not to impart information, that is protected by section 14 of the Bill of Rights Act. In reaching this view we have taken into consideration the importance of both financial and performance reporting by the Board. Accurate information is essential in the compilation of these reports which ensure the maintenance of credible quota management systems in the New Zealand meat industry.

Section 21: the right to be secure from unreasonable search and seizure

7. The Bill establishes two regulatory regimes. An auditing regime under clauses 40-46 and an inspection regime under clauses 59-63. These clauses confer on auditors and 'authorised persons' powers of search and seizure. Section 21 of the Bill of Rights Act provides the right to be secure against unreasonable search and seizure.

8. The purpose of the auditing regime is to assess the effectiveness of the Board's quota management systems in order to achieve compliance with the Government's international treaty obligations relating to quota markets.

9. The purpose of the inspection regime is to ascertain whether, inter alia, a person has taken any action that may jeopardise the ability of New Zealand meat producers to access a quota market. In doing this it seeks to maintain the integrity of the New Zealand quota system and the industry's economic well-being.

10. We have considered whether the exercise of the powers conferred in the Bill may give rise to issues of inconsistency with section 21 of the Bill of Rights. We are of the opinion that the regimes are construed in such a way as to only give rise to "reasonable" search and seizure due to the restrictions and safeguards impugned by the act on auditors and 'authorised persons' carrying out inspections.

Section 25(c): the right to be presumed innocent

11. The Bill contains various offence provisions that contain a reverse onus whereby the accused must prove something in order to escape liability (clauses 64, 65, 66). We are of the opinion that these provisions constitute "justified limitations" on the right to be presumed innocent that is protected by section 25(c) of the Bill of Rights Act. In reaching this view, we have taken into consideration the fact that the offences in question may be described as public welfare regulatory in nature and the importance of ensuring that operators in the meat industry are aware of, and meet their obligations under the Bill (particularly the need for exporters to be registered, and adhere to their quota allocations) in view of the potential economic consequences of non-compliance.

Conclusion on consistency of the Bill with the Bill of Rights Act

12. We have concluded that the Bill does not appear to be inconsistent with the Bill of Rights Act.

FULLER ANALYSIS: THE BILL OF RIGHTS ISSUES RAISED BY THE BILL

Section 14: the right to freedom of expression

13. The right to freedom of expression extends to all forms of communication that attempt to express an idea or meaning. The right extends to conduct as well as silence. We note that several clauses of the Bill appear to raise prima facie issues in terms of section 14 of the Bill of Rights Act as they compel individuals in certain situations to provide information. For example, we note clause 10 of Schedule 10 which requires the directors of the Meat Board to disclose any interests that they may have in a transaction or a proposed transaction with the Board.

14. We consider that these clauses are all justifiable under section 5 of the Bill of Rights Act. The clauses are necessary to enable the Board to fulfil its statutory duties that include financial and performance reporting. The ability to gather the required information to complete these tasks is vital in ensuring that the financial reports are accurate. There is a strong public interest in public sector compliance and an expectation that this information be available in the public forum. The provisions also ensure that all conflicts of interest are disclosed to ensure transparency in all transactions.

15. In our opinion, the reporting and transparency obligations are significant and important objectives, especially as they oblige the Board to ensure maintenance of credible quota management systems. Further, the limitations are rationally and proportionately connected to this objective as they are tailored to certain circumstances and types of information relevant to the Board's functions.

Section 21: the right to be secure from unreasonable search and seizure

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

Inspection and auditing powers - Clauses 40-46, 59-63

17. To achieve the objectives underlying the Bill it was considered necessary to implement regulatory auditing and inspection regimes. We have considered whether the powers that are conferred by these regimes may give rise to an issue of inconsistency with section 21 of the Bill of Rights Act.

18. Under the auditing regime - which is set out in clauses 40 through 46 - auditors have the power to conduct a quota compliance audit (which involves specific powers

to enter premises, examine facilities, inspect products, examine and copy documents, remove product samples and documents, and to require production of documents). The purpose of such an audit is to assess the effectiveness of the Board's quota management systems in order to achieve compliance with the Government's international treaty obligations relating to quota markets.

19. Under the inspection regime - which is set out in clauses 59 through 63 - an 'authorised person' has the power to inspect any place to ascertain whether, inter alia, a person has taken any action that may jeopardise the ability of New Zealand meat producers to access a quota market. It can therefore be said that the purpose of this power is to ensure the maintenance of the integrity of the New Zealand quota system and the industry's economic well-being.

20. In determining whether the search and seizure powers are consistent with section 21, we considered the following factors and safeguards that are contained in the Bill:

- a) The manner in which the powers can be exercised are concisely stated and limited, particularly with respect to authorisation of inspectors and the places that may be searched;
- b) The types of information and items that can be seized are clearly set out in the relevant provisions and restricted to achieving specific purposes. For example determining compliance with the quota allocation regime;
- c) For an audit requiring access to a place other than a place of business a search warrant is required. Similarly, for an inspection requiring access to a place other than a place of business prior consent by the occupier or a search warrant is required;
- d) In some instances additional safeguards are included that provide protection for the parties in question. For example, under clause 62(2) an authorised person carrying out an inspection must upon taking a document, article or thing, leave in a prominent place a schedule of documents, articles and things taken. Authorised persons must also be suitably qualified and trained to conduct inspections; and
- e) The requirement to produce information does not override the privilege against self-incrimination.

In light of the restrictions and safeguards outlined above, we consider that the inspection and auditing powers set out in the Bill do not appear to be prima facie inconsistent with section 21 of the Bill of Rights Act.

Section 25(c): the right to be presumed innocent until proven guilty according to law

21. Section 25(c) of the Bill of Rights Act provides for the right to be presumed innocent until proved guilty according to law. In *R v Wholesale Travel Group*^[1], the Supreme Court of Canada held that 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.

22. In strict liability offences, once the Crown has proved the actus reus, the defendant can escape liability by proving, on the balance of probabilities, either the common law defence of total absence of fault, or a statutory defence that embodies this, such as "without reasonable excuse". In general, defendants should not be convicted of strict liability offences where an absence of fault or a "reasonable excuse" exists.

23. A statutory defence reverses the usual burden of proof by requiring the defendant to prove, on the balance of probabilities, the defence. Because the burden of proof is reversed, a defendant who is able to raise doubt as to his or her fault but is not able to prove to the standard of the balance of probabilities, absence of fault or a "reasonable excuse" would be convicted. We consider, therefore, that as the defendant is required prove something in order to escape liability, the use of strict liability offences is contrary to the presumption of innocence captured by section 25(c) of the Bill of Rights Act.

Clauses 64, 65, 66 and schedule 1, clause 10(4) of the Bill

24. The Bill contains a number of strict liability offences, which are as follows:

- Clause 64 (unauthorised or unregistered persons exporting meat products);
- Clause 65 (refusal to comply with a request for information); and
- Clause 66 (prevention and obstruction of audit or inspection processes).

25. These provisions contain reverse onus provisions which, by virtue of the phrase "without reasonable excuse" and section 67(8) of the Summary Proceedings Act, place a burden of proof on the defendant. As stated above, this gives rise to a prima facie issue under section 25(c) of the Bill of Rights Act.

26. We have considered whether these clauses can be considered a reasonable limit on the right to be presumed innocent until proven guilty by law in terms of section 5 of the Bill of Rights Act. In our view, justification can occur on the grounds that the reverse onus provisions:

- relate to a public welfare regulatory regime in which the offence arises;
- the information sought is 'peculiarly within the realm of the defendant' as to the reasons for not providing the information sought; and
- the penalty for breach is at the lower end of the scale.

27. We have concluded that the strict liability offences contained in the Bill are consistent with the first two conditions. The aim of the Bill, as stated above, is to establish and operate in New Zealand meat export quota management systems and to provide for compliance audits in relation to those systems. To this end, the Ministry of Agriculture and Forestry has indicated that the offences have been framed as strict liability offences to ensure that there is an onus on individuals operating in the meat industry to be aware of, and meet their obligations under the Bill (particularly in light of the need for exporters to be registered, and adhere to their quota allocations).

28. However, the penalties for these liability clauses include provisions to fine offenders up to \$200 000 and are therefore not at the 'lower end of the scale.' We have taken into account the Ministry of Agriculture and Forestry's explanation that the offences have been framed as a strict liability offences because:

"Tariff quotas (mainly the EU sheep-meat market) are currently administered in a manner that means New Zealand obtains in the order of \$200-400 million per year in "quota rents" (higher returns than world market prices).

If meat is exported into a quota market in contravention of a quota management system, there is the potential to jeopardise New Zealand's ongoing ability to earn the quota rents. In essence, if the importing country authorities are not satisfied that New Zealand's system is watertight, they may seek to change the arrangements to the substantial detriment of New Zealand. While New Zealand would probably challenge such a decision at the WTO, it is important to provide a strong incentive for meat exporters to comply with quota management mechanisms."

29. We therefore consider that, on balance, the limit the strict liability offences place on section 25(c) of the Bill of Rights Act is justifiable in terms of section 5 of that Act.

CONCLUSION

30. 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.

31. 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 Agriculture and Forestry, if you agree.

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Principal Legal Adviser	Senior Legal Adviser
Office of Legal Counsel	Bill of Rights/Human Rights Team

CC: Minister of Justice

Minister of Agriculture and Forestry

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Footnotes

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