

21 August 2007

ATTORNEY-GENERAL

## **LEGAL ADVICE**

### **CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: PUBLIC TRANSPORT MANAGEMENT BILL**

- 1 We have assessed whether the Public Transport Management Bill ('the Bill'), (PCO 7897/13) is consistent with the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). We understand that this Bill will be considered by the Cabinet Business Committee at its meeting on 27 August 2007.
- 2 We understand that the Bill is likely to be subject to further minor amendments before it is submitted to Cabinet, and we will provide you with further advice should this prove necessary.
- 3 We have concluded that the Bill appears to be consistent with the Bill of Rights Act. In reaching this conclusion we have considered possible issues of inconsistency with sections 21 (unreasonable search and seizure), 25(c) (the right to be presumed innocent until proven guilty), and 27 (the right to natural justice) of the Bill of Rights Act.

### **PURPOSE OF THE BILL**

- 4 The stated purpose of the Bill is to contribute to the aim of achieving an integrated, safe, responsive, and sustainable land transport system. To achieve this purpose, the Bill:
  - specifies the powers of regional councils to set standards for the public transport services provided in their regions;
  - regulates the registration of public transport services provided on a commercial basis; and
  - helps regions obtain the best value for money in achieving an integrated, responsive, and sustainable public transport system that also enables fair competition and a competitive and efficient market for public transport services.

### **POSSIBLE ISSUES OF INCONSISTENCY WITH THE BILL OF RIGHTS ACT**

#### **Section 25(c) – the right to be presumed innocent until proven guilty**

- 5 Section 25(c) affirms the right to be presumed innocent until proven guilty according to law. In *R v Wholesale Travel Group*,<sup>1</sup> the Supreme Court of Canada held that the right to be presumed innocent until proven guilty requires at a minimum that an individual must be proven guilty beyond reasonable doubt, and that the state must bear the burden of proof. The right to be presumed innocent until proven guilty was considered by the New Zealand Supreme Court in *R v Hansen*.<sup>2</sup> The majority of the Court considered that the right to be presumed innocent is not absolute, and can be subject to justified limitations.<sup>3</sup>
- 6 In strict liability offences, once the Crown has proved the *actus reus*, the defendant can only 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 that defence. In general, defendants should not be convicted of strict liability offences where an absence of fault or a "reasonable excuse" exists.
- 7 A statutory defence reverses the usual burden of proof by requiring the defendant to prove, on the balance of probabilities, the elements of 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 absence of fault or a reasonable excuse to the standard of the balance of probabilities would be convicted. We consider, therefore, that where the defendant is required to prove something in order to escape liability, the use of strict liability offences is contrary to the presumption of innocence protection contained by section 25(c) of the Bill of Rights Act.

#### *Strict Liability Offences in the Bill*

- 8 The Bill contains the following strict liability offences:
  - Clause 46 (operating an unregistered commercial public transport service) – liable on summary conviction to a fine not exceeding \$30,000 in the case of a first offence; and \$60,000 in the case of a second or subsequent offence
  - Clause 47 (varying the details of a registered commercial public transport service and without reasonable excuse failing to give the required notice) – liable on summary conviction to a fine not exceeding \$30,000
  - Clause 48 (without reasonable excuse, withdrawing registered commercial public transport services without giving the required notice) – liable on summary conviction to a fine not exceeding \$30,000
  - Clause 49 (without reasonable excuse withdrawing registered commercial public transport services before expiry of minimum duration specified in regional transport plans) – liable on summary conviction to a fine not exceeding \$30,000

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

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

<sup>3</sup> *R v Hansen* [2007] NZSC 7, see for example paragraph 66.

- Clause 50 (a regional council failing to comply with the requirement to keep a current register of all commercial public transport services registered by it) - liable on summary conviction to a fine not exceeding \$3,000.
- 9 Where an issue arises a provision may nevertheless be consistent with the Bill of Rights Act if it can be considered a "reasonable limit" on the right that is "demonstrably justified" under section 5 of that Act. The section 5 inquiry is two-fold: whether the provision serves an important and significant objective; and whether there is a rational and proportionate connection between the provision and that objective.<sup>4</sup>
  - 10 We consider that the provisions can be justified in light of the following factors:
    - a) the nature and context of the conduct to be regulated;
    - b) the reasons why the defendant should provide evidence or prove on the balance of probabilities that they are not at fault;
    - c) the ability of the defendant to exonerate themselves; and
    - d) the penalty level.

#### *Nature of the Conduct*

- 11 The courts have generally accepted that there is a distinction between "truly criminal offences" and offences that are considered to be in the realm of "public welfare regulatory offences".<sup>5</sup> A reversal of the onus of proof is generally considered to be more easily justifiable for regulatory offences. Those who choose to participate in regulated industries should expect to meet certain standards of behaviour.<sup>6</sup>
- 12 We consider that these clauses can be described as regulatory in nature. The requirement to register services (or variations or withdrawals) enables regional councils to plan and manage the public transport services in their regions. The council has a power to decline services, if they would have a material adverse effect on the financial viability of a contracted service or on traffic management grounds. Enabling the planning and management of public transport services is considered to be a significant and important objective.

#### *Ability of Defendants to Provide Evidence and Exonerate Themselves*

- 13 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

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<sup>4</sup> See *Moonen v Film Literature Board of Review* [2000] 2 NZLR 9 and *R v Oakes* (1986) 26 DLR (4th).

<sup>5</sup> *Civil Aviation Authority v MacKenzie* [1983] NZLR 78

<sup>6</sup> *R v Wholesale Travel Group* (1992) 84 DLR (4th) at 213.

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.

- 14 The Bill will enable defendants to claim a reasonable excuse defence. The Ministry of Transport advises that defendants will be in a better position to know that the breach occurred and what steps they took to avoid it. It is reasonable in these circumstances, to place the burden on defendants to show why they are not at fault. This is also rationally connected to the objective of enabling the planning and management of public transport services.

#### *Penalty Level*

- 15 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. We note that these offences carry liability on summary conviction punishable by fines, which range from \$3,000 to \$30,000 in the first instance. We consider these penalties to be the appropriate maximum penalties for the area being regulated.
- 16 The Ministry of Transport advised that once controls can be applied to registered commercial public transport services, there will be greater incentive to disregard the registration requirements. To discourage this, the Bill proposes a higher penalty of a maximum \$60,000 fine for a second or subsequent offence of operating an unregistered service. We consider that such a penalty is reasonable and proportionate given the recidivist nature of the offending.
- 17 For the reasons set out above, we have concluded that the strict liability offences set out in clauses 38 to 42 of the Bill can be justified under section 5 of the Bill of Rights Act.

#### **Section 21 – the right to be free from unreasonable search and seizure**

- 18 Section 21 of the Bill of Rights Act provides the right to be secure against unreasonable search and seizure. The requirement to produce documents and information under statutory authority constitutes a search for the purposes of section 21 of the Bill of Rights Act.<sup>7</sup>
- 19 Clause 51 of the Bill provides any enforcement officer (sworn or non-sworn members of the Police) with the power to require any person to whom the Act applies to produce for inspection any documents, books, or records.
- 20 The Ministry of Transport advises that this power may be exercised when acting on a complaint from a regional council, and will be exercised to determine whether an offence against the registration requirements has been committed. The purpose of clause 43 is consistent with a regulatory power of inspection.

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<sup>7</sup> *New Zealand Stock Exchange v Commissioner of Inland Revenue* [1992] 3 NZLR 1 (PC).

- 21 We consider that these provisions do not constitute unreasonable searches in terms of section 21 of the Bill of Rights Act.

### **Section 27 – the right to natural justice**

- 22 Section 27(1) of the Bill of Rights Act provides that every person whose interests are affected by a decision by a public authority has the right to the observance of the principles of natural justice. One of the fundamental principles of natural justice is the right to be heard.
- 23 For completeness, we note that a number of provisions in the Bill provide regional councils with the power to decline to register a commercial public transport service, to decline to register a variation to a service, and to deregister commercial public transport services. The Bill also sets out a process that a regional council must follow when exercising the power to decline to register or to deregister. Councils are required to notify the operator of the intention to decline to register or to deregister, the reasons for declining or deregistering and the grounds in support of its reasons. The Bill also provides that the operator must be given an opportunity to be heard within a set period of time.
- 24 Accordingly we have concluded that these provisions do not limit the right to natural justice affirmed in section 27 of the Bill of Rights Act.

### **CONCLUSION**

- 25 We have concluded that the Bill appears to be consistent with the rights and freedoms contained in the Bill of Rights Act.

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