

Trade Marks (International Treaties And Enforcement) Amendment Bill

30 June 2008

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:

TRADE MARKS (INTERNATIONAL TREATIES AND ENFORCEMENT) AMENDMENT BILL

1. We have considered whether the Trade Marks (International Treaties and Enforcement) Amendment Bill (PCO 7626/9.5) ("the Bill") is consistent with the New Zealand Bill of Rights Act 1990 ("Bill of Rights Act"). We understand the Bill is likely to be considered by the Cabinet Legislative Committee at its meeting on Thursday, 3 July 2008.
2. The Bill amends both the Trade Marks Act 2002 and the Copyright Act 1994. Its purpose is to:
 - implement three international trade marks treaties into New Zealand law:
 - the Madrid Protocol (facilitating trade mark protection overseas),
 - the Singapore Treaty (simplifying and harmonising registration requirements and procedures), and
 - the Nice Agreement (relating to trade mark classification);
 - empower the Ministry of Economic Development's National Enforcement Unit and Customs to enforce criminal offences related to counterfeit goods and pirated works in the Trade Marks Act and the Copyright Act; and
 - make a number of miscellaneous technical amendments to the Trade Marks Act

We have concluded that the Bill does not appear to be inconsistent with the rights and freedoms affirmed in the Bill of Rights Act.

In reaching this conclusion, we considered potential issues of inconsistency with sections 21 and 25(c) of the Bill of Rights Act. Our analysis of these issues is set out below.

ISSUES OF POTENTIAL INCONSISTENCY WITH THE BILL OF RIGHTS ACT

Section 21 of the Bill of Rights Act: the right to freedom from unreasonable search and seizure

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.

Powers of entry and examination – search and seizure without a warrant

Clause 17 of the Bill inserts Subpart 2A into the Trade Marks Act. Clause 31 of the Bill inserts Subpart 6A into the Copyright Act. Both Subparts are identical and govern the powers and duties of enforcement officers to gather information and investigate offences under the respective Acts. Sections 134D and 134E of Subparts 2A and 6A outline an enforcement officer's limited power of entry and examination without a warrant. The search and seizure provisions in sections 134D and 134E apply in limited circumstances. Section 134D limits the search to an examination of public places at a time when such places are open to the public or to a search with the consent of an occupier. Section 134E limits the seizure power to items found in parts of the place open to the public that an enforcement officer has reasonable grounds to believe are counterfeit or evidence of a counterfeiting offence under the Act. Section 134P(1) requires an enforcement officer, prior to entry, to identify himself, announce his intention to search and provide evidence of his authority to search.

On their face, sections 134D and 134E authorise enforcement officers to conduct a "search and seizure" within the meaning of section 21 of the Bill of Rights Act. Therefore, the search and seizure must be reasonable in the circumstances.

The Ministry of Economic Development has identified that the sale of counterfeit goods, by its nature, is itinerant and usually conducted in temporary locations for short periods of time. There are many instances in which the exigent circumstances surrounding the investigation of an offence render obtaining a warrant impractical. Although it is unusual to grant the power of warrantless search and seizure in the criminal context, exigent circumstances is one of the exceptions where a warrantless search or seizure can be reasonable under the circumstances.

Sections 134D and 134E balance these exigencies against the rights of individuals to be secure from unreasonable searches and seizures. The provisions limit searches to those places where the public is permitted. The provisions limit seizures only to items found in parts of the place open to the public and to situations where a reasonable belief exists that the items are evidence of an offence. Further, no search or seizure is conducted without informing the occupier. Finally, no item is examined or seized that has not been placed for public display by the occupier. Given these boundaries, we consider that the limited powers of search and seizure are reasonable under the circumstances.

Powers of entry and examination – Search and seizure pursuant to a warrant

In addition, sections 134F to 134N govern the powers of an enforcement officer of entry and examination pursuant to a search warrant. These provisions also authorise enforcement officers to conduct a "search and seizure" within the meaning of section 21 of the Bill of Rights Act. However, we note that the warrant provisions constrain the conduct of enforcement officers to that which is reasonable in the circumstances. Further, we note

that in deciding whether to proceed with or without a warrant, an enforcement officer is bound to act in accordance with the Bill of Rights Act with due consideration to whether the search and seizure is reasonable in the circumstances.

Powers of entry and examination – Searches conducted with consent

Section 134D also permits entry and examination upon consent of the occupier. Section 134D(3) provides that no person who appears to an enforcement officer to be under the age of 14 may constitute an occupier for purposes of a consensual entry and examination. Section 134D(1)(c)(iii) provides that the occupier may revoke consent at any time. Even a consensual search is a “search” for purposes of section 21 of the Bill of Rights Act. We note that the age of the person giving consent will impact on the reasonableness of the search.

The minimum age limit of 14 years old contained in section 134D(3) is consistent with the minimum age that a child may be left home alone under section 10B of the Summary Offences Act 1981. Further, an enforcement officer has discretion to determine whether, by reference to the person’s apparent age, the individual can consent to a search. We note that such discretion must be exercised in a manner consistent with the Bill of Rights Act. Given these constraints, the consent provisions in section 134D(3) are reasonable.

Destruction of seized items

Sections 134T to 134W govern the retention and destruction of items seized by enforcement officers. Section 134W permits the destruction of perishable items at the instruction of the Commissioner of Police or the chief executive of the Ministry of Economic Development. On its face, section 134W constitutes a “seizure” under section 21 of the Bill of Rights Act. Section 134W may be contrasted with section 134V, which only permits destruction of items seized upon court order. We note, however, that there are exigent circumstances surrounding perishable items that render such a seizure reasonable, such as where items that may rot, spoil or deteriorate. Further, we note that the Commissioner of Police or the chief executive of the Ministry of Economic Development would be bound to exercise such powers in a manner consistent with the Bill of Rights Act.

Enforcement powers of customs officers – seizure of goods in customs controlled areas

Clause 21 of the Bill inserts sections 155A to 155J into the Trade Marks Act. Clause 35 inserts sections 144 to 144H into the Copyright Act. These provisions govern the enforcement powers of customs officers. Sections 155A and 144 are identical and permit a customs officer to seize goods in a “customs controlled area” that the officer has reasonable cause to believe are evidence of an offence. On their face, these provisions constitute a “seizure” for purposes of section 21 of the Bill of Rights Act. However, section 10 of the Customs and Excise Act 1996 permits customs officers to detain items in a “customs controlled area” for the purposes of examination. Sections 155A and 144 merely clarify that items believed to be evidence of an offence are within the items Customs may also detain and examine. Based on the length and nature of the detention of the items and the interest of Customs in control over items prior to entering the country, the seizure is reasonable in

the circumstances.

Section 25(c) of the Bill of Rights Act: the right to be presumed innocent until proved guilty.

Section 25(c) of the Bill of Rights Act affirms the right to be presumed innocent until proved guilty. This means that an individual must not be convicted where reasonable doubt as to his or her guilt exists; therefore, the prosecution in criminal proceedings must prove, beyond reasonable doubt, that the accused is guilty.

Strict liability offences give rise to an issue of inconsistency with section 25(c) because the accused is required to **prove** (on the balance of probabilities) a defence; whereas, in other criminal proceedings an accused must merely **raise** a defence in an effort to create reasonable doubt. This means, where an accused is unable to prove the defence, that he or she could be convicted even though reasonable doubt exists as to his or her guilt.

Clause 21 inserts section 155J into the Trade Marks Act and clause 35 inserts section 144I into the Copyright Act. Both sections create an offence for failure to provide certain information to Customs “without reasonable excuse”. Because an individual must prove the reason for failure to comply, these sections create strict liability offences.

A provision containing a strict liability offence may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of section 5 of that Act. In our view, justification for strict liability provisions can occur where: the offence relates to a public welfare regulatory regime rather than truly criminal behaviour; the information sought is 'peculiarly within the realm of the defendant'; and the penalty for breach is at the lower end of the scale.

The objective behind these provisions is that Customs have access to information regarding goods for import or export into New Zealand. The offence has been cast as a strict liability offence because, while a person may have good reason for failing to comply with a request for information, those reasons are peculiarly within the realm of the individual’s knowledge. The penalties for violation of these provisions are consistent with penalties for other strict liability offences concerning the failure to provide information. For these reasons, we consider that the offences in sections 155J and 144I are a justified limitation on the right to be presumed innocent until proven guilty.

CONCLUSION

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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