

Trade (Safeguard Measures) Bill

18 July 2008

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:

Trade (Safeguard Measures) Bill

1. We have considered the Trade (Safeguard Measures) Bill (PCO 8079/5.1) ('the Bill') for consistency with the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). We understand that the Bill is likely to be considered by the Cabinet Legislation Committee at its meeting on 24 July 2008.
2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching this conclusion we have considered possible inconsistencies with sections 19(1) (freedom from discrimination) and 27(1) (right to natural justice) of the Bill of Rights Act.

PURPOSE OF THE BILL

3. The Bill repeals and replaces the Temporary Safeguard Authorities Act 1987. The purpose of the Bill is to enable New Zealand to apply safeguard measures at its border in accordance with the Agreement establishing the World Trade Organisation. Safeguards are temporary measures, usually in the form of a duty, in order to:
 - a) provide temporary protection to a domestic industry from serious injury caused by increased imports; and
 - b) facilitate adjustment by a domestic industry to increased competition from increased imports.
4. The Bill:
 - includes matters that must be considered when determining whether the application of a safeguard measure is in the public interest;
 - provides that safeguard investigations be undertaken by the Ministry of Economic Development rather than by independent Temporary Safeguard Authorities;
 - extends the time frame for completing such investigations to ensure a WTO-compliant investigation can be undertaken;
 - empowers the responsible Minister to impose a final and provisional safeguard duty or to recommend that other measures be taken; and
 - authorises the Minister of Commerce to extend, liberalise, and terminate a safeguard duty following a review.

POSSIBLE INCONSISTENCIES WITH THE BILL OF RIGHTS ACT

Freedom from Discrimination

5. Section 19(1) of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the grounds set out section 21 of the Human Rights Act 1993, which includes ethnic or national origins.
6. Clause 18(4) empowers the Minister to exempt imports from certain countries from a safeguard measure. The purpose of this provision is to ensure that New Zealand can comply with current and future bilateral trade agreements which provide that safeguards measures may not be imposed on the treaty partner's exports. In our view, the discretion conferred by clause 18(4) must be exercised in a manner that is consistent with freedom from discrimination. In other words, the Minister could not adopt a process for exempting certain countries that could lead indirectly to unjustified discrimination against individuals from other countries.

Right to Natural Justice

7. Section 27(1) of the Bill of Rights Act affirms the right of everyone to the observance of the principles of natural justice. The right to natural justice can impose an obligation on a decision-maker to ensure that anyone whose rights or interests may be affected by a decision have sufficient notice and are given adequate opportunity to prepare a response to that decision. Prior notice is essential to an effective right to be heard. [\[1\]](#)
8. Clause 6(3) of the Bill provides that a decision is not invalid for failure to comply with the notification provisions contained in that clause. In our view, clause 6(3) does not protect procedural errors that amount to a breach of the right to natural justice. The purpose of the provision is merely to ensure that failure to comply exactly with a procedural requirement to notify after a decision does not automatically invalidate that decision. Clause 6(3) does not prevent review of a decision on the grounds that the investigation was not carried out properly, including circumstances where natural justice has been breached.
9. Clause 10(1) of the Bill entitles all interested persons to access information relevant to a safeguard investigation except:
 - a) confidential information (unless the submitter of the confidential information consents to the information being made available); or
 - b) other information that the chief executive considers should be withheld under the Official Information Act 1982 (OIA).
10. An inability to access relevant information could limit the right to natural justice because it could inhibit the ability of interested persons to respond to information that is injurious to their position. We have concluded that clause 10(1) does not limit the right to natural justice. The chief executive must properly determine whether information can be treated as confidential. Information is treated as confidential where submitter has shown good reason for the chief executive to believe that:

- a) making the information available would give a significant competitive advantage to a competitor of the submitter;
 - b) making the information available would have a significantly adverse effect upon the submitter;
 - c) the information should be treated as confidential for another reason.
11. The chief executive may request a submitter of confidential information to provide a summary, for access by all interested persons, of information withheld under clause 10(1) or reasons why such a summary cannot be provided. If no summary is provided or if the chief executive is not satisfied with the summary, the chief executive may disregard the information.
12. In respect of information withheld under the OIA, section 5 of that Act establishes the general principle that information is released unless there is good reason for withholding it. The Act includes the grounds on which information may be withheld. Part 5 of the Act makes any decision to withhold information subject to review by the Ombudsmen who may order the release of the information.

CONCLUSION

13. 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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1. *Waitemata Health v AG* [2001] NZFLR 1122, (2001) FRNZ 216 (CA)

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