

Waste Minimisation (Solids) Bill

16 May 2006

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:

WASTE MINIMISATION (SOLIDS) BILL

1. We have considered the Waste Minimisation (Solids) Bill ('the Bill'), a Member's Bill in the name of Nandor Tanczos MP, for consistency with the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). The Bill was introduced to the House of Representatives on 4 May 2006 and is currently awaiting its first reading. The next Members' day is scheduled for 17 May 2006.
2. We have concluded that the Bill appears to be consistent with the Bill of Rights Act. In reaching that conclusion we have considered possible inconsistencies with freedom of expression, the right to be secure against unreasonable search and seizure, the right to natural justice, and the right to be presumed innocent. Our analysis under those sections is set out below.

SUMMARY OF ADVICE

3. Clause 59 of the Bill requires brand-owners and vendors to provide certain information about products to the public and prescribes the manner in which this should be done. We consider that the information that must be provided to the public does not appear to be sufficiently "expressive" in content to attract the protection of section 14 of the Bill of Rights Act (freedom of expression).
4. Clause 35 of the Bill empowers Waste Control Authorities to make announced and unannounced inspections of waste transported to, or inspected by, the operators of a disposal facility. Regulatory inspections are more likely to be considered reasonable for the purposes of section 21 of the Bill of Rights Act because they generally take place in areas that have lower expectations of privacy than searches carried out on suspicion of criminal offending. We consider this clause to be consistent with normal powers of regulatory inspection and, as such, it appears to be reasonable for the purposes of the Bill of Rights.
5. Clause 26(b) of the Bill requires Waste Control Authorities to accept or reject a waste minimisation plan within 20 working days of receiving it. Similarly, clause 53(6) of the Bill requires the Waste Minimisation Authority to accept or reject a product stewardship plan within 90 days of receiving advice from the product advisory group. Although these provisions raise an issue of natural justice (by restricting the ability of the decision-maker to hear from the organisation submitting the plan), we have concluded that they are consistent with that right as the timeframes set out in the Bill are adequate.
6. The Bill contains several strict liability offences, which we have considered for consistency with section 25(c) of the Bill of Rights Act (the right to be presumed innocent). In our view, these offences are consistent with this right. This is because the offences are regulatory in

nature and turn on a particular matter that is *peculiarly* within the knowledge of the defendant. Given the regulatory nature of the offences, the penalty range of \$1,000 to \$100,000 is acceptable.

7. Clause 47(1)(e) (failure to pay a levy) is of more concern because it also provides six months imprisonment. While imprisonment for strict liability offences can be justifiable, the penalty must be clearly associated with the seriousness of the offence and the importance of the objective at which the offence is aimed. A failure to pay the levy could, in some (but not all) circumstances, amount to serious offending and it would only be the most serious offending in this category that would be expected to attract a prison sentence. While we consider this offence to be acceptable, the penalties set out in clause 47(1)(e) are close to the limit of what can be justified under section 5.

PURPOSE OF THE BILL

8. The purpose of the Bill is to protect the environment by minimising the amount of waste produced by businesses, public organisations and households. All organisations would be required to adopt and implement plans to decrease the amount of waste they produce. The Bill:
 - Sets targets for the reduction of waste and dates for the achievement of those targets;
 - Prohibits the disposal of materials for which there are systems for diverting them from waste disposal facilities;
 - Places a levy on the disposal of residual waste to deter wasteful behaviour and fund the Waste Management Authority;
 - Require producers to take responsibility for certain products through the lifetime of those products;
 - Establishes the Waste Minimisation Authority which would be responsible for approving producer responsibility programmes; and
 - Deems Local Authorities to be Waste Control Authorities with responsibility to adopt and implement waste minimisation and management plans.

ISSUES OF INCONSISTENCY WITH THE BILL OF RIGHTS ACT

Freedom of Expression

9. Section 14 of the Bill of Rights Act provides that:

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

10. Clause 59 of the Bill requires a brand-owner to provide (free of charge) to each seller of its products with consumer information on:
 - safe use and storage of the products;

- safe storage and handling of the products at the end of their lives;
 - the location of and access to facilities where end-of-life products can be taken; and
 - any refundable deposit or fee charged by the brand-owner for taking responsibility for the end-of-life collection products.
11. The seller must display the information on clearly visible signs with minimum specifications. The information must also be distributed to each buyer in a printed hand-out at the point of sale. The brand-owner must advertise the location and operating hours of its collection facilities once a week for 52 weeks after the collection facility is opened. The Bill sets out minimum specifications for the size of the advertisement which must be placed in a newspaper serving the consumers' area.
 12. The Courts in Canada and the United States have held that freedom of expression necessarily entails the right to say nothing or the right not to say certain things.^[1] Nevertheless, we consider that the requirements set out in the Bill are consistent with the right to freedom of expression. We note (while acknowledging the minor differences between section 14 of the Bill of Rights Act and section 2(b) of the Canadian Charter) the decision of the Supreme Court of Canada in *Irwin Toy Ltd v Attorney-General (Quebec)*^[2] that "expression" has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content.
 13. In this case, the information that must be provided to the public does not appear to be sufficiently "expressive" in content to attract the protection of section 14. It does not compel any individual to state an opinion or say something that they do not believe to be true. It does not suggest, for example, that the product is 'bad for the environment'. Rather, the information can be described as factual and descriptive in nature.
 14. In reaching this view, we have taken into account the fact that the right to freedom of expression includes the right to receive information. The requirement to provide the required information should be balanced against the consumers' rights to receive accurate factual information about the products they buy.
 15. For completeness, we also note that clause 75 of the Bill restricts the dissemination of statistical information collected by Waste Control Authorities under regulations. This clause is designed to protect the confidentiality of personal information. Consequently, while it is arguable as to whether such information is excessive in nature, the clause is clearly justifiable under section 5 of the Bill of Rights Act.

Unreasonable Search and Seizure

16. Section 21 of the Bill of Rights Act provides that:

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

17. Clause 35 of the Bill empowers Waste Control Authorities to make announced and unannounced inspections of waste transported to, or inspected by, the operators of a disposal facility. The inspection is carried out for the purposes of determining whether the

amount of non-disposable materials exceeds that permitted by regulation. This clause raises an issue under section 21 of the Bill of Rights Act because a power of inspection constitutes a search for the purposes of that section.

18. Section 21 of the Bill of Rights Act does not affirm a right to be secure against all searches and seizures but only those that are "unreasonable" in the circumstances. It requires that certain procedural safeguards be established around the powers to ensure that they are reasonable.
19. The Canadian Supreme Court has drawn a distinction between a "search" and an "inspection" of commercial operations to ensure compliance with the law.^[3] These types of regulatory inspections are more likely to be considered reasonable because they generally take place in areas that have lower expectations of privacy than searches carried out on suspicion of criminal offending (i.e. commercial premises). Also, regulatory powers of inspection are not as extensive as search powers associated with criminal investigations.
20. We consider clause 35 of the Bill to be consistent with normal powers of regulatory inspection and, as such, it appears to be reasonable for the purposes of section 21 of the Bill of Rights. The details of how the search is conducted are to be set out in regulations, however, any such regulations would also need to be consistent with the Bill of Rights Act.
21. For completeness, we note that several clauses of the Bill impose requirements to produce information or documents with corresponding offences for non-compliance. The requirement to produce information or documents under statutory authority constitutes a search.^[4] We consider these clauses to be reasonable as they are necessary for the effective operation of the Bill and largely administrative in nature.

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 by the decision maker.^[5]
23. Clause 26(b) of the Bill requires Waste Control Authorities to accept or reject a waste minimisation plan within 20 working days of receiving it. Similarly, clause 53(6) of the Bill requires the Waste Minimisation Authority to accept or reject a product stewardship plan within 90 days of receiving advice from the product advisory group. That includes any time spent obtaining additional information from the brand-owner. We have considered whether these provisions, by restricting the ability of the decision-maker to hear from the organisation submitting the plan, are inconsistent with section 27(1).
24. In our view, these clauses do not restrict the right to natural justice as the timeframes set out in the Bill are adequate. In reaching this conclusion, we note that clause 26 specifically requires the decision-maker to provide reasons for the decision, which supports the principles of natural justice.^[6] Clause 26 appears to envisage that a plan can be resubmitted and reconsidered because it requires the decision-maker to specify what is required for it to approve the plan. Neither provision prevents plans from being resubmitted and reconsidered.

The Right to be Presumed Innocent

25. Section 25(c) of the Bill of Rights Act provides that everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to law. 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.^[7]
26. Strict liability offences raise a *prima facie* issue of inconsistency with section 25(c) because, once the prosecution has proven the defendant committed the act in question, the defendant must prove the defence (or disprove a presumption) on the balance of probabilities to escape liability. In other criminal proceedings a defendant must merely raise a defence in an effort to create reasonable doubt. Where a defendant is unable to prove the defence, or disprove a presumption, then she or he could be convicted even if reasonable doubt exists as to her or his guilt.

Strict Liability Offences Contained in the Bill

27. The Bill contains strict liability offences including:
 - Clause 36(1) makes it an offence to dispose of items where a prohibition has been placed on disposal;
 - Clause 47(1) (a) makes it an offence for a waste disposal facility to fail to operate a weigh bridge;
 - Clause 47(1)(e) makes it an offence for a waste disposal facility to fail to pay a levy to the Waste Management Authority; and
 - Clause 76 makes it an offence to publish information to which clause 75 (set out above) applies.
28. A number of factors need to be considered in determining whether a departure from section 25(c) is justified under section 5:
 - the nature and context of the conduct to be regulated;
 - the reasons why the defendants should provide evidence or prove on the balance of probabilities that they are not at fault;
 - the ability of the defendant to exonerate themselves; and
 - the penalty level.

Nature of the Conduct

29. 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".^[8] 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 be expected to meet certain expectations of care and accept the enhanced standards of behaviour required of them.^[9] The offences set out in this Bill fall into that category.

Ability of Defendants to Provide Evidence and Exonerate Themselves

30. 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 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. For the specified offences in this Bill, the defendants are in a better position to explain why they failed to comply with the necessary regulatory requirements. Only they know why they might have disposed of prohibited items, failed to operate a weigh bridge or pay a levy, or disclosed confidential information.

Penalty Level

31. 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. The strict liability offences in this Bill impose maximum fines between \$1,000 and \$100,000. Given the regulatory nature of the offences, this is within a range that is acceptable for strict liability offences.

32. Clause 47(1)(e) (failure to pay a levy) is of more concern because it provides for penalties of up to \$100,000 or 6 months imprisonment (or both). A penalty of imprisonment over one year is usually associated with indictable offences and generally requires the prosecution to prove all the elements of the offence beyond reasonable doubt.

33. The Canadian Supreme Court has considered the question of imprisonment for public welfare regulatory offences and concluded that it can be justified as the stigma associated with imprisonment for such offences is less than that for truly criminal offences.^[10] However, while an offence that reverses the burden of proof and contains a penalty of a term of imprisonment may, in limited situations, be justifiable, the penalty must be clearly associated with the seriousness of the offence and the importance of the objective at which the offence is aimed.

34. The levies imposed by the Bill would be necessary to fund the waste management system. Accordingly, a failure to pay the levy could, in some (but not all) circumstances, amount to serious offending. It would only be the most serious offending in this category which would be expected to attract a prison sentence.

35. On balance, we have concluded that the strict liability offences contained in the Bill are justifiable under section 5 of the Bill of Rights Act. Despite this conclusion, we consider the penalties sets out in clause 47(1)(e) to be close to the limit of what can be justified under section 5.

CONCLUSION

36. We have concluded that the Bill is consistent with the rights and freedoms contained in the Bill of Rights Act.

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Footnotes

1 *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977)

2 [1989] 1 SCR 927

3 *R v Jarvis* 219 DLR (4th) 233

4 *New Zealand Stock Exchange v Commissioner of Inland Revenue* [1992] 3 NZLR 1 (PC)

5 See for example *Franic v Wilson* [1993] 1 NZLR 318 (HC) and *Upton v Green (No 2)* [1996] 3 HRNZ 179

6 *Lewis v Wilson and Horton Ltd* [2000] 3 NZLR 546 (CA)

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

8 *Civil Aviation Authority v MacKenzie* [1983] NZLR 78

9 *R v Wholesale Travel Group* (1992) 84 DLR (4th) at 213

10 *R v Wholesale Travel Group* (1992) 84 DLR (4th) at 219

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