

Weathertight Homes Resolution Services Amendment Bill

9 August 2006

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: WEATHERTIGHT HOMES RESOLUTION SERVICES AMENDMENT BILL

1. We have considered the Weathertight Homes Resolution Services Amendment Bill ('the Bill') for consistency 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 Business Committee on Monday, 14 August 2006.
2. We have concluded that the Bill appears to be consistent with rights and freedoms affirmed in the Bill of Rights Act. In reaching this conclusion, we have considered the Bill for possible limitations on section 21 (unreasonable search and seizure) and section 27(1) (right to natural justice) of the Bill of Rights Act. Our analysis under those sections is discussed below.

PURPOSE OF THE BILL

3. The Bill amends the Weathertight Homes Resolution Services Act 2002 ('the Act'), which provides homeowners with an alternative to the Courts for the resolution of leaky building claims. The Bill contains several changes to the existing procedure intended to improve the speed and efficiency of the resolution service.

CONSISTENCY OF THE BILL WITH THE BILL OF RIGHTS ACT

Section 21: Unreasonable Search and Seizure

4. Section 21 of the Bill of Rights Act affirms the right of everyone to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.
5. Clause 18 of the Bill inserts a new section 36 into the Act which, among other things, empowers the Tribunal to compel parties to provide documents that it reasonably requires. A failure to comply is an offence under new section 55E and could lead to a fine of up to \$2000. A requirement to produce documents is likely to be considered a search for the purposes of section 21, especially where failure to provide the documents results in possible sanction.[\[1\]](#)
6. The Canadian courts have taken the view that a proper balance between the interests of the individual and the state can be struck if the requirement to produce documents is subject to appropriate terms and conditions, including those designed to protect the interests of the person compelled to provide the documents.[\[2\]](#)
7. We have concluded that this provision appears to be consistent with the right to be secure against unreasonable search and seizure. In reaching this conclusion we note that the ability

to require documents is consistent with the adjudication function of the Tribunal (i.e. the Tribunal may exercise this power in relation to an adjudication or the parties to it) and that the power must be exercised reasonably. Also, the power to demand the production of documents is less of an intrusion into the expectation of privacy than a power of entry.^[3]

Section 27(1): Consistency with the Right to Natural Justice

8. Section 27(1) of the Bill of Rights Act affirms 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.

The Right to Natural Justice and Time Limits

9. Clause 9 of the Bill inserts a new section 10(5) into the Act which limits the time available for individuals to respond to assessor's report to 20 days. Similarly, clause 10 inserts a new section 12A into the Act which imposes a 20 day limit on the time to apply for a reconsideration of a determination. Although time limits can limit the right to natural justice, in this case, the time limits appear to be reasonable and do not limit the right to natural justice affirmed in section 27 of the Bill of Rights Act.

The Right to Natural Justice and Cross-examination

10. Clause 18 of the Bill inserts a new section 38C(2) into the Act which requires the Tribunal to comply with the principles of natural justice. This provision does not appear to alter the obligation of the Tribunal to comply with the principles of natural justice, which exists regardless of any statutory requirement. New section 38C(3) states that subsection (2) does not require the Tribunal to permit cross-examination but it may do so in its "absolute discretion". The right to natural justice generally requires the right to cross-examine or test the evidence of the other side, especially in circumstances where credibility is an issue, although it will not be necessary in all cases.
11. Applying section 6 of the Bill of Rights Act, which requires the Courts to prefer interpretations that are consistent with the Bill of Rights Act, the discretion conferred by section 38C(3) can be interpreted as subject to the obligation to observe the principles of natural justice. Although that discretion is described as "absolute", this does not remove the presumption that the principles of natural justice apply to that discretion. Section 38C(3) therefore clarifies that the right to natural justice will not necessarily require the Tribunal to allow cross-examination. Accordingly, it appears to be consistent with section 27(1) of the Bill of Rights Act.

The Right to Natural Justice and Legal Representation

12. Clause 18 also inserts a new section 39A(1)(b) into the Act which makes one of the aims of the Tribunal to minimise the involvement of lawyers in low value claims (defined as claims under \$50,000). The principles of natural justice might require that a person be legally represented where representation is necessary in the interest of fairness.^[4] A question of

fairness might arise where there are points of law to decide, the capacity of a particular party to represent themselves is in doubt, or procedural difficulties are likely to be encountered. New section 39A(1) is subject to section 50 of the Act, which provides for parties to be represented at hearings, and new section 38C(2) in the Bill, which requires the Tribunal to comply with the principles of natural justice. Accordingly, it appears to be consistent with section 27(1) of the Bill of Rights Act.

CONCLUSION

13. Based on the analysis set out above, 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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Footnotes

1 *NZ Stock Exchange v CIR* [1991] 3 WLR 221; [1991] 4 All ER 443 (PC); see also *McKinlay Transport Ltd v R* (1990) 68 DLR (4th) 568 (SCC); *Thomson Newspapers v Canada* [1990] 1 SCR 425.

2 *United Kingdom v Hrynyk* 135 DLR (4th) 693, 702.

3 *Trans Rail v Wellington District Court* [2002] 3 NZLR 780, 791-792

4 *Drew v Attorney-General* [2001] 1 NZLR 428

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