

26 October 2016

Hon Christopher Finlayson QC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Maritime Transport Amendment Bill

Purpose

1. We have considered whether the Maritime Transport Amendment Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. We have not yet received a final version of the Bill. This advice has been prepared with the latest version of the Bill (PCO 19185/23.0). We will provide you further advice if the final version of the Bill includes amendments affecting the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 21 (unreasonable search and seizure). Our analysis is set out below.

The Bill

4. The Bill amends the Maritime Transport Act 1994 ('the Act'). Its main purposes are to:
 - a. reduce the risks of drug and alcohol use in the commercial maritime sector, including by requiring commercial maritime operators to have drug and alcohol management plans that provide for workers engaged in safety-sensitive work to be drug tested by those operators and the Director of Maritime New Zealand
 - b. enable New Zealand to accede to the 2003 Protocol to the International Fund for Compensation for Oil Pollution Damage 1992 by increasing the compensation available to meet claims for pollution damage caused by major oil tanker spills in New Zealand waters (liability claims)
 - c. provide for more money to be made potentially available to meet liability claims by allowing New Zealand to make reservations to the Convention on Limitation of Liability for Maritime Claims that exclude limitation of liability for maritime claims relating to wreck removal, cargo removal, and damage caused by hazardous and noxious substances, and
 - d. improve the operation of the Act's existing provisions by making minor and corrective amendments.

Consistency of the Bill with the Bill of Rights Act

Section 21 – Unreasonable search and seizure

5. Section 21 of the Bill of Rights Act affirms the right to be secure against unreasonable search or seizure, whether of the person, their property or correspondence, or otherwise. Section 21 protects a number of values including personal privacy and dignity,¹ but any expectation of privacy needs to be reasonable. The primary domain of s 21 is in the law enforcement or criminal context, but the courts have recognised its relevance in the regulatory context too.²
6. Clause 6 of the Bill introduces new Part 4B (Drug and alcohol management plans and testing). New s 40Z requires a Drug and Alcohol Management Plan ('DAMP') to be developed by commercial maritime operators ('DAMP operators').³ New s 40Z(2) requires DAMPs to provide for randomised drug or alcohol testing of workers engaged in safety-sensitive activities⁴ ('operator testing'). New s 40ZB requires DAMP operators to ensure operator testing is carried out. New s 40Z(3) provides that DAMPs may also include further matters for managing health and safety risks arising from drug or alcohol use, including testing other than at random.
7. New s 40ZC also permits the Director of Maritime New Zealand ('the Director') to test any one or more of a DAMP operator's safety-sensitive workers at any reasonable time and in any reasonable circumstances the Director considers appropriate ('Director testing').
8. Both operator and Director testing require the worker's consent.⁵ If a worker refuses to consent, or if he or she fails the test, the DAMP operator must stand the worker down from performing safety-sensitive activities until they are able to perform them safely, and implement the response plan in the DAMP.

Is the Bill of Rights Act engaged?

9. The Bill of Rights Act applies to actions done by the legislative, executive or judicial branches of government, or by any person or body performing a public function, power or duty conferred or imposed by or pursuant to law.⁶
10. Director testing under new s 40ZC engages the Bill of Rights Act as the Director is both performing a public function and exercising a power conferred by the Bill. As new s 40ZB places a duty on DAMP operators to conduct randomised testing of safety-sensitive workers, we consider the Bill of Rights Act applies equally to operator testing.
11. In reaching this conclusion, we note the 2004 Employment Court decision *New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc v Air New Zealand*. The Court held that general statutory duties on a company to ensure its activities were carried out safely, and to establish and follow a management system ensuring

¹ See, for example, *Hamed v R* [2012] 2 NZLR 305 at [161] per Blanchard J.

² See Butler and Butler, *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [18.29.33].

³ New s 40Y (Interpretation) defines DAMP operators as persons who operate a ship (other than a pleasure craft) which requires 'safety-sensitive' activities to be carried out, hold a maritime document for operating that ship, and have established a 'prescribed safety system'.

⁴ Defined as activities capable of significantly affecting the health or safety of any person aboard a ship, including the person performing the activity, as well as any activity prescribed as such by maritime rules.

⁵ Clause 7, new ss 40ZB(4)(a), 40ZC(2)(c).

⁶ New Zealand Bill of Rights Act 1990, s 3(b).

compliance with prescribed safety standards, were not enough to bring that company's activities (in particular, a drug-testing policy) within the application of the Bill of Rights Act.⁷ We consider the specific and mandatory requirement for DAMP operators to drug test safety-sensitive workers under new s 40ZB distinguishes testing under the Bill from the circumstances in that case, and brings the testing within the ambit of the Bill of Rights Act.

12. New s 40Z(3) may be read on its face as explicitly conferring on DAMP operators an additional power to test workers other than at random. We understand from the Ministry of Transport that the intention of this provision is instead to preserve the legality of testing outside the Bill's regime, in the context of private employment agreements. For the purposes of this advice, we do not consider it necessary to analyse new s 40Z(3) further, because testing other than at random will occur either:
 - a. outside the Bill's regime and the scope of the Bill of Rights Act, as the power is arguably not conferred by or exercised pursuant to the Bill, or
 - b. under new s 40Z(3) and within the scope of the Bill of Rights Act, in which case s 6 of that Act will require the testing to be carried out consistently with the rights and freedoms contained in the Bill of Rights Act.
13. In reaching this position we have also taken into account existing legislative duties of good faith and reasonableness applying to employment relationships. We consider these duties support the conclusion that, to the extent new s 40Z(3) engages the Bill of Rights Act, its content is reasonably justified.

Do operator and Director testing engage s 21?

14. Testing under the Bill involves taking and analysing bodily samples to determine the presence or level of alcohol or a testable drug. The Supreme Court has recognised this process constitutes a search under s 21 of the Bill of Rights Act.⁸ New Part 4B therefore engages the right against unreasonable search and seizure.

Are operator and Director testing powers reasonable?

15. Ordinarily a provision found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of that Act. However, the Supreme Court has held an unreasonable search logically cannot be demonstrably justified and therefore the inquiry does not need to be undertaken.⁹ In assessing whether the provisions for Director and DAMP operator testing are reasonable, we have considered the importance of the objective sought to be achieved and whether the provisions are rationally connected and proportionate to that objective.
16. New Part 4B is designed to reduce the safety risks of drug and alcohol use in the commercial maritime sector. We consider this objective is sufficiently important to warrant action which may engage s 21 of the Bill of Rights Act.
17. We also consider the provisions for testing are rationally connected to that objective. Misuse of drugs and alcohol can lead to impairment and safety risks at work. The

⁷ *New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc v Air New Zealand* [2004] 1 ERNZ 614 at paras [206] - [207].

⁸ *Cropp v Judicial Committee* [2008] 3 NZLR 744 at [18].

⁹ *Ibid* at [33]; *Hamed v R*, above n 1 at [162].

effects of blood-alcohol levels on cognitive function are well-documented. While the reliability of testing for the presence or level of certain drugs (to establish impairment at the time of testing) may be less settled, we consider there is a clear connection between reducing the risks of drug use and testing for drugs.

18. The possibility of alcohol and drug testing, coupled with consequences for failure or refusal to comply, can be expected to have a deterrent effect on alcohol and drug use in the commercial maritime sector. Testing applies only to safety-sensitive workers whose activities are capable of significantly affecting the health or safety of any person aboard a ship.
19. We also consider the testing regime is proportionate to the importance of the objective. Only workers who perform safety-sensitive activities may be tested. There is a stronger case for testing safety-sensitive workers to reduce risks in the context of workplace drug and alcohol management, and those workers can reasonably expect to be subject to correspondingly increased scrutiny.
20. The Bill also requires the worker's consent before operator or Director testing can occur. While the prescribed consequences for refusing to submit to a test are equivalent to those for failing a test, they are limited to a stand-down period in respect of safety-sensitive activities until the worker can safely resume full duties. The definition of 'response plan' in new s 40Y suggests arrangements and processes prescribed in that plan in relation to the stand-down period must be reasonable. Requirements for testing to be carried out only in relation to alcohol and drugs specified in the DAMP, and for the worker to be informed of the consequences of refusing to consent to the test, help to ensure the testing regime is reasonable and proportionate.
21. The Bill also provides further checks in respect of Director testing. Section 40ZC(2)(b) provides for Director testing to be carried out only in reasonable circumstances. Workers selected for testing have a right to appeal the decision to test the worker, and the Director must, when carrying out testing;
 - a. carry and show to the worker a document containing information about the power to perform the test, and
 - b. provide the worker with a written statement containing information about the purpose of the test, how it will be carried out, the consequences of refusing or failing the test, and the right to appeal and to request a second test.
22. We therefore consider the powers contained in the Bill for both Director and DAMP operator testing are reasonable, and do not breach s 21 of the Bill of Rights Act.

Conclusion

23. 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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