

18 August 2022

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Sustainable Biofuel Obligation Bill

Purpose

1. We have considered whether the Sustainable Biofuel Obligation 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 in relation to the latest version of the Bill (PCO 22623/3.9). We will provide you with further advice if the final version includes amendments that affect 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 14 (freedom of expression), s21 (unreasonable search and seizure), and 25(c) (presumption of innocence until proven guilty). Our analysis is set out below.

The Bill

4. The Bill introduces an obligation for any person or company that imports or refines liquid fossil fuels for transport (excluding aviation fuels) in New Zealand, to also supply sustainable biofuels. The Bill requires biofuels to meet high-level sustainability criteria, and provides for regulations to stipulate how those sustainability criteria will be assessed.
5. The objective of these obligations is to reduce the greenhouse gas emissions intensity of fossil fuels, as aligned with the required emission intensity reduction percentages for 2023 to 2035.
6. The Bill also proposes:
 - a. certification schemes to play a role in certifying the sustainability of biofuels along the supply chain;
 - b. flexibility mechanisms that allow obligated parties to trade emissions intensity reductions between each other, or to “bank” or “borrow” emissions intensity reductions into the next year;
 - c. reporting requirements on obligated parties’ achievement of the emissions intensity reduction percentage annually;
 - d. powers for the Environmental Protection Authority (EPA) to monitor and enforce the new requirements, including by means of a civil pecuniary penalty for noncompliance of \$800 per tonne of carbon dioxide equivalent emissions not achieved, with a lower penalty of \$300 per tonne of carbon dioxide equivalent emissions in the first year.

Consistency of the Bill with the Bill of Rights Act

Section 14- Freedom of expression

7. Section 14 of the Bill of Rights Act affirms the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right to freedom of expression has also been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹
8. As is common for regulatory legislation, the Bill contains provisions requiring regulated parties to provide information to the regulator, and provisions limiting what the regulator may do with the information. Such provisions *prima facie* engage the right to freedom of expression.
9. However, a limit on a right or freedom may be justified with relation to s 5 of the Bill of Rights Act.² We consider that any limits on the right to freedom of expression in the Bill are clearly justified as they are rationally connected to a sufficiently important objective, impair the right to freedom of expression no more than reasonably necessary to achieve the objective, and are otherwise in proportion to the importance of the objective.

Section 21 – Unreasonable search and seizure

10. Section 21 of the Bill of Rights Act affirms the right of everyone to be secure against unreasonable search and seizure, whether of the person, property, or correspondence or otherwise. Clause 27 of the Bill imports search and seizure provisions from the Climate Change Response Act 2002. Those provisions were considered reasonable in the context of that Act and we consider that they are equally reasonable in the current context for the same reasons.³

Section 25 (c) - Presumption of innocence until proven guilty

11. Section 25(c) of the Bill of Rights Act affirms that anyone charged with an offence has the right to be presumed innocent until proven guilty according to the 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.⁴
12. The Bill contains a number of strict liability offences (cl 21, 22 and 25) for failure to comply with the regulatory requirements in the Bill. These give rise to a *prima facie* issue of inconsistency with section 25 (c) because a strict liability offence may be proved by a finding that certain facts occurred without proof of *mens rea*. The accused is then required to prove (on the balance of probabilities) a defence to avoid liability; whereas, in other criminal proceedings an accused must merely raise a defence in an effort to create reasonable doubt.

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

² See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (SC)

³ Ministry of Justice *legal advice on the Climate Change Response (Emissions Trading) Amendment Bill* (9 November 2007).

⁴ *R v Wholesale Travel Group* (1992) 84 DLR (4th) 161, 188 citing *R v Oakes* [1986] 1 SCR 103.

13. Strict liability offences may nevertheless be justifiable limits on rights under section 5 of the Bill of Rights Act. They have been considered more justifiable where:
 - a. the offence is in the nature of a public welfare regulatory offence;
 - b. the defendant is in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite; and
 - c. the penalty for the offence is proportionate to the importance of the Bill's objective.
14. The strict liability offences in the Bill operate as part of a scheme to regulate people or companies that import or refine liquid fossil fuels for transport. The nature of the offences mean that person or company is in the best position to justify their apparent non-compliance and the penalties are proportionate to the importance of the Bill's objective and the commercial context of the scheme.
15. The strict liability offences in the Bill provide the defendant with a defence of reasonable excuse (which must be proven by the defendant on a balance of probabilities). This defence is broader than the common law defence of total absence of fault.
16. We are satisfied that the strict liability offences in the Bill place a justifiable limit on the right to be presumed innocent until proven guilty.

Conclusion

17. 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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