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Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Water Services Economic Efficiency and Consumer Protection Bill

Purpose

1. We have considered whether the Water Services Economic Efficiency and Consumer Protection 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 23496/3.0). 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), s 21 (right to be secure against unreasonable search and seizure), and s 25(c) (presumption of innocence). Our analysis is set out below.

The Bill

4. The Bill introduces economic regulation and consumer protection measures for the three waters sector (the reform of the three waters sector is the subject of the Water Services Entities Bill), and provides for the Commerce Commission (Commission) to be the regulator.
5. The Bill provides for the following measures:
 - a. the water services entities (entities)¹ will be subject to economic regulation, with flexibility to adapt this regulation for different services, such as stormwater,
 - b. information and quality regulation, which will apply from the implementation date (this is the later of July 2027, or a date specified by Order in Council),
 - c. price quality regulation, which will apply from the second regulatory period (beginning three years after the implementation date),
 - d. minimum service level codes to be set and enforced by the Commission,
 - e. the establishment of a consumer dispute resolution scheme,
 - f. a new position of Water Services Commissioner on the Commission's board.

¹ The four new statutory water services entities established under the Water Services Entities Act 2022 (currently a Bill before Select Committee).

6. The Bill also provides for funding of the regime via levies on regulated entities, and for a range of remedies and enforcement mechanisms.

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 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. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.²

Information disclosure regulation

8. The Commission has the power to make determinations relating to information disclosure regulation, quality regulation and price-quality regulation for regulated water services providers (see clause 15).³ A determination has the status of secondary legislation. Determinations relating to information disclosure regulation will set out public information disclosure requirements that apply to one or more regulated water services entities. The entities must, in addition to publicly disclosing the information required, supply to the Commission a copy of all information disclosed and comply with requests from the Commission for any further information required to monitor compliance with information disclosure requirements (see clause 33). Determinations relating to quality regulation and price-quality regulation may also include requirements for water services entities to supply certain information to the Commission (see, for example, clause 39(3)(b) and clause 42(3)(b)).
9. Clause 15, which empowers the making of determinations, does not, in itself, limit the right to freedom of expression; and is accordingly consistent with the Bill of Rights Act. However, secondary legislation made under this empowering provision may limit the right to freedom of expression. We note for completeness that secondary legislation must be consistent with the Bill of Rights Act, otherwise there is a risk it will be ultra vires.

Other information requirements

10. There are other provisions in the Bill which *prima facie* engage the right to freedom of expression by requiring water services entities to provide certain information to the Commission or the Minister of Commerce and Consumer Affairs. For example, clause 67(1)(c) requires a water services entity to report annually to the Commission on its consumer complaints processes.

Is the limitation justified and proportionate under section 5 of the Bill of Rights Act?

11. Where a provision is found to limit any particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is demonstrably justifiable in terms of s 5 of that Act. The s 5 inquiry is approached as follows:⁴

² See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

³ Defined as a statutory water services entity in relation to this part of the Bill.

⁴ *Hansen v R* [2007] NZSC 7.

- a. Does the provision serve an objective sufficiently important to justify some limitation on the right or freedom?
 - b. If so, then:
 - i. is the limit rationally connected to the objective?
 - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. is the limit in due proportion to the importance of the objective?
12. We consider that any limits contained within the Bill are justified under s 5 of the Bill of Rights Act because:
- a. the objective of ensuring water services bodies are subject to a robust level of independent scrutiny to ensure they act efficiently and consumers receive sufficient protection is sufficiently important to justify some limitation on s 14;
 - b. requiring water services bodies to provide information to the Commission is rationally connected to that objective; and
 - c. the provisions impair s 14 no more than is reasonably necessary and are in due proportion to the importance of the objective, noting that they require the provision of certain information relating to regulated activities by the water services entities, and the information that may be required is of limited expressive value.

Section 21 – Right to be secure against unreasonable search and seizure

13. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.
14. In order to monitor compliance with quality regulation, or price-quality regulation, clauses 38(2) and 41(2) respectively allow the Commission to issue a notice to a water services entity requiring it to provide any or all of:
- a. a written statement regarding compliance,
 - b. a report on the written statement signed by an auditor,
 - c. information to enable the Commission to determine whether a quality path has been complied with,
 - d. a certificate confirming the truth and accuracy of the information provided.
15. Clause 128(d)-(f) also provides that the Commission may, for the purpose of carrying out its functions and exercising its powers under the Bill, require certain information from any person. This includes the power to:
- a. require any person to prepare and produce forecasts, forward plans, or other information (clause 128(d));
 - b. require any person the Commission has reason to believe may have information or documents relevant to an investigation, audit or inquiry to produce or supply documents or answer questions (clause 128(e)); and

- c. require any person to supply an expert opinion from an appropriately qualified person in relation to certain matters (clause 128(f)).
16. The power to compel information amounts to a search for the purposes of s 21 of the Bill of Rights Act. As noted above, a provision found to limit a particular right or freedom may 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 that an unreasonable search logically cannot be demonstrably justified and therefore the inquiry does not need to be undertaken.⁵ Rather, s 21 is self-limiting in that the assessment to be undertaken is whether the search power is reasonable. The reasonableness of a search power can be assessed with reference to the purpose of the search and the degree of intrusion on the values which the right seeks to protect.
17. We consider the search powers in the Bill are consistent with its purposes and are reasonable in the circumstances. The powers in clause 38(2) and 41(2) apply in relation only to information required to monitor a water services entity's compliance with the regime set up by the Bill. The powers in clause 128 apply to information that will assist the Commission in carrying out its functions and powers in relation to the regulation of water services entities, including its monitoring and investigatory powers. Any intrusion into privacy is minimal, the information that the Commission may require relates to the activities regulated under the Bill, and there will not be another viable way for the Commission to obtain the information.
18. We note for completeness that the Bill also imports some of the Commission's existing powers under the Commerce Act 1986 (clauses 125 – 127), including the Commission's powers to require information from people and warranted powers of entry. The power to require information is linked to the Commission's investigation functions under the Act, and the power of entry requires a warrant. The provisions of Part 4 of the Search and Surveillance Act 2012 apply in respect of the search power. We consider that the incorporation of the existing powers into this context to be reasonable to ensure that the Commission has the necessary tools to enforce the regulatory regime.

Section 25(c) – right to be presumed innocent until proven guilty

19. 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.⁶

Strict liability offences

20. The Bill contains several apparent strict liability offences for failure to comply with relevant court orders by the date, or within the period specified in the order (see clause 93(1)(b) in relation to information disclosure, 94(1)(b) in relation to quality regulation, 95(1)(b) relating to price-quality regulation and 96(1)(b) relating to the services quality code set by the Commission).
21. The relevant court order will be either an order requiring information disclosure under clause 92 (in the case of the offence in clause 93(1)(b)), or injunction under clause 84 (for the other offences). An injunction under clause 84 will only be issued following an initial

⁵ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (SC) at [162] per Blanchard J

⁶ *R v Wholesale Travel Group* (1992) 84 DLR (4th) 161, 188 citing *R v Oakes* [1986] 1 SCR 103

contravention or where the court is satisfied that a contravention is likely if an injunction is not issued. The penalty for each offence is a maximum of \$200,000 for an individual or \$1,000,000 for an entity.

22. Strict liability offences prima facie limit s 25(c) of the Bill of Rights Act. This is because a strict liability offence may be proved by finding that certain facts occurred without proof of *mens rea*. The accused is then required to prove a defence (on the balance of probabilities), or disprove a presumption, to avoid liability; whereas usually in criminal proceedings an accused must merely raise a defence in an effort to create reasonable doubt.
23. Strict liability offences may nevertheless be justifiable limits on rights under s 5 of the Bill of Rights Act. They have been found to be more likely to be justifiable where:
 - a. The offences are regulatory in nature and apply to persons participating in a highly regulated industry;
 - b. The defendant will be 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.
24. The strict liability offences in the Bill operate as part of a scheme to regulate the three waters services to ensure efficient operation and consumer protection. The offences are logically connected to the purposes of the Bill to promote the long-term benefit of consumers and provide for consumer protection and an improvement in the quality of service provided by regulated water services entities.
25. It is a general principle that strict liability offences are associated with penalties at the lower end of the scale. The financial penalties for strict liability offences in the Bill are significantly higher than fines typically associated with strict liability offences. Nevertheless, we consider these fines are reasonable in the context of a highly regulated industry. The fines are likely to be necessary to contribute to the purposes of the offence regime (including deterrence and punishment). A court retains the discretion to impose a lower penalty than the maximum described in the Bill.
26. We consider that the strict liability offences created by the Bill can be justified under s 5 of the Bill of Rights Act. This is because:
 - a. the offences are of a public welfare nature, in that these measures will fulfil the purpose of the Bill;
 - b. the defendant is likely to be in the best position to justify an apparent failure to comply with the relevant court order; and
 - c. while the offences carry significant potential penalties, none of them involve imprisonment.
27. As such, we are satisfied that the strict liability offences set out above place a justifiable limit on the right to be presumed innocent until proven guilty.

Infringement offences to be set in regulations

28. The Bill also contains a regulation making power that allows for the creation of infringement offences.

29. Clause 130, which empowers the making of these regulations, does not, in itself, limit the right to be presumed innocent; and is accordingly consistent with the Bill of Rights Act. However, secondary legislation made under this empowering provision may limit the right.
30. We note for completeness that secondary legislation must be consistent with the Bill of Rights Act, otherwise there is a risk it will be ultra vires. We also note that the empowering provision contains some limits as to the type of conduct that can be subject of an infringement offence and limits the penalty for an offence to either a \$1,000 infringement fee or \$2,000 court ordered fine for an individual, or a \$3,000 fee or \$6,000 court ordered fine for an entity.

Conclusion

31. 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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