

16 November 2022

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Climate Change Response (Late Payment Penalties and Industrial Allocation) Amendment Bill

Purpose

1. We have considered whether the Climate Change Response (Late Payment Penalties and Industrial Allocation) 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 in relation to the latest version of the Bill (PCO 24947/1.12). 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) and s 25(c) (right to be presumed innocent until proved guilty). Our analysis is set out below.

The Bill

4. The Bill amends the New Zealand Emissions Trading Scheme (ETS) in the Climate Change Response Act 2002 (the principal Act). The amendments concern:
 - a. the penalty that applies when small forestry participants fail to surrender or repay units by the due date; and
 - b. industrial allocation of units.
5. The Bill follows the Climate Change Response (Emissions Trading Reform) Amendment Act 2020 which introduced strengthened penalties for ETS participants. That Act included the 'three to one' penalty which was an absolutely liability penalty set at three times the price of carbon for each unpaid unit with no discretion to be reduced. The 'three to one' penalty was deferred for small forestry participants due to concerns that the 'three to one' penalty was too high and could cause serious financial hardship if they were unable to pay it, potentially putting their personal assets (such as their home or farm) at risk.
6. This Bill updates the penalty for small forestry participants. The Bill proposes a reduced strict liability penalty, allowing the regulator to waive the final penalty if the participant can prove a total absence of fault.
7. Amongst other amendments to the principal Act, the Bill also updates all allocative baselines of emissions based on data from new base years. The Bill requires that allocative baselines are reviewed every ten years to determine if they need updating.

Consistency of the Bill with the Bill of Rights Act

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

8. Clause 7 inserts new sections 134AA and 134AB which creates a new strict liability penalty for small forestry participants who fail to surrender or repay their units by the due date. These provisions apply to forestry participants with 25,000 units or less.
9. The proposed penalty for small forestry participants is set at:
 - a. 0.5 x the price of carbon per unpaid unit where the unpaid unit relates to post-1989 forest land registered in the ETS;
 - b. 0.25 x the price of carbon per unpaid unit where the unpaid unit relates to pre-1990 forest land.
10. The smaller penalty for pre-1990 forest land reflects the fact that participation in the ETS is voluntary for owners of post-1989 forest land while it is mandatory for pre-1990 forest land. Pre-1990 forest landowners may be less aware of their obligations under the ETS.
11. Although the maximum penalty that could be imposed under new ss 134AA and 134AB is not fixed, it could have serious financial implications that are potentially equivalent to or exceeding fines that could be imposed for conduct that is characterised as criminal under the principal Act. We have therefore considered whether these provisions engage s 25(c) of the Bill of Rights Act.
12. In our view, the conduct penalised by new ss 134AA and 134AB is appropriately characterised as civil rather than criminal. The provisions aim to deter non-compliance with the ETS by negating financial benefits that could be gained by withholding units after deforestation, rather than to punish any wrong to society. It appears that effort has been made to ensure that the penalty is proportionate to the level of harm caused and mitigate the risk of serious financial hardship to small forestry participants. The penalty may also be waived if the participant can prove total absence of fault.
13. Moreover, no criminal stigma is attached to this type of penalty action. On this basis, we are satisfied that the civil pecuniary penalty created by ss 134AA and 134AB does not engage s 25(c) of the Bill of Rights Act.

Section 14 – Freedom of expression

14. 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.¹
15. Clause 18 inserts new s 161F which allows the Minister to require information from participants of the ETS about new industrial activities. The information gathered is intended to be used to make projections for future years' emissions, in order to set allocative baselines in addition to past years' information. As cl 18 empowers the Minister to compel participants to provide information, s 14 of the Bill of Rights Act is therefore engaged.
16. Under s 5 of the Bill of Rights Act, a limit on a right may be justifiable where the limit:
 - a. serves a sufficiently important objective to justify the limit;

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

² *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

- b. is rationally connected to achieving that objective;
 - c. does not impair the right or freedom any more than is reasonably necessary for the sufficient achievement of the objective; and
 - d. is in due proportion to the importance of the objective.
17. In respect of cl 18, the provision of information serves to set more accurate allocation baselines. Allocative baselines are essential for ensuring the industry participants receive the appropriate allocation of units and support. The provision of information is rationally connected to this objective. The power to require this information is required for regulatory purposes under the ETS. The information is factual in nature and in the context of calculating allocation baselines, we do not consider that the power to require this type of information unduly limits s 14 of the Bill of Rights Act.
18. Overall, we consider that the limits imposed by the Bill on the freedom of expression are justified under s 5 of the Bill of Rights Act.

Conclusion

19. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



Edrick Child
Acting Chief Legal Counsel
Office of Legal Counsel