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8 October 2007

Hon David Carter
Chairperson
Primary Production Committee
Parliament Buildings
WELLINGTON

Dear Mr Carter

Dairy Industry Restructuring Amendment Bill (No 2)

Introduction

1. This submission is in response to your letter of 20 September 2007 to me, seeking written comment from the Legislation Advisory Committee (LAC) on the above Bill, specifically with regard to clause 14.
2. The LAC was established to provide advice to Government on good legislative practice, legislative proposals and public law issues. The Committee produces and updates the LAC Guidelines adopted by Cabinet as appropriate benchmarks for legislation.
3. Should your Committee wish to speak to the LAC about this submission, I and Dr Warren Young would be happy to make ourselves available for this purpose. Arrangements for such a hearing can be made by contacting my secretary, Petrina Macaskill, on 914 4836.

Summary

4. Our submission is restricted to commenting on clause 14, by reference to the Law Commission report on Search and Surveillance Powers (NZLC R97), tabled in Parliament on 7 August 2007. The LAC supports the approach taken by the Law Commission in that report. I attach the relevant paragraphs and recommendations from that report that are referred to in this submission.
5. The Law Commission report on Search and Surveillance powers has yet to be adopted as Government policy. It proposes the enactment of a statute containing all police search powers and surveillance powers and generic procedural requirements for all agencies exercising such powers. The Commission is giving consideration to the possible extension of its recommendations relating to those procedural requirements to regulatory agencies exercising inspection/ compliance powers.
6. The Dairy Industry Restructuring Amendment Bill (No 2) contains a large number of inconsistencies with the search warrant regime and associated procedural framework proposed by the Law Commission. The LAC believes that there needs to be a more consistent and coherent approach to search and seizure powers and that the approach proposed by the Commission is an appropriate means of achieving this. The LAC therefore suggests that it would be desirable for your Committee to give consideration to better aligning the Bill with the relevant Commission recommendations, at least in relation to the procedural requirements on executing a search warrant.

Issues

7. In this section of the submission we highlight major areas of inconsistency between the Law Commission Search and Surveillance report and comment on a number of drafting issues that make the intent of particular provisions unclear.

Purpose of search warrant

8. Search warrants are issued for evidence gathering purposes where the commission of criminal offending is believed to be occurring or have occurred. Proposed new section 29H is drafted in those terms. However, proposed section 29D states that the purpose of the search warrant is for determining and monitoring compliance. That is not correct.
9. Monitoring powers in a regulatory context can generally be exercised on a routine basis without a requirement that any threshold be met. For that reason, they may be exercised without warrant: there is little to be gained in requiring judicial approval if there are no grounds to be met before approval is given. The power in proposed section 29C is of this nature.
10. In contrast, a search warrant power always requires that that the judicial officer be satisfied that a particular threshold is met (such as reasonable grounds to believe that evidence of an offence is in the place being searched).

The warrant power in proposed section 29H is of that nature. It is therefore incorrect and confusing to describe it in proposed section 29D as being “for the purpose of determining and monitoring compliance with the rules set out in Schedule 5B”. We note that although proposed section 29E and 29F are also expressed as being for the purpose of determining and monitoring compliance, they are rightly confined to the section 29C power.

Scope of proposed section 29D

11. Apart from that there are other difficulties with proposed section 29D. First a warrant issued under proposed section 29H should specify with reasonable particularity the nature of the items that may be searched for and seized, and the consequent power of search and seizure under proposed section 29D(c) should be limited to those items. That is standard in search warrant regimes and we do not understand why a different formulation has been adopted here. Secondly, the power to use force under paragraph (b) should be limited to circumstances where that is necessary to effect entry, break open or access any area or item to be searched, or seize any item, with a specific provision requiring that force to be reasonable. It may be that this is implicit in the current draft, but it should be made explicit. (See the Commission’s recommendations 6.6 and 6.7).
12. Thirdly, the ability to seize documents in electronic form suggests that computer records can be seized. This needs to be accompanied by statutory provisions making explicit how that may be done. (See the Commission’s paragraphs 7.45-7.52 and recommendations 7.4-7.5).
13. Finally, we note that, if paragraph (c) is limited as we propose, it would be appropriate to make separate provision for what is known as “plain view” seizure: the seizure of items that are encountered during the search and while not within the scope of the warrant, provide evidence of offending under the Act. (See the Commission’s paragraphs 3.119-3.148 and recommendation 3.11). This should be confined to seizure; contrary to what is contemplated by the current paragraph (c), searches for such items should not be permitted.
14. If a plain view seizure does occur, the notification regime applying to seizures when exercising the warrant power should apply. (See the discussion of this issue in paragraph 20, below).

Associated powers on executing the warrant

15. Proposed section 29D sets out three powers available to the executing officer. However, it is silent to as to a significant number of matters associated with the execution of search powers set out in chapter 6 of the Law Commission report, including:
 - The use of assistants (recommendations 6.11-6.13);
 - The use of equipment (recommendation 6.14);
 - The taking of photographs and recording of images (recommendation 6.16);

- Copying of documents falling within the search power (recommendation 6.17);
 - Removal of items from the search scene (recommendations 6.18-6.19);
 - Directions entitled to be given at the search scene to preserve evidence (6.22-6.23).
16. Your Committee may wish to give consideration as to whether any or all of those powers are appropriate in the present context.

Specific issues with proposed section 29H

17. The proposed search warrant power is relatively unusual (but not unique) in that it appears that most offences under this legislation are punishable by fine only. Generally, search warrants, due to their coercive nature, are only issued in respect of imprisonable offences (see section 198 (1) Summary Proceedings Act 1957). That is because the more serious the offence under investigation, the greater the justification for impinging on privacy rights by entering private property to investigate criminal activity. While the Law Commission report recognises that search warrant powers may be justified for some non-imprisonable offences, your Committee may wish to explore with the departmental advisers the policy imperative in introducing such an extensive search warrant regime, given that the principal Act has been in force since 2001 and no search warrant regime was considered necessary when it was introduced. It may be that the search warrant power is appropriate only in relation to those specific offences for which a term of imprisonment is available.
18. The formulation of what items a search warrant may be issued for under proposed new section 29H is unusual in that it reflects neither the standard section 198 Summary Proceedings Act categorisation, nor the approach proposed by the Law Commission in its report. Proposed section 29H(1)(c) is unacceptably broad as it allows a warrant to be issued in respect of items that *may* be evidence. Section 198(1)(b) of the Summary Proceedings Act refers to items that there are reasonable grounds to believe *will* be evidence. The Commission proposes that the threshold should be reasonable grounds to believe that evidential material (as defined) is in the place being searched. One or the other of these formulations should be adopted.

Who may apply for and execute a search warrant and exercise compliance powers

19. The Bill is silent as to who the Chief Executive may authorise to apply for and execute a search warrant or exercise compliance powers. Only appropriately trained state officials should be empowered to exercise coercive law enforcement powers. The Law Commission report sets out in paragraphs 4.27 to 4.41 who should be permitted to apply for search warrants and paragraphs 6.3 to 6.11 discusses who may execute entry, search and seizure powers (and the responsibilities arising from such execution).

Requirements when executing a warrant

20. Proposed new section 29I is generally in accord with existing statutory provisions as to requirements on those who exercise search warrant powers in legislation such as this Bill, but the notification regime (in relation to things seized) proposed by the Commission is more prescriptive than in the Bill. The Commission's proposed regime provides greater benefits for those who are subject to a search and allows postponement of the notification process in narrowly defined circumstances. (See the Commission's recommendations 6.29-6.36). In broad terms, the notification procedures for seizures under a search warrant should apply, with necessary modifications, to seizures that occur when a compliance power is exercised under proposed section 29C.

Power to require information

21. The intent of proposed section 29F is unclear. If it is intended to deal with only the production of "documents or other records" (the words used in proposed section 29E(b)(i)) then, subject to our comments below in paragraph 20, the LAC has no particular issue with this provision. However, due to the fact that the word "information" has been used in this provision, it gives rise to the possibility that it is intended to extend to oral information, thus becoming an examination power.
22. The LAC notes that there is a general right, in both domestic and international law, not to answer the questions of law enforcement officers in the course of their criminal investigations. Generally, this is on the basis that, where the information sought is contrary to the interests of the person required to give it, the person is likely to provide untruthful or unreliable information and, at worst, commit perjury. Thus it is not generally in the overall public interest to force people to provide information that may incriminate them. Indeed, the history of state attempts to do so has not generally been successful.
23. In some limited regulatory contexts (such as those overseen by the Commerce and Securities Commissions), an exception to this principle has been made. However, the LAC is not convinced that it is warranted here. The proposed section 29F should be amended to make it clear that such a power is precluded.

Specific issues with proposed section 29F

24. In the Law Commission's report, it noted the undesirability of production powers without prior judicial authorisation for law enforcement purposes, but recognised that in some operational contexts a production notice issued by the agency itself may be justified (see recommendations 10.7 and 10.8). The LAC recognises that for regulatory purposes, such as proposed in this provision, a production notice may be appropriate. However, proposed section 29F needs to be redrafted to require that the documents (or other records) be sought by way of a written notice specifying the material sought with a reasonable degree of specificity and the date by which it must be provided and the place to which it must be delivered. It is essential for the person compelled to comply

to be adequately informed of his or her obligations having regard to the penalty proposed in clause 15(2).

Disposal of property

25. The disposal regime in proposed section 29J broadly conforms with the Law Commission's proposals except in two important respects:
- The 2 year period in 29J(c)(i) seems excessive. The Commission recommends that if no prosecution has commenced within 6 months from the date an item is seized, the agency should, upon request, either return the item to the person entitled to possession or apply to a judge on an ex parte basis for an order for its continued retention (recommendation 13.8).
 - It is not clear on what basis the court would order the item to be forfeited to the Crown or disposed of. Some statutory guidance on what basis and in what circumstances these steps can be taken should be incorporated into the Bill. As the Bill stands, any items constituting evidence of an offence (such as business records) could be subject to a forfeiture order even if they were in themselves entirely innocuous.

Schedule 5D: Form of search warrant

26. The prescribed form in Schedule 5D is generally in accord with current search warrant forms in terms of the information required to be included in the form, but falls well short of the information that the Law Commission considers should be included in a search warrant (see paragraph 4.136 of its report).
27. There is also a drafting problem, in that the categories of item that may be searched for in the prescribed form do not match the wording of things that may be the subject of a warrant under proposed section 29H. There is no room for variation between the two. The "may be" references should be omitted from the bullet points in the form and the wording made consistent with proposed section 29H.

Power of entry without search warrant

28. While proposed section 29C, being a non-search warrant power for compliance purposes, is not the main focus of our submission, we note that proposed new section 29C(2) is defective as currently drafted. It requires announcement of an intention to enter to be given *upon entry*. That defeats the purpose of prior announcement as set out in paragraphs 6.12 to 6.14 of the Law Commission report. Curiously, there is no prior announcement requirement in clause 29I in relation to the requirements when executing a search warrant. The Law Commission recommendations on prior announcement, and when it may be dispensed with, are set out in recommendations 6.4 and 6.5.
29. Further, proposed new section 29C(2)(b) does not deal with the situation where prior announcement is dispensed with (because it would defeat the purpose of entry) but someone is present in the place entered. The Bill needs to state what information should be given to an occupier in these

circumstances. This issue is dealt with in the Commission's recommendation 6.27.

Relationship with section 145 of the principal Act

30. The intended relationship between the proposed new search, seizure and production powers in the Bill and the existing search and related powers in section 145 of the Dairy Industry Restructuring Act 2001 is unclear. As there appears to be no restriction as to the circumstances in which the proposed powers may be exercised, your Committee may wish to seek clarification as to possible jurisdictional overlap between the two sets of powers. It may be appropriate for the Bill to specify the circumstances in which the powers may be exercised.

31. The LAC has set out only the main areas of inconsistency in the Bill with the Law Commission Search and Surveillance report that your Committee may consider should be better aligned at this time. Further, we have noted some drafting matters that should be rectified. Dr Young and I would be pleased to talk to your Committee to elaborate on this submission, if that would be helpful to your consideration.

Yours sincerely

Geoffrey Palmer
Chairperson