



September 2008

Envirolink

With the election looming, and Parliament fast running out of sitting dates (Parliament is scheduled to dissolve on or before 10 October), the Government has pushed as much of its legislation through the house as possible. This includes all of the environmental Bills that we have been advising you about over the last 12 months. These have become law in all but name because the last step in becoming law is the Governor-General's Royal Assent. This may keep the Honourable Anand Satyanand quite busy for the next few weeks.

This month we note the last minute changes to these Bills and we also summarise a recent High Court decision regarding the enforceability of "no-complaints" covenants.

New environmental legislation

Leading the way for Climate Change

The Bill receiving the most attention is the Climate Change Response (Emissions Trading and Renewable Preference) Act 2008.

Parliament separated the original Bill into the Climate Change Response (Emissions Trading) Act (ETS), and the Electricity (Renewable Preference) Bill. Although both are contentious, the ETS Act received the most scrutiny by MPs and members of the public.

One final amendment was made to the ETS Bill before it was passed. Green Party co-leader Jeanette Fitzsimons secured a further change to the Bill by ensuring that only "green Assigned Amount Units" (AAUs) are admissible under the ETS. AAUs are tradable units between states under the Kyoto Protocol. Fitzsimons' amendment is intended to protect the environmental integrity of the ETS, so that participants can only surrender AAUs that meet specific "green" requirements. Like so much of the ETS, these requirements are to be detailed in regulations (yet to be promulgated).

The Government rejected the Maori Party's proposal to insert a new clause in the ETS Bill to address concerns that the ETS will devalue Treaty of Waitangi settlements due to its implications for forestry land. We note that this has promoted Nga Tahu to submit a fresh claim to the Waitangi Tribunal on the basis that the ETS Bill undermines its 1998 treaty settlement with Crown. We will watch this development with interest.

Waste Minimisation

The Waste Minimisation Bill passed its third reading recently with the support of all parties. It continues its focus on two areas – the introduction of a waste levy and a requirement for product stewardship schemes for priority products. The levy is delayed until July 2009 but the product stewardship and other parts of the Act will come into force as soon as it receives the Royal Assent.

Limited - but potentially significant - changes were made as the Bill was being finalised.

The definition of waste was modified again, including by reference to a new defined term "diverted material". That definition closely aligns to the Court of Appeal decision *Carter Holt Harvey Ltd v North Shore City Council & Ors* (CIV-2005-404-4412). The new term has been inserted in addition to the reference to waste to other definitions: recovery, recycling, reuse and waste minimisation. The aim was clearly to benefit from the Court of Appeal decision, but definitions of waste internationally are always scrutinised closely and we are sure New Zealand will be no different.

In an open move to protect existing players in the waste minimisation industry, the Act now requires territorial authorities when distributing their portion of the levy money to consider the effects of that decision on existing services, facilities and activities. If councils had thought their decisions around distribution of the levy were potentially challengeable before, they've got even more to worry about now in getting it right!

Affordable Housing

The Affordable Housing: Enabling Territorial Authorities Act has also quietly become law under urgency. As mentioned in our [July edition](#) the Act aims to address the housing needs of those with moderate to low incomes. It does this by giving councils the option of undertaking a housing needs assessment and drafting an affordable housing policy. Such a policy could require developers to make a contribution towards affordable housing in the form of land, buildings or a financial contribution.

The National Party has condemned the Act claiming it will do nothing to address the causes of unaffordable housing and will in fact force prices of non-affordable housing up as the increased costs faced by developers will undoubtedly be passed on. It has also attacked the voluntary nature of the Act claiming that few councils will utilise the Act's policies. Such fierce opposition raises questions about the future of the Act if there is a change of government post 8 November.

Biofuels

Despite the concerns about sustainability noted in our [June edition](#), a Biofuel Sales Obligation has been created. This obligation is within the Energy (Fuels, Levies, and References) Amendment Act 2008 (Act) which will come into force on 1 October 2008.

Biofuels Sales Obligation requires oil companies to supply biofuels as a fixed percentage of total oil sales. Initially this will only be 0.5 percent of sales, but it will increase annually by 0.5 percent to reach a level of 2.5 percent in 2012. Having said that, the Act expressly contemplates that the Biofuels Sales

Obligation may be reviewed in the future. And the National Party, if it is elected, may do just that.

Opponents of the Act (including the National Party) claim that the Biofuels Sales Obligation will not reduce emission levels and fails to take into account the current international debate on the sustainability of biofuels. The Act's supporters are praising the Act for creating more certainty which will encourage domestic biofuels suppliers to enter the market.

Of particular interest in the current economic climate is the Government's claim that the obligation won't result in a "noticeable" difference in the price of petrol. The validity of this claim remains to be seen.

Public Transport Management

The Public Transport Management Act (Act) will come into force on 1 January 2009, repealing the Transport Services Licensing Act 1989 (Current Act). The Act is designed to improve the integration and management of public transport services between government, local government and public transport service providers.

Under the Current Act, regional councils and, in Auckland's case, the Auckland Regional Transport Authority (ARTA) have limited control over uncontracted public transport services.

The Act enables regional councils to:

- impose greater controls over public transport services, and to require that any or all public transport services must be provided under contract. Services provided without a contract can be prohibited, and this applies to both existing and future services
- establish controls with which commercial operators must comply. Examples of these controls include quality and performance standards, and integrated ticketing requirements. These controls will not apply to inter regional bus and ferry services, rail, school services contracted or funded by the Ministry of Education, taxi, shuttle or private hire services because they are not perceived to suffer from the same integration problems affecting intra-regional public transport
- access information about commercial operators to improve public transport services, for example operational statistics

The onus will now fall on regional councils and ARTA to use the new legislation to its full capacity. Minister of Transport, Annette King, has suggested that Labour would like to undertake further legislative reform and clearly flagged that additional development of rail networks is a transport priority for her Government.

No Complaints Covenants do not trump the RMA

In a recent case involving *South Pacific Tyres NZ Ltd (SPT) v Powerland (NZ) Ltd (Powerland)*¹ the High Court confirmed our understanding of case law on “no-complaints” or “reverse sensitivity” covenants. It confirmed that although people cannot be compelled to give up their RMA rights, private entities can contractually waive rights to participate in RMA processes.

This High Court decision was about an application for summary judgement by SPT against Powerland with respect to a “no complaints” covenant. The parties had entered into the covenant in relation to a residential dwelling Powerland wanted to build. SPT sought an order requiring Powerland to register the no complaints covenant against the certificate of title to its land and a caveat to stop the covenant lapsing in the future.

Powerland refused to register the covenant against its land alleging first that the covenant was contrary to the common law doctrine of ouster as it would effectively oust the jurisdiction of the Court, and secondly that the covenant was an illegal contract under the Illegal Contracts Act 1970 (Act).

The Court considered whether the public participation rights under the RMA could be waived by Powerland. It cited *Ports of Auckland Limited v Auckland City Council*² as authority for the proposition that people cannot be compelled to give up their rights under the RMA but can freely waive certain rights under the RMA as long as the rights are not “rights which should be regarded as incapable of surrender for reasons of public policy.”

The Court acknowledged the possibility that “no-complaints” covenants may, in effect, allow unreasonable adverse environmental effects to continue unimpeded. However, it was not persuaded that this was reason enough to render the covenant as contrary to public policy.

In this case, the Court held that all the covenant did was to prevent Powerland from being the person who brings RMA proceedings against STP. The covenant did not prevent the Environment Court from considering RMA applications brought by other persons. This meant that the covenant did not oust the Court’s jurisdiction.

As the Court was of the opinion that the covenant did not breach the RMA or was contrary to public policy, the argument of its illegality under the Act was also rejected and Powerland was ordered to register the covenant against its land.

1 (16 May 2008) High Court, Wellington

2 [1998] NZRMA 48

Contacts

Rachel Devine - Partner

T +64 9 353 9912

M 021 521 299

E rachel.devine@minterellison.co.nz

Paul Radich - Partner

T +64 4 498 5019

M 021 673 777

E paul.radich@minterellison.co.nz

Shaun McAuley - Senior Solicitor

T +64 9 353 9834

E shaun.mcauley@minterellison.co.nz

Linley Black - Solicitor

+T +64 9 353 9879

E linley.black@minterellison.co.nz

Laura Crone - Solicitor

T +64 9 353 9866

E laura.crone@minterellison.co.nz

Tess Drewitt - Solicitor

T +64 9 353 9726

E tess.drewitt@minterellison.co.nz

Emma Geange - Solicitor

T +64 9 353 9842

E emma.geange@minterellison.co.nz

Amber Trebitsch - Solicitor

T +64 9 353 9818

E amber.trebitsch@minterellison.co.nz

Disclaimer

The information contained in this update is intended as a guide only. Professional advice should be sought before applying any of the information to particular circumstances. While every reasonable care has been taken in the preparation of this update, Minter Ellison does not accept liability for any errors it may contain. Minter Ellison Rudd Watts is aware of the challenges that arise from climate change so are being environmentally responsible by using offset paper, manufactured using ECF pulp, sourced from sustainable well managed forests by Nordland Mill - an FSC certified mill.