NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Climate Change Response (Emissions Trading Reform) Amendment Bill

17/01/2020

Submission on the Climate Change Response (Emissions Trading Reform) Amendment Bill

1 Introduction

1.1 The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Climate Change Response (Emissions Trading Reform) Amendment Bill (the Bill).

1.2 The submission comments briefly on technical and drafting matters, with the aim of improving the clarity, certainty and practical workability of the Bill.

1.3 The Law Society does not seek to be heard but is available to assist officials on drafting and technical issues if that would be helpful to the select committee.

2 Accessibility of the legislation

2.1 The Bill is lengthy and complex due to the scale of the amendments and the highly technical nature of the subject matter, and this has the potential to make the legislation less accessible to users. While the Bill's complexity is unavoidable, it will be important that assistance is provided to users to understand and comply with the law once it is in effect. It should be expected that the Environmental Protection Authority (EPA) will publish comprehensive guidance and explanatory material to assist with this.

3 Use of cross-references

3.1 The Bill makes extensive use of cross-references and examples.[1] These can be beneficial to users (particularly in the case of complex legislation) by providing assistance to navigate the legislation. However we note that cross-references do not achieve the same legal effect as specifying that a particular legal requirement or process applies. While many of the cross-references in the Bill are for navigational purposes, there are some provisions in which a cross-reference has been used where we question whether the legislative intent is achieved. An example is proposed section 30O(3), discussed at [9] – [13] below.

4 Pecuniary penalty provisions: proposed sections 134 – 136 (clause 115)

4.1 There is inconsistency between the pecuniary penalty provisions in clause 115 (proposed sections 134 –136) and the other pecuniary penalty provisions provided for under clause 178.

4.3 The Legislation Design and Advisory Committee's Legislation Guidelines note that pecuniary penalties can have serious reputational and financial effects on a person or entity. The Guidelines state in relation to pecuniary penalties that –

> Generally, decisions about liability for pecuniary penalties and the amount of the penalty should be made by a court, and not the enforcement agency. Judicial imposition of the penalty provides open and transparent consideration of liability and any aggravating or mitigating circumstances, and the avoidance of allegations of a conflict of interest by the enforcement agency (if the enforcement agency is both the complainant and the judge). … In very limited circumstances, penalties could be

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[1] See in particular proposed sections 30GB(7), 30O(3), 63(4), 109(3), 179A(2A), 188(8), 189BA(3), 191AB(4), 191BB(5), 194AA(4)(c), 194FC(4), 194FD(1)(b)(i), 194LA(6), 194PA, 194SC(6), proposed Schedule 1AA clause 18(2), and the amendment to proposed regulation 8(3) of the Climate Change (Unit Register) Regulations 2008.

> imposed by an independent non-judicial body. … Such models should have a process for appeal and review. Consideration should also be given to requiring the chair or other members of the body to have legal expertise.[2]

4.4 There are therefore concerns about clause 115 which confers power on the EPA to make the decision to impose the penalty: it is not clear what process must be followed to do so (raising questions about natural justice), and it is also not clear what rights of appeal apply. This contrasts with the pecuniary penalties under clause 178 where the EPA must apply to the court for a pecuniary penalty order to be imposed (see new section 194EF(2)). The Law Society recommends that the same approach should apply in respect of clause 115.

5 Infringement offences: new subpart 3, part 2 (clause 46)

5.1 The Bill inserts a new subpart regarding infringement offences.

5.2 The Legislation Guidelines recommend that section 21 of the Summary Proceedings Act 1957 should apply to all new infringement offences. Section 21 sets out a generic process by which a person may challenge an infringement notice, and provides for reminder notices, instalment arrangements and other procedures:

> New infringement penalties should use this existing system to ensure consistency with the infringement regime systems and to reduce complexity in the law. Cogent reasons are required to justify any departure from the Summary Proceedings Act procedure.[3]

5.3 The Guidelines note that for section 21 to apply, "legislation should contain an express provision to the effect that the new offence is an infringement offence for the purposes of section 21 of the Summary Proceedings Act 1957" (emphasis added), and that "Ideally, the infringement regime should also be included in the list of regimes in section 2 of the Summary Proceedings Act 1957 under the definition of 'infringement notice'".

5.4 Proposed new section 30O(3) includes a cross-reference to section 21 of the Summary Proceedings Act, however this does not have the same legal effect as an express provision stating that the new offence is an infringement offence for the purposes of section 21 of the Summary Proceedings Act 1957. An example of the preferred drafting approach can be found at section 33P(4) of the Maritime Transport Act which states as follows (emphasis added):

> If an infringement notice has been issued under this section, proceedings may be commenced in respect of the offence to which the notice relates in accordance with section 21 of the Summary Proceedings Act 1957, and the provisions of that section apply with all necessary modifications.

5.5 The Law Society recommends that the new infringement offences subpart are amended accordingly, in line with the Legislation Guidelines.

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2 Legislation Guidelines: 2018 edition, Chapter 26; available at http://www.ldac.org.nz/guidelines/legislation-guidelines-2018-edition/compliance-and-enforcement/chapter-26/http://www.ldac.org.nz/guidelines/legislation-guidelines-2018-edition/compliance-and-enforcement/chapter-25/.

3 Note 2, at Chapter 25.3.

6 Drafting matters

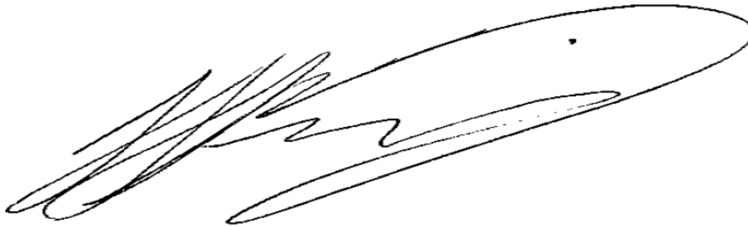
Proposed section 70 – allocation plan issued

6.1 The phrasing of proposed section 70 (clause 74) could be improved. The Climate Change (Pre-1990 Forest Land Allocation Plan) Order 2010 (the 2010 Order) was made under section 70 of the principal Act which is in force, not the amendment. We recommend that subsection (2) is redrafted to make it clear that it refers to the allocation plan issued under the 2010 Order. Similarly, the statement in subsection (4) that the allocation plan must be presented is unnecessary if that has already occurred.

SOP 413

6.2 The new Schedule 5, introduced by Supplementary Order Paper 413 dated 3 December 2019, states at (1) that "for 25% of farms in New Zealand" specified action is to be taken by a nominated date. Read literally, that suggests a precision that is unlikely to be borne out in practice. The Law Society suggests that this should refer to "a minimum of 25%" rather than exactly that number.

6.3 In the same Schedule, limb (6) refers to "a quarter of farms". This raises the same point. In addition, read in conjunction with limb (1), it raises questions as to whether this is one quarter by number, or whether, because of the different manner of expression, it is one quarter by some other measure – by area perhaps. Assuming this ambiguity is not intended, the Law Society suggests that for consistency limb (6) should use the same terminology as (1), "a minimum of 25% of farms".



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17 January 2020