New Zealand Law Society
Te Kāhui Ture o Aotearoa

Forests (Legal Harvest Assurance) Amendment Bill

03/08/2022

Forests (Legal Harvest Assurance) Amendment Bill 2022

1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Forests (Legal Harvest Assurance) Amendment Bill (**Bill**).

1.2 This Government Bill seeks to amend the Forests Act 1949 (**Act**) and establish a new regulatory system for providing legal harvest assurance for the forestry and wood-processing sector.[1] It does this by inserting new Parts 5 to 7 into the Act and making other amendments.

1.3 This submission has been prepared with input from the Law Society's Environmental Law Committee, and Public & Administrative Law Committee.[2]

1.4 The Law Society does not wish to be heard.

2 Protection of persons outside the Public Service (clause 6)

2.1 This clause extends the protection of Crown officials from personal liability to those outside the public service (as a result of section 63D of the Forests (Regulation of Log Traders and Forestry Advisers) Amendment Act 2020, which delegates 'any or all of the Forestry Authority's functions or powers' under Part 2A of the Forests Act to "a forestry industry body or other person outside the Public Service").

2.2 This raises constitutional questions about the use of the Crown protection from liability in tort for the benefit of private actors. The Regulatory Impact Statement does not address this feature of the Bill, and the New Zealand Bill of Rights Act 1990 consistency advice does not consider whether doing so is consistent with section 27(3) of NZBORA. The Law Society recommends that the Committee take advice about whether this clause is appropriate.

3 Definition of 'legally harvested' (new section 77(1))

3.1 The definition of 'legally harvested timber' in proposed new section 77(1) focuses not only on legal compliance and authority, but possession of private property rights to access land and harvest trees. If someone owns the forestry rights to a piece of land but enters into a private civil dispute with the landowner (who trespasses them), then the outcome of that civil dispute could lead to timber becoming 'illegally harvested'. While the Bill necessarily targets illegal harvesting by trespass, it does not appear to be intended that timber harvested under apparent rights that are subsequently disputed should be covered. Accordingly, consideration should be given to either amending the definition or providing for timber harvested in such circumstances not to have been illegally harvested.

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1 Explanatory Note of the Bill.

2 More information about these Committees is available on the Law Society's website: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/.

4 Meaning of 'harvest laws' (new section 77(3))

4.1 The breadth of the term 'harvest laws' in new section 77(3) means that timber on land which causes private nuisances, or the like, could become 'illegally harvested.'[3] If the work done by the forestry company triggered the broad definition of harvest, then the private nuisance committed by the forestry company would render the harvest in breach of '*laws that... set requirements... on land and resource use*.' Again, this would render the timber 'illegally harvested.' The Bill clearly seeks to ensure that 'theft' type situations are covered, and to cover the wide range of laws and regulations across the world that could be relevant here, however, there are too many potential private law complications surrounding land use and property rights for such broad drafting to be appropriate.

4.2 Further, minor non-compliance with the Resource Management Act 1991 (**RMA**) could be a breach of 'harvest laws.' This position is complicated, however, because 'harvest' is used in the Bill in a manner that is broader than the same term as used in the National Environmental Standards for Plantation Forestry, and includes earthworks to prepare for harvest or to stabilise land after harvest. It is not clear that associated discharges are included, and if so, what degree of connection to the harvest is required. For example, it is unclear whether the walls of slash carried down the East Cape rivers to the coast in recent flash flooding would have been a breach of 'harvest laws.' This is important, because whereas a local authority might note trivial non-compliances with the RMA during harvest but take no action, this Bill might preclude export of the timber.

4.3 We therefore suggest redrafting this definition, and clarifying whether 'harvest laws' include, but are not limited to, the RMA (and, in particular, those parts of the RMA governing discharges of contaminants to ground or to water associated with, or potentially caused by, the harvest) and if so, to what extent.

4.4 Alternatively, we invite the select committee to consider a proactive disclosure regime which allows the regulator to determine that timber has been 'legally harvested' if the owner brings an issue like this to the attention of the regulator.

4.5 We also suggest amending new section 98(4) to provide specifically, that other methods to demonstrate due diligence might include monitoring reports provided by local authorities of compliance (or otherwise) with the RMA.

5 Definition of importer (new section 84)

5.1 The definitions of 'import' and 'importer' in proposed new section 84 do not align with the definition of 'importer' in the Customs and Excise Act 2018, causing coverage issues. The Customs and Excise Act definition of 'importer' is deliberately broad and includes persons transporting goods domestically,[4] whereas 'import' in the Bill is specifically limited to bringing timber from outside NZ into NZ. These definitions should be aligned: there is no reason why 'importer' could not mean a person who 'imports' timber (using the Bill's

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3 Consider *Nottingham Forest Trustee Ltd* [2021] 3 NZLR 823, where a lines company successfully sued a forestry company because its trees kept falling on power lines.

4 *Daily Freightways* [1974] 2 NZLR 704.

definition of 'import'). We suggest that there is consistency of definitions between the relevant Acts.

6 Immunity from liability for assessors outside public service (new section 117)

6.1 It is unclear why this clause exists, as clause 6 extends the existing immunity in section 13 of the Act to people outside the public service (discussed above at paragraphs 2.1-2.2). More importantly, the extension in clause 6 is expressly limited to the extent to which the private sector actor has been delegated/is exercising public functions under the Act. Clause 117 has no such limitation, and should either be aligned with clause 6 on this point or deleted.

7 Secretary to give notice of harvest laws (new section 139)

7.1 This clause does not expressly say whether 'what the Secretary considers' the harvest laws of a country to be, has any bearing on the applicability of the general definition of 'harvest laws.' If someone complies with the Secretary's specified laws, but not all the laws of a country, it is unclear whether the relevant timber has been illegally harvested. The Bill would benefit from this point being clarified to avoid this ambiguity.

8 Power of warrantless entry and inspection (new section 141)

8.1 On its face, this clause breaches section 21 of the NZBORA and should be redrafted. Seemingly premised on the need to detect regulatory offences, it creates a warrantless search power that is not justified. Section 71B of the Act correctly restates the warrant-preference rule from the Search and Surveillance Act 2012 but authorises warrantless searches when necessary to protect life or property. That is the correct approach and there is no need to derogate from it.

8.2 The NZBORA consistency advice claims, by way of justification under section 5, that private land and workplaces have lesser expectations of privacy and so warrantless searches are acceptable. The Law Society does not agree with that conclusion, which appears to be inconsistent with case law.[5] Part of the power of warrant requirements is that they require officials to justify the search (beyond, for example, voluntary requests for information).

9 Offence to provide false or misleading information (new section 145)

9.1 This clause includes an unusual provision that prevents a defendant from relying on a defence unless they give written notice to the prosecutor (new section 145(3)). This provision engages section 25(e) NZBORA because it prohibits a defendant from giving a defence unless they give advance notice, and this does not appear to be reasonably justifiable in this context under section 5 of the NZBORA. Arguably, it also engages section 23(4) of NZBORA as it requires the defendant to give a statement, although we acknowledge that there is a more persuasive argument here that the limited degree of disclosure is such that the breach of section 23(4) is reasonably justifiable.[6]

9.2 We suggest redrafting this clause as follows, to give judicial discretion to ensure that a defendant does not lose a valid defence to a prosecution because of an administrative

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5 See, for example, *Tranz Rail* [2002] 3 NZLR 780 (CA).

6 See by analogy *M v R* [2015] NZCA 587, at [17].

oversight (which is entirely possible on the current drafting). A similar clause can be found in section 341 of the RMA.

> Except with the leave of the Court, a defendant may not rely on the defence in subsection (2) unless the defendant delivers to the prosecutor a written notice 15 working days prior to the hearing date stating that he or she intends to rely on subsection (2).

9.3 Proposed new section 146(3) will also need to be similarly redrafted.

9.4 The Law Society has not asked to be heard in relation to this Bill, but would be happy to respond to any questions the Primary Production Committee may have, and thanks the Committee for considering its submission on this Bill.

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