

10 March 2008

Hon David Carter
Chairperson
Primary Production Committee
Parliament Buildings
Wellington

Dear Mr Carter

**Biosecurity and Hazardous Substances and New Organisms Legislation
Amendment Bill**

Introduction

- 1 This submission is in response to your letter of 7 March 2008 to Margaret Thompson requesting a submission on the Bill from the LAC.
- 2 The LAC was established to provide advice to Government on good legislative practice, legislative proposals, and public law issues. The LAC produces and updates the LAC Guidelines adopted by Cabinet as appropriate benchmarks for legislation.
- 3 The Bill has been introduced as a result of the decision of the Court of Appeal in *The National Beekeepers' Association of New Zealand v The Chief Executive of the Ministry of Agriculture and Forestry* [2007 NZCA 556. The effect of the decision is that the importation of honey and other bee products from Australia which might incidentally contain the organism *P. alvei* requires clearance under the Biosecurity Act 1993 (**BSA**) and approval under the Hazardous Substances and New Organisms Act 1996 (**HASNO**). *P. alvei* is a new organism for the purposes of HASNO.
- 4 The Bill amends section 28 BSA to enable a MAF inspector to give a clearance under the Act for goods the importation of which involves, or might involve, an incidentally imported new organism. The Bill also provides that approval under HASNO is not required for the importation of an incidentally imported new organism that is imported in or on goods lawfully imported under BSA.

- 5 The Bill validates import health standards issued before the commencement of the Bill, including the *Import Health Standard for the Importation into New Zealand of Specified Bee Products from Australia* (dated 2 August 2006). It also validates biosecurity clearances given before the commencement of the Bill, including biosecurity clearances given under the *Import Health Standard for the Importation into New Zealand of Specified Bee Products from Australia*. The validations are limited to removing any invalidity only to the extent that it arises from an importation of goods which involves an incidentally imported new organism.
- 6 The substantive amendments to BSA and HASNO are prospective. The validations, however, are retrospective. The validations override the decision in *The National Beekeepers' Association of New Zealand v The Chief Executive of the Ministry of Agriculture and Forestry* and do not preserve the benefit of the judgment for the successful appellant, The National Beekeepers Association of New Zealand.

Summary of LAC advice

- 7 Legislation that retrospectively validates past conduct and deprives a successful party to court proceedings of the benefit of a judgment obtained in those proceedings should be resorted to only in rare and exceptional circumstances. The appellant has successfully challenged the legality of the exercise of a statutory power and ought, on the face of it, to be entitled to benefit from the Court of Appeal's judgment. The LAC considers, however, that in this case the retrospective validation of the import health standard and the biosecurity clearance can be justified.

Discussion

- 8 The general principle applying to the interpretation of legislation is that legislation applies prospectively and does not have retrospective effect: section 7 Interpretation Act 1999. The principle is subject to the express words of a statute or a different interpretation required by the context. Legislation should not interfere with accrued rights or interests, nor should it deprive anyone of the benefit of a judgment obtained in legal proceedings.
- 9 Retrospectivity can, however, be justified in some circumstances. A main consideration is the overall fairness to those affected. Not all retrospective legislation will be unfair. Indeed, it may be entirely beneficial. In considering whether the legislation is justified it is necessary to look at the purpose of the legislation and the impact it has on those affected. No one should be subject to a criminal penalty for some act that was not a crime at the time it was done. On the other hand, there may be a strong public interest in changing the law or it might be necessary to do so for the effective administration of the law. See generally Legislation Advisory Committee Guidelines 3.3.1-3.3.3.

- 10 In this case the purpose of the Bill is to clarify the relationship between two statutes. The Bill does that by providing that the incidental importation of a new organism does not require approval under HASNO if a clearance has been given under BSA. Whether that is a sound and workable outcome is a policy matter. There is, however, nothing to prevent Parliament changing the law to bring about that outcome. The more difficult question is whether Parliament ought to do that retrospectively and at the same time override a court decision as it applies to the parties.
- 11 Parliament does sometimes change the law retrospectively but at the same time preserve the benefit of a court decision for a successful litigant: see Commerce (Clearance Validation) Amendment Act 2001.
- 12 The Court of Appeal judgment quashes the relevant import health standard that was the subject of the proceeding. It is not, however, a judgment as to the rights of The National Beekeepers Association of New Zealand or beekeepers generally. The standard itself is part of the general regulatory framework governing importation. It does not create specific individual entitlements. It is not like a right, licence, permit, status, or authority granted to or conferred on a particular person which a court has upheld but which Parliament then steps in and takes away.
- 13 This is not a case where it would be possible to preserve the benefit of the judgment for the appellant without destroying the reinstated but clarified regime. The benefit of the judgment to the appellant may be seen as resolving a conflict between two principal statutes. The importation of a particular consignment of honey might be regarded as unlawful with whatever consequences follow from that. An incidental benefit may also involve an element of trade protection. These are not, however, accrued rights which the principle against retrospectivity seeks to protect. If the legislation is not clarified and the standard validated retrospectively, the regulatory regime may well be unworkable.

Conclusion

- 14 Legislation that operates retrospectively and deprives persons of existing rights or interests or the benefit of court judgments can only be justified in rare and exceptional circumstances. The LAC considers that, on balance, this is a situation in which it can be justified.

Yours sincerely

George Tanner QC
Legislation Advisory Committee

