

22 June 2014

Chair  
Government and Environment Committee  
Parliament Buildings  
P O Box 18 041  
Wellington 6160

### **National Animal Identification and Tracing Bill**

1. This submission is made by the Legislation Advisory Committee (LAC).
2. The LAC was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. The LAC has produced and updates the Legislation Advisory Committee Guidelines: Guidelines on the Process and Content of Legislation (LAC Guidelines) as appropriate benchmarks for legislation. The LAC Guidelines have been adopted by Cabinet.
3. The terms of reference of the LAC include:
  - (a) to scrutinise and make submissions to the appropriate body on aspects of Bills introduced into Parliament that affect public law or raise public law issues:
  - (b) to help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.
4. The LAC considered the Bill at its meeting on 25 February 2011. In addition to more minor drafting matters that have already been referred to Parliamentary Counsel, the LAC is concerned that the Bill vests functions in a new organisation (the NAIT organisation) when the nature and scale of the tasks required by the Bill make this inappropriate. The NAIT organisation is to be a private industry-owned body corporate.

#### *Governance model*

5. Chapter nine of the LAC Guidelines addresses the creation of a new public agency. It provides guidelines for determining when an agency should be a department of state. Paragraph 9.1.3 of the LAC Guidelines states that:

The Public Service departmental form is likely to be preferred where one or more of the following apply:

- the agency will exercise coercive powers of the state (eg prisons or tax collection);
- the agency will provide policy advice to Government;
- other special powers will reside in the agency or its officials;
- the agency will carry out multiple functions, particularly where the functions potentially conflict;
- ...

6. Given the NAIT organisation's functions, it appears that it may be more appropriate for a Public Service department, or at least some other form of public entity, to be given this role. The functions of the NAIT organisation include:
  - the collection of levies (cl 10(1)(ii));
  - the gathering of information about compliance with the NAIT scheme (cl 10(1)(v));
  - establishing and maintaining consultation systems (cl 10(1)(ix));
  - undertaking compliance and enforcement functions (cl 10(1)(vi)), many of which involve extensive coercive powers, including requiring persons to produce information and answer questions, and very extensive powers of search and inspection (Part 5);
  - establishing animal identification standards and accreditation standards (cl 14);
  - approving identification systems (cl 15);
  - accrediting entities and persons with specified functions (cl 20); and
  - performing any function or duty consistent with its obligation when requested to by the Minister (cl 10(2)).
7. There does not appear to be a compelling reason for using the private body corporate governance model. The Regulatory Impact Statement indicates that various options were considered, such as a Crown company, Crown Entity company and stand-alone private company. It indicates that decision-makers put weight on the need for the governance to involve an industry-Crown partnership. However, there is no reason why a body involving an industry-Crown partnership, which will exercise statutory functions and powers, cannot also be subject to some of the standard accountability mechanisms that are common across the public sector. The LAC is concerned that insufficient weight was given by decision-makers to the need for public accountability and transparency.

### *Accountability*

8. The NAIT system and the governance body responsible for it, which will be industry-owned and operated, will have the responsibility for designing and running a system the object of which is to protect New Zealand primary industry. However, it would not be subject to public control or any form of parliamentary scrutiny or other public accountability. The functions and powers of the NAIT authority are so extensive and coercive that a departure from the standard model recommended by the LAC Guidelines is hard to justify. The minimum accountability requirements should be to produce an annual report and statement of intent. There is also a case for making the entity subject to the Public Audit Act 2001, since it appears that the system will be

funded predominantly on the basis of levies, which farmers are required to pay, but they will have no say in how the NAIT organisation is run because there is no required mechanism for it to be answerable to them. More broadly, there is no mechanism for the entity to be publicly answerable for the exercise of its public powers.

9. Clause 159 of the Bill requires the NAIT organisation to prepare annual statements regarding levies paid to the NAIT organisation that include details of the money paid to the organisation, the assets the organisation has as a result of the money paid, the organisation's receipt and expenditure of money paid as levy and any other statement necessary to show the organisation's financial position. The NAIT organisation must ensure that the statements are audited. While these statements and this audit would be available to the NAIT organisation, there does not appear to be any provision for them to become publicly available. The LAC recommends that the Committee consider applying provisions similar to those found in sections 95B to 95D of the Biosecurity Act 1993 (which will be replaced by new sections 100K to 100M by clause 137 of the Biosecurity Law Reform Bill 2010). Further, making the NAIT organisation subject at least to the Auditor-General's mandate would mean that the levy process would be subject to regular public audit, and provide some level of accountability for its activities. If the Select Committee has not already done so, it may wish to seek the views of the Auditor-General, as an independent officer of Parliament, about this issue.
10. The LAC also draws to the Committee's attention the question of whether the Ombudsmen Act 1975 and Official Information Act 1982 should apply to the NAIT organisation. The LAC notes that the Bill contains useful information access provisions in Part 4. The question is whether the public nature of the organisation's purpose (described expressly by clause 53 as a "law enforcement agency" and having functions described as "compliance and enforcement" in clause 10(1)(a)(iv)), and the extent of its powers, also justifies a right of recourse to the Ombudsmen in respect of the organisation's administrative actions and decisions as they affect individuals and bodies corporate, and the overarching availability of information about its activities (including, but not limited to, reasons for decisions involving bodies corporate) under the Official Information Act.
11. Paragraph 9.6.2 of the LAC Guidelines states in relation to the application of the Ombudsmen Act 1975 that "[t]he factors to be taken into account are the relationship between the agency and central or local government and its public purpose". The same paragraph sets out the following factors which are relevant to whether or not the Official Information Act should apply:
  - the agency's dependence on central government funding;
  - the obligation of the agency to consult with the Minister on particular matters, respond to ministerial directions, or obtain ministerial approval;
  - the existence of ministerial control over appointments in contrast to, for example, elected membership representing relevant interest groups;
  - the existence of any government controls on finance, for example, by the Auditor-General;
  - the public purpose of the agency.

12. In view of the public nature of the purpose of the NAIT organisation, its obligation to respond to ministerial directions and the Minister's role in designating the NAIT organisations, it appears that application of the Ombudsmen Act 1975 and Official Information Act 1982 may be warranted.

#### *Designation of the NAIT organisation*

13. The LAC has a particular concern about NAIT Limited, a company referred to in the Bill only by reference to its registration number. Under the Bill, the company is to identify and advise the Minister on entities which could suitably fill the role of the NAIT organisation. But the Bill also provides that NAIT Limited would become the NAIT organisation if no suitable entity can be identified (clause 8). However, clause 8(4) does not require the Minister to apply the criteria set out in subclause (3) before designating NAIT Limited as the NAIT organisation. The Bill is otherwise silent regarding the governance and shareholding arrangements of NAIT Limited. A search of the companies register indicates that the company currently has no Crown shareholding or Crown-appointed directors, and that no constitution has been filed. This means that the Bill has the potential to result in extensive and coercive public powers being exercised by a private company with no public accountability other than the reporting requirements in clauses 128 and 129 regarding the exercise of powers of search.
14. It would be preferable for the Bill to provide either that the Minister must apply the criteria under clause 8(3) before designating NAIT Limited as the NAIT organisation under clause 8(4), or (if that is impracticable) for there to be a minimum level of Crown shareholding or other form of Crown control before the company is able to exercise the functions and powers of the NAIT organisation. Making the NAIT organisation subject to additional accountability mechanisms, as suggested above, and making it clear that those mechanisms would also apply to NAIT Limited if designated under clause 8(4), would also go some way to addressing this concern.

#### *Enforcement powers*

15. The LAC also has particular concerns about the enforcement powers that are provided in this Bill, some of which (as drafted) have no parallel elsewhere in the statute book. In this regard, the Committee draws attention to the following:
  - The LAC does not think that the power to detain and search a person without warrant under clause 110 is justified. Powers to search without warrant should be limited to situations of urgency where it is not practicable to obtain a warrant in advance of the search, and powers to search the person should be limited to situations in which the seriousness of the offence in respect of which evidential material is sought is so serious that it outweighs the substantial intrusion involved in a search of the person. We do not think either criterion is met in this instance.
  - The power in clause 110 does not specify the purpose of the search that is to be undertaken. It merely requires that, as a pre-requisite to the search, a constable suspects on reasonable grounds that the person has knowingly accessed

information of the type specified. A search power framed in these terms is contrary to principle. It should specify that the constable has reasonable grounds to believe that the person is in possession of specified evidential material.

- The ancillary powers that are available during the execution of the search (which have been taken from the Search and Surveillance Bill 2009 currently before Parliament) are not always appropriate. It is noted, in particular, that clause 106(b) gives a NAIT officer power to move a vehicle that has been stopped if he or she has reasonable grounds to believe that it is necessary for road safety purposes. An enforcement officer under this Bill does not have jurisdiction to deal with road safety matters, and ought not to be able to take possession and control of a vehicle for that purpose.
- The power to require any person to answer relevant questions, contained in clause 57(1), is in the LAC's view, too wide. Although the scope of the questioning is limited to the matters specified in subclause (2), the questions may be directed at any person, whether or not they are a person dealing with NAIT animals or are otherwise involved in the industry that is subject to these regulatory provisions. In the LAC's view, that is an over-reach of executive power. The Committee notes, in any case, that there is no specific offence to enforce this obligation to answer questions. We doubt that the generic offence in clause 132(a) would cover a failure to answer questions.

#### *Other issues*

16. The LAC has several further concerns with the Bill. These include:

- The complexity of the contents and structure of the Bill. This may be improved with the addition of an overview;
- Clauses 45 and 46 are significant provisions indicating how those affected by the NAIT scheme can apply for information. However, they are somewhat confusing, repetitive and lengthy. They are grouped according to who makes the decision rather than by the type of information that is being applied for, which may be a more user-friendly approach;
- The lack of notice requirements when a Minister is revoking the designation of a NAIT organisation;
- The wide immunity from civil or criminal liability given to those involved in the governance and administration of the Bill. This may go beyond the level of immunity that should be considered acceptable;
- The lack of clarity about when a fee should be imposed and when a levy should be imposed;
- The reference made to a NAIT organisation becoming bankrupt or insolvent under the Insolvency Act 2006 when this Act does not apply to corporations, associations or companies; and

- The inconsistency in the way in which the penalties for offences are structured. Some include only terms of imprisonment. Some include both a term of imprisonment and a fine.
17. These issues are described in more detail in the Law Commission's report to the LAC on the National Animal Tracing and Identification Bill, which is attached for your consideration.

George Tanner QC  
Acting Chair  
Legislation Advisory Committee