



Report of the

ATTORNEY-GENERAL

on the Resource Management (Cellsite
Moratorium) Amendment Bill

*Presented to the House of Representatives pursuant to
Section 7 of the New Zealand Bill of Rights Act 1990 and
Standing Order 260 (2) of the Standing Orders of the
House of Representatives*

**VETTING FOR CONSISTENCY WITH THE
NEW ZEALAND BILL OF RIGHTS ACT 1990:
RESOURCE MANAGEMENT (CELLSITE MORATORIUM)
AMENDMENT BILL**

- 1 I have considered whether this Bill, which is a Member's Bill calling for a moratorium on issuing resource consents for the installation of cellphone transmitters within 300 metres of a school, complies with the New Zealand Bill of Rights Act 1990. I have concluded that clause 2 of the Bill limits the right conferred by section 27(3) of the New Zealand Bill of Rights Act and cannot, on the information available, be treated as a justified limit under section 5 of the Act.

Scope of the Section 27(3) Right

- 2 Section 27(3) of the New Zealand Bill of Rights Act provides as follows:

"Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals".

Clause 2 of this Bill provides a special regime for applications for a resource consent to install a cellular transmitter within 300 metres of a school during the period commencing on the day on which the Bill comes into force and ending when relevant national environmental guidelines on the siting of cellphone transmission facilities have been issued by the Minister for the Environment in consultation with the Minister of Health. In respect of these applications the consent authority is required not to consider any application or grant a resource consent in respect of the application, but must return the application, and any fee accompanying it to the applicant, as soon as practicable. The consent authority may, in accordance with the provisions of the Resource Management Act 1991, consider applications for a resource consent to install a cellular transmitter within 300 metres of a school if the applications are received before the day on which the Bill comes into force. Of particular relevance is proposed new section 105A(4) of the Resource Management Act 1991, inserted by clause 2 of the Bill, which provides as follows:

"(4) Neither the consent authority nor the Crown is liable to pay costs, compensation, or damages to a person—

"(a) Who makes an application; or

"(b) Who, but for this section, would have made an application for a resource consent to install a cellular transmitter within 300 metres of a school to the consent authority during the period commencing on the day on which the **Resource Management (Cellsite Moratorium) Amendment Act 1997** comes into force

and ending with the issuing of the national environmental guideline referred to in **section 105B.**"

- 3 In previous consideration of section 27(2) and (3) of the New Zealand Bill of Rights Act the view has been adopted that in general these provisions do not preclude alterations to the substantive law, which may affect the prospects of success for any proceeding provided that the proceedings themselves or the procedures applying to the conduct of those proceedings remain unaffected. This approach seems consistent with the indication given as to the scope of these respective provisions by the Court of Appeal in *Knight v CIR* [1991] NZLR 30 at p37 and *Gazely v Attorney-General* 16/7/96 CA 52/94.
- 4 In considering whether proposed new section 105A(4) constitutes a limit on the right conferred by section 27(3) of the New Zealand Bill of Rights Act, I have noted that the clause refers not only to the Crown but also to consent authorities. My consideration of the proposed new section is of course restricted, in light of section 27(3), to the effect of this clause on the right of individuals to bring civil proceedings against, and to defend civil proceedings brought by, the Crown. In this regard, I note that the proposed new section 105A(4) does not preclude applicants to whom the moratorium applies from bringing proceedings against the Crown. However, by precluding the possibility of "costs, compensation and damages", proposed new section 105A(4) limits the remedies available to any litigant in any proceedings. This in turn must affect the pleadings and the overall conduct of the litigation. In other words the clause will affect the procedures to be adopted in the conduct of any proceedings and not solely the substantive law. While an applicant may bring proceedings against the Crown it cannot be said in the light of proposed new section 105A(4), that the proceedings can be brought and heard "*in the same way as civil proceedings between individuals*". For these reasons I conclude that proposed new section 105A(4) constitutes a limit on the right conferred by section 27(3) of the New Zealand Bill of Rights Act. This conclusion is consistent with the view I have expressed in relation to proposed new section 27A(4) of the Casino Control Act 1990, as inserted by clause 2 of the Casino Control (Moratorium) Amendment Bill, upon which, I note, proposed new section 105A(4) seems to have been largely based.

Section 5 of the New Zealand Bill of Rights Act

- 5 Section 5 of Bill of Rights Act provides:

"Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such

reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

6 In applying section 5, I rely on decisions of the Canadian Supreme Court on their equivalent provision (known as the "Oakes test", *R v Oakes* (1986) 26 DLR (4th) 200 Supreme Court of Canada). I also apply Richardson J's formulation of the test in *MOT v Noort* [1992] 3 NZLR 260 at page 283 which involves balancing the following factors:

- (a) The significance in the particular case of the values underlying the Bill of Rights Act;
- (b) The importance in the public interest of intrusion on the particular right protected by the Bill of Rights;
- (c) The limits sought to be placed in the application of the Act's provision in the particular case; and
- (d) The effectiveness of the intrusion in protecting the interests put forward to justify those limits.

7 Regardless of which approach is adopted, the view which has been adopted is that two essential components must be satisfied. First, the limit must be substantively justified.

This has been taken to mean that the limitation must be of sufficient importance to warrant overriding a constitutionally protected right or freedom (i.e. it must relate to concerns which are pressing and substantial in a free and democratic society). Second, it must be shown that the means used to achieve the objective are reasonably and demonstrably justified. Essentially this involves a test of proportionality which consists of three components:

- (a) the measures adopted must be carefully designed to achieve the objective in question, not arbitrary, unfair or based on irrational considerations; that is they must be rationally connected to the objective;
- (b) the measures should impair as little as possible the right or freedom in question; and
- (c) there must be proportionality between the law limiting the right and the objective of the limitation (i.e. the limitation must not be so deleterious of a right as to outweigh the substantive justification for the limitation).

The onus of justifying the limitation on the right or freedom rests on the party seeking to impose that limit (in this case the Crown). *Solicitor General v Radio New Zealand* [1994] 1 NZLR 48 refers.

8 In achieving the specific objective of the limiting legislation, although the particular right should be impaired no more than is necessary to meet the objective, it is recognised that there is a

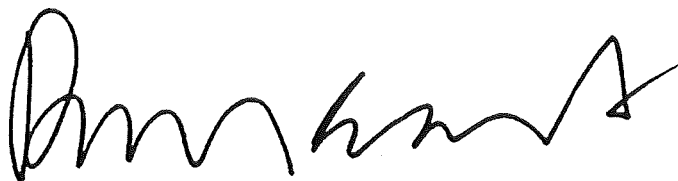
margin of error within which reasonable legislators could disagree (see *Attorney-General of Hong Kong v Lee Kwong-kut* [1993] 3 All ER 939, at 954 (PC)).

- 9 In discussions with the office of the Member concerned, I note that after considerable reflection staff from that office were ultimately unable to advance any satisfactory justifications for proposed new section 105A(4) of the Resource Management Act 1991. I also note the advice from the Member concerned that proposed new section 105A(4) essentially constitutes a drafting error as the clause was inadvertently carried over from the Casino Control (Moratorium) Amendment Bill which was being used as the drafting template for this Bill. As noted above, I have previously concluded that proposed new section 27A(4) of the Casino Control Act (as inserted by the Casino Control (Moratorium) Amendment Bill, limits the right conferred by section 27(3) of the New Zealand Bill of Rights Act.

Conclusion

- 10 On the information available I am satisfied that there is no substantive justification for the limit imposed on the right conferred by section 27(3) by proposed new section 105A(4) of the Resource Management Act 1991 (as inserted by this Bill). I note that the inclusion of proposed new section 105A(4) in this Bill is seen as a drafting error and that it is the intention of the Member concerned to recommend to the select committee that the proposed new section be omitted from this Bill.

Dated this 11th day of November 1997.



Attorney-General