

# New Zealand Law Society

## SUBMISSION ON THE FOOD BILL

- 1 The New Zealand Law Society (Society) welcomes the opportunity to comment on the Food Bill (Bill). The Society's submission focuses on the implications of the New Zealand Bill of Rights Act 1990 (NZBORA) for the power to search without a warrant that is provided for in the Bill.

### **Clause 275 Power to enter without search warrant**

#### *Introduction*

- 2 Clause 275 provides a food safety officer with the power to enter certain specified places “without a search warrant” and to “use any force that is reasonable for the purposes of entry and search”.
- 3 The list of specified places is broad, including “a place where a person intends to operate a food business”, “the specific place in a dwellinghouse or marae where a food business operates” and “any other place, except a dwellinghouse or marae, where the officer reasonably believes that – (i) imported food is held; or (ii) food is being traded in; or (iii) a food-related accessory is being traded in.”
- 4 As discussed in more detail below, the cl 275 power is particularly intrusive as a result of:
  - 4.1 The minimal controls on its exercise. This can be contrasted with the detailed controls set out in cll 289-298 in respect of warrants;
  - 4.2 The purposes for which the cl 275 power can be used, which are so broad as not to constitute any material limitation on the power;
  - 4.3 The extensive powers that a food safety officer has upon entry: cll 265-272.
- 5 At the same time, it is clear that the cl 275 power is necessary to enable routine inspections to ensure compliance with the Act.

#### *Application of NZBORA*

- 6 Section 21 of the New Zealand Bill of Rights Act 1990 (NZBORA) protects everyone, including corporate bodies (see s29), from unreasonable search and seizure. While the extent of

privacy expectations must be measured against the legislative and regulatory environment in which the corporation operates, it is not appropriate to deny to corporations any privacy expectations: See *Tranz Rail Ltd v District Court at Wellington* [2002] 3 NZLR 780 at para 28.

- 7 The cl 275 power to search without a warrant includes dwellinghouses and marae where a food business operates. Places of this type carry a greater expectation of privacy.
- 8 Persons who operate in a highly regulated industry can expect to be subject to scrutiny and may be required to make available substantial amounts of business-related information, with little judicial oversight, in order for the regulation to be effective. But even in this context, s21 will require greater protection depending on the nature of the inquiry and the type of access sought, so that, for example, it is easier to justify access to commercial premises for auditing purposes than a search of an office for evidence of criminal conduct.
- 9 In the context of s21 NZBORA, the requirements of New Zealand law, the rule of law and the International Covenant on Civil and Political Rights are that in order for a curtailment of any right to be reasonable and justified in a free and democratic society:
  - 9.1 the intrusion must be justified by a sufficient countervailing public interest;
  - 9.2 where the purpose of the intrusion is the collection of evidence for a criminal investigation, there must be specific and sufficient grounds for the searching of the particular person or property; and
  - 9.3 without such special circumstances, any intrusion should occur only with prior and independent authorisation.
- 10 A warrant ensures that these conditions are met. It also ensures that the decision to undertake a search and seizure is not made by the person who conducts it.
- 11 It is therefore important for consistency with NZBORA that the power to search without a warrant be as limited as possible and that it not be available for the purpose of collecting evidence for a criminal investigation.

***Purpose of cl 275 very broad***

- 12 Clause 264 provides that a food safety officer may exercise a power in cl 275 for one or more of the following purposes:

- 12.1 To determine whether the applicable requirements of the Act have been/are being complied with;
  - 12.2 To ensure that the applicable requirements of the Act have been/are being/will be complied with;
  - 12.3 To investigate any thing that might have/might potentially have contaminated food or a food-related accessory;
  - 12.4 To determine whether food is safe and suitable;
  - 12.5 To determine whether food or a food-related accessory poses a risk to human life or public health.
- 13 Because of the breadth of these purposes (when compared with the purpose of searches under a warrant), it is likely that cl 275 will always be preferred to obtaining a warrant under cll 289-298 in respect of searches of the places specified in that clause, and that a warrant will only be obtained to search dwellinghouses and marae.
- 14 In particular, cl 264(a) (“to determine whether the applicable requirements of this Act have been, or are being, complied with”) is sufficiently broad to arguably allow the collection of evidence of suspected offences. The cl 266 heading (information powers and evidence gathering) also suggests that it may be intended that cl 275 be used for this purpose.
- 15 It would be desirable to clarify that cl 275 is not to be used to obtain evidence of the commission of a past offence, in order to comply with the principles set out in para 9 above. It is likely that the Courts will seek to interpret it in this way, in order to achieve consistency with NZBORA. But this should be made clear so as to provide clear operational guidance.

***Minimal threshold/conditions specified***

- 16 Minimal safeguards are provided in respect of the cl 275 power:
- 16.1 There are no conditions of any substance for exercising the power;
  - 16.2 There is no judicial supervision or supervision by a third party of conditions.
- 17 The only conditions imposed on a cl 275 search are:
- 17.1 Reasonable oral or written notice must be given (but not if giving notice would defeat the purpose of the exercise of the power);

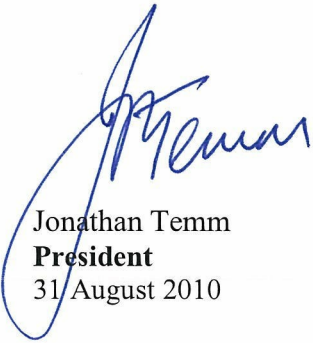
- 17.2 The officer must enter at a reasonable time;
- 17.3 The officer must produce evidence of the officer's appointment;
- 17.4 If the officer does not give notice and the owner or occupier is not present when the officer enters the place, the officer is required to leave a written statement setting out details of the search.
- 18 Clause 275 does not specify any general threshold that needs to be met, or grounds that need to exist before it can be used. (In the case of some of the specific places that can be entered, there is a "reasonable belief" requirement. For example, "a place, except a dwellinghouse or marae, where the officer reasonably believes documents relating to trading in food will be found" (cl 275(2)(e)).)
- 19 In comparison, the requirement for a warrant is a reasonable belief that there is, at a place, any thing in relation to which an offence against the Act has been/is being committed, or that there has been/is being/is intended to be used by a person for the commission of an offence against the Act; or that is evidence of the commission of an offence against the Act (cl 291).
- 20 To ensure that entry is proportional to the objectives of the Bill, it would be desirable to include a general condition for the use of the cl 275 power, such as a requirement that the officer reasonably believes that entry is necessary to protect against risks to human life and public health, or to monitor for compliance with the regulatory regime.

### ***Recommendations***

- 21 The Law Society recommends:
- 21.1 That it be specified (in cl 274) that if a food safety officer wishes to enter a place for the purpose of collecting evidence of the suspected commission of offences, it is necessary to obtain a warrant;
- 21.2 The inclusion of a requirement in cl 275 that the food safety officer reasonably believes that entry is necessary to protect against risk to human life or public health, or to monitor for compliance with the regulatory regime.

***Conclusion***

22 The Society does not wish to appear in support of this submission. However, the Society is willing to meet with the Committee or officials advising it if the Committee considers that would be of assistance.



Jonathan Temm  
**President**  
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