

Plumbers, Gasfitters, and Drainlayers Amendment Bill

Government Bill

As reported from the Government
Administration Committee

Commentary

Recommendation

The Government Administration Committee has examined the Plumbers, Gasfitters, and Drainlayers Amendment Bill and recommends by majority that the amendment set out below be passed. The committee is unable to agree on whether the bill should be passed.

Introduction

The Plumbers, Gasfitters, and Drainlayers Amendment Bill seeks to do two things. First, it is intended to retrospectively validate a disciplinary levy imposed under section 143 of the Plumbers, Gasfitters, and Drainlayers Act 2006 (The Act) between 1 April 2007 and 11 January 2012, and an offences fee prescribed under section 142 of the Act since 12 January 2012, by the Plumbers, Gasfitters, and Drainlayers Board. Second, the bill seeks to amend the Act to provide the board with a levy power to fund its function of instituting prosecutions for breaches of any pertinent Act.

The Plumbers, Gasfitters, and Drainlayers Board

The board was established under the Plumbers, Gasfitters, and Drainlayers Act 1976, and is continued in existence by the current Plumbers, Gasfitters, and Drainlayers Act 2006. The board is responsible for protecting the health and safety of the public by regulating and ensuring the competency of persons carrying out sanitary plumbing, gasfitting, and drainlaying work. One function of the board is to prosecute those who work illegally in the industry: non-registered persons performing work that only registered persons are allowed to perform.

We note that the matters covered by this bill arise because the 2006 Act did not specifically allow the board to impose a levy for the prosecution of such people working illegally.

We further note that the board received legal advice on 9 December 2010 supporting the board's ability to set the offences fee.

The disciplinary levy and the offences fee

The board is funded entirely from fees and levies charged under the Act, which are collected only from people registered under the Act. One such levy is the disciplinary levy, which is set by the board to fund the costs of complaints and disciplinary action against such persons. There is also the offences fee, which the board collects in order to fund prosecutions against non-registered persons working illegally in the industry. The validity of the disciplinary levy and the offences fee has been the subject of complaints to the Regulations Review Committee and the Office of the Ombudsman.

Amendment to the collection of the offences fee

We recommend a minor drafting amendment to clause 5, which would insert new subsection 171B(2). This amendment would make it clear that, while the board could continue to collect the currently prescribed offences fee for as long as necessary, it could not change the fee. In order to change the amount it collects to fund its prosecution function, it would need to replace the offences fee with an appropriate disciplinary and prosecution levy imposed under section 143 (as amended by the bill).

Validation of the disciplinary levy and the offences fee

We agree that it is necessary to extend the board's power to impose a new levy to secure funding for all of the functions it is required to carry out under the Act. The board could then legitimately impose a levy to meet the costs of prosecuting non-registered persons working illegally in the industry.

Some of us consider that it is necessary to validate the disciplinary levy and the offences fee, without which the board's finances would be severely constrained. The board needs to be properly funded to carry out its statutory functions to protect the public. The alternatives to validation, such as refunding the disciplinary levy and offences fee or retaining the status quo (which would allow civil proceedings to recover the levy and the fee), could leave the board underfunded. We wish to make it clear that we do not condone the board's actions. The board acted *ultra vires* in using part of the levy to prosecute non-registered persons working illegally in the industry, and has attracted criticism for doing so. It is unusual for a select committee to recommend legislation that would apply retroactively and we do not do so except where we consider it is absolutely necessary, as in this case.

We consider that the board has been held to account through its Accountability Agreement with the Minister for Building and Construction, the select committee process, and an Ombudsman's Opinion on a complaint of 14 July 2011 about the validity of the disciplinary levy. We note that the Ombudsman has recommended that the disciplinary levy imposed between 31 July 2010 and 11 January 2012 be validated by legislation.

However, others of us do not agree with the retroactive validation of the offences fee and disciplinary levy. We consider that if the offences fee and the disciplinary levy are validated the board is not being held accountable for its actions. We agree that the board needs to be properly funded to carry out its statutory duties. We also agree that the board should be able to set an offences fee. We do not agree, however, with making lawful the previous unlawful actions taken by the board. We are also in favour of the Ombudsman's recommendation that registered persons be compensated for excess levy payments.

Other matters

Historical issues in the sector

We note that the sector has a colourful history. A number of registered persons have been in contention with the board for many years; many of them now belong to the Plumbers, Gasfitters and Drainlayers Federation, one of the sector's two professional bodies. The other professional body, Master Plumbers, Gasfitters and Drainlayers New Zealand Inc., supports the bill.

In 2008, because of concern about the board's performance, the Minister for Building and Construction replaced most of its appointed members and requested that it be investigated by the Office of the Auditor-General. The office's report, published in July 2010, raised a number of issues with the board's performance, and set out what the board needed to do to improve it, including rebuilding its relationship with disgruntled registered persons; but it indicated that the board was on the right track. We are pleased to hear that, on balance, the board has improved its standard of performance.

We understand that the industry feels that the board needs to increase its transparency and its communication with the sector. We agree with this sentiment.

We note that the Office of the Auditor-General is due to conduct a follow-up audit later this year. We await the results with interest.

Funding models

We are interested in the funding models of other regulatory boards in the building and construction portfolio. We note that some boards use a different model from the Plumbers, Gasfitters, and Drainlayers Board. The electrical workers model receives funding from the electricity levy to fund investigations into non-registered persons carried out by the Ministry of Business, Innovation and Employment. This levy is charged to the industry through electricity generators, who then pass on the cost to consumers.

We are aware of some support in the plumbing, gasfitting, and drain-laying sector for a levy similar to the electricity levy, or funding from the existing gas levy to fund some of the board's functions. The most appropriate model of funding levies is a debate that is likely to continue during the review of the Act.

Process

We were concerned that the committee initially was given only one week to consider this bill. This timeframe was not ideal, but we were advised that it was preferable that the legislation be enacted before 1 April 2013, when the new licensing year commences.

We were then given a two-week extension to the reporting date, which has assisted our deliberation.

Some of us remain concerned at the short time the committee had to progress this bill. We think that the time available was insufficient for the committee to consider the bill thoroughly.

Green Party minority view

Green Party members of Parliament are open to finding a solution to the on-going issues that have beset the Plumbers, Gasfitters and Drainlayers Board over the collection of the disciplinary levy and, since 2010, offences fee, for the prosecution of unlicensed practitioners.

In our view it is appropriate that the board prosecute unlicensed practitioners and be funded in order to carry out this function. Licensed practitioners stand to gain from the prosecution of unlicensed practitioners because of the benefit to the reputation of their industry, and we therefore have no philosophical objection to the idea of licensed practitioners funding this function through a levy or fee. We note that this funding model is used by a number of construction industry boards including the Chartered Professional Engineers Council, the Engineering Associates Registration Board, and the New Zealand Registered Architects Board.

However, we do accept the concerns of some submitters that the board has not been as transparent as it could be about how the offences fee is spent, and note their concerns that it may not be being used entirely for the purposes of prosecuting unlicensed practitioners. If the fee is collected for this purpose, it should be used only for this purpose, and we recommend that the board be more proactive about disclosing how the levy is spent so that stakeholders can be confident that it is only being used for the purpose for which it is collected.

It is clear that the disciplinary levy and later the offences fee have been collected inappropriately and illegally. While we support legis-

lation to validate the collection of such a fee in future, we are not comfortable with retrospective validation of the funds that have already been collected. Retrospective legislation should be used extremely sparingly because of the precedent it sets, and we are not convinced that it is required in this case. There are also issues of natural justice: a number of complainants have pursued their legitimate concern about the illegal collection of the disciplinary levy and offences fee through every available mechanism, including the Ombudsman, Auditor-General, and Regulations Review Committee, the latter twice. To reach the end of this process and be vindicated, only to have the law changed by Parliament, seems unfair and inappropriate.

Our preference would be to legislate to validate the collection of an offences levy by the board from now on, but not to retrospectively validate its previous collection. We recognise that this may require the board to refund its previous levies and fees, and think this is appropriate. However, noting the concern that this may leave the board in a financially unviable position, we think it would also be appropriate if the Government offered financial support to the board to enable it to refund the illegally collected levies and fees and still continue to operate. Based on estimates by the Ombudsman in its report into a complaint on this matter, this might mean a liability to the Government of around \$1 million. While this is a substantial sum, it is probably appropriate that the Government make a financial contribution to enable the board to refund the levies, given that the current situation has arisen in part because the wording of the Plumbers, Gasfitters, and Drainlayers Act 2006 was inadequate to allow for the intended function of the board. We think the refunding of the illegally collected fees and levies would go some way towards restoring confidence in the board amongst the sector, and put the board on a more secure footing in the future.

It is of vital importance that the passage of this legislation does not create new grievances within the plumbing, gasfitting, and drainlaying sector. We think that the retrospective validation of funds, coupled with the extremely short time that the committee has had to consider this bill, is likely to do exactly that. Since this problem has been known for several years, our preference would have been for a robust consultation with the industry, followed by non-retrospective legislation following the normal timeframes for select committee consid-

eration. We remain uncomfortable and concerned with the rushed process and suspect that it will create new issues and grievances which are in nobody's interests. We could have supported a solution that was not retrospective, but given these concerns, we cannot support the bill as currently drafted.

Appendix

Committee process

The Plumbers, Gasfitters, and Drainlayers Amendment Bill was referred to the committee on 14 March 2013. We received and considered three submissions from interested groups and 23 submissions from individuals. We heard from three submitters.

We received advice from officials from the Ministry of Business, Innovation and Employment.

Committee membership

Hon Ruth Dyson (Chairperson)

Chris Auchinvole

Kanwaljit Singh Bakshi

Hon Trevor Mallard

Eric Roy

Holly Walker

Raymond Huo replaced Trevor Mallard for this item of business.

Mojo Mathers replaced Holly Walker for this item of business.

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Key to symbols used in reprinted bill

As reported from a select committee

text inserted by a majority

~~text deleted by a majority~~

Hon Maurice Williamson

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The Parliament of New Zealand enacts as follows:

- 1 Title**
This Act is the Plumbers, Gasfitters, and Drainlayers Amendment Act **2013**.

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

3 Principal Act

This Act amends the Plumbers, Gasfitters, and Drainlayers Act 2006 (the **principal Act**). 5

Part 1**Extension of purposes for which Board
may impose levy****4 Section 143 amended (Disciplinary levy) 10**

(1) In the heading to section 143, after “**Disciplinary**”, insert “**and prosecution**”.

(2) Replace section 143(1) with:

“(1) The Board may, by notice in the *Gazette*, impose on every registered person a disciplinary and prosecution levy of any amount it thinks fit for the purpose of funding the costs arising out of— 15

“(a) investigations into allegations or complaints against registered persons; and

“(b) proceedings concerning discipline under Part 3; and 20

“(c) investigations into, and prosecutions against persons for, the breach of any Act or regulation relating to sanitary plumbing, gasfitting, or drainlaying.”

Part 2**Validation of disciplinary levy and
offences fee 25****5 New sections 171A and 171B inserted**

After section 171, insert:

“171A Validation of disciplinary levy

“(1) A disciplinary levy payable during the period beginning on 1 April 2007 and ending on the close of 11 January 2012 is and always has been validly imposed by the Board. 30

- “(2) Money received by the Board in payment of a disciplinary levy validated by **subsection (1)** is and always has been lawfully collected and applied.
- “(3) In this section, **disciplinary levy payable** means a disciplinary levy payable or purportedly payable in accordance with the following: 5
- “(a) Plumbers, Gasfitters and Drainlayers Board (Fees) Amendment Notice 2007 (*Gazette* 2007, p 414):
- “(b) Plumbers, Gasfitters and Drainlayers Board (Fees) Amendment Notice (No 2) 2007 (*Gazette* 2007, p 575) 10 as amended by the Corrigendum to the Plumbers, Gasfitters and Drainlayers Board (Fees) Amendment Notice (No 2) 2007 (*Gazette* 2007, p 721):
- “(c) Plumbers, Gasfitters and Drainlayers Board (Fees) Amendment Notice (No 3) 2007 (*Gazette* 2007, 15 p 3635):
- “(d) Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010 (*Gazette* 2010, p 936) as amended by the Amendment to the Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010 (*Gazette* 2010, p 1675): 20
- “(e) Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010 (*Gazette* 2010, p 2140) as amended by the Amendment to the Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010 (*Gazette* 2010, p 2213) and 25 republished as the Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010 (*Gazette* 2010, p 3604).

“**171B Validation of offences fee**

- “(1) An offences fee payable on and from 12 January 2012 is and always has been validly prescribed by the Board.
- ~~“(2) If an offences fee validated by **subsection (1)** is amended on or after the date on which this section comes into force, the validation ceases to apply on and from the date on which the amendment takes effect.~~ 30
- “(2) The Board must not amend an offences fee validated by **subsection (1)**, but may revoke it. 35
- “(3) Money received by the Board in payment of an offences fee validated by **subsection (1)** is and always has been lawfully collected and applied.

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- “(4) In this section, **offences fee payable** means an offences fee payable or purportedly payable in accordance with the following:
- “(a) Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010 (*Gazette* 2010, p 3604) as amended by the Amendment to the Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010 (*Gazette* 2011, p 5677): 5
 - “(b) Plumbers, Gasfitters and Drainlayers (Fees and Disciplinary Levy) Notice 2013 (*Gazette* 2012, p 4495).”

Legislative history

11 March 2013	Introduction (Bill 101–1)
14 March 2013	First reading and referral to Government Administration Committee
