Our advice

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PRIVILEGED AND CONFIDENTIAL

Local authorities' enforcement of NZ Standard 5465:2001: modifying the Standard, searching vehicles to determine compliance with the Standard, and incorporating amendments made to the Standard

Background

The *New Zealand Standard 5463:2001 Self containment of motor vehicles and caravans* (**Standard**) sets out requirements for vehicles to meet in order to qualify as 'self-contained', and includes a certification regime for this process. It is common practice for local authorities to reference the Standard in their freedom camping bylaws, typically so as to provide that freedom camping in some areas is restricted to those using self-contained vehicles that meet the Standard.

The Standard was amended in May 2017, to improve the minimum requirements for toilets. Section 16 in the Standard provides a transitional regime for the changes introduced under this amendment.

We understand the New Zealand Motor Caravan Association (**NZMCA**) is concerned about differing interpretations of the new minimum requirements for toilets. In particular, the NZMCA is concerned that some issuing authorities may potentially be certifying vehicles as self-contained under the Standard on the basis of an incorrect interpretation[1] of the minimum requirements for toilets.

The NZMCA is interested in whether local authorities might be able to address such a problem through their freedom camping bylaws. We understand from the NZMCA that some local authorities are also interested in whether they could potentially look behind certification issued under the Standard, to ensure vehicles truly comply with the substantive requirements in the Standard, including the minimum requirements for toilets. Apparently some local authorities are also interested in whether they might enforce the recent amendments to the Standard before they come into force under the transitional provisions in the Standard.

If local authorities are able to look behind the Standard in this way, they want to know if they would have the necessary search powers to back up such an approach (eg ability to search a campervan to see if it complies with the requirements in the Standard).

1 We understand that there are differing interpretations of section 6.1.1 in the Standard, notably about the phrase "even with the bed made up". You have not asked us to advise on the correct interpretation of this section.

Finally, the NZMCA is aware that local authorities reference or cite the Standard in somewhat different ways within their bylaws. The NZMCA is interested in whether the recent amendment made to the Standard will automatically apply to all local authorities' bylaws. The NZMCA has indicated that local authorities are themselves interested in how they might best reference or cite the Standard in bylaws to as to capture any amendments made to the Standard.

Questions

You have asked the following questions:

1. Can a local authority provide that the only self-contained vehicles permitted under its bylaw are those that in fact comply with the substantive requirements in the Standard, even if the vehicle has already received a self-containment certificate?

2. Can a local authority provide that the only self-contained vehicles permitted under its bylaw are those that meet the substantive requirements in the Standard, but without regard to the transitional provisions in the Standard (ie effectively overriding the transitional provisions)?

3. Can a local authority enforcement officer enter a vehicle to check whether it complies with the Standard?

4. How should a local authority cite the Standard in its bylaw to ensure that it captures any amendments made to the Standard?

Answers

Local authority bylaws arguably provide a possible means to address the NZMCA's concerns about issuing authorities certifying vehicles on the basis of an incorrect interpretation of the new toilet requirements. Local authorities can choose to incorporate just some of the Standard, and in a modified form. Bylaws could in theory require vehicles to effectively meet NZMCA's view of the correct minimum toilet requirements. Also, local authorities could modify the Standard so as to override the transitional provisions in the Standard for the new toilet requirements.

There is, however, a serious practical problem with using bylaws in this way. Unfortunately, existing statutory powers of entry are unlikely to prove useful to local authorities wanting to enter and search a self-contained vehicle to determine if it complies with the Standard or any other requirements imposed by a local authority through its bylaws (eg modifications to the Standard). There would be serious risks if a local authority were to purport to give itself such powers in bylaws.

Finally, local authorities will almost certainly need to amend their bylaws to adopt the May 2017 amendment to the Standard. It may not be possible for local authorities to draft bylaws so as to automatically capture any amendments to the Standard.

Our reasons

Summary

Question 1: Can a local authority provide that the only self-contained vehicles permitted under its bylaw are those that in fact comply with the substantive requirements in the Standard, even if the vehicle has already received a self-containment certificate?

Open to local authorities to incorporate Standard into bylaws in a modified form

The Standard itself is not legally binding or enforceable unless, and to the extent, it is incorporated into local authorities' bylaws.[2]

It will be open to a local authority to incorporate the Standard into a bylaw in a modified form. Section 30 of the Standards and Accreditation Act 2015 (**Standards Act**) expressly allows for Standards to be incorporated "in whole or in part" and for any reference or incorporation of a Standard to be done "with or without modification".

Accordingly, where a local authority cites the Standard in its bylaw, it could choose to incorporate just some aspects of the Standard, to modify aspects of the Standard, and it could include requirements additional to the Standard.

Local authorities may be able to use this discretion to require self-contained vehicles to meet certain toilet requirements

A local authority could use the discretion in section 30 of the Standards Act to address the NZMCA's concerns about issuing authorities issuing certification for vehicles that do not meet (the NZMCA's interpretation of) the minimum toilet requirements.

For instance, a local authority could provide in its bylaw that a "self-contained vehicle" will be one that meets the substantive requirements of the Standard and certain additional toilet requirements described by the local authority in the bylaw, with those additional requirements being the NZMCA's detailed view on the necessary standards for a toilet.

As an alternative, a local authority could require compliance with all requirements in the Standard, other than the requirement in section 6.1.1 (which we understand is the problematic section) and instead provide its own minimum requirements for toilets within the definition of a "self-contained vehicle".

2 See sections 29 and 30 of the Standards Act.

Another alternative might be for a local authority to simply provide that a "self-contained vehicle" must in fact meet the substantive requirements of the Standard to the satisfaction of the local authority, regardless of whether a warrant, certificate, or sticker has been issued.

There will no doubt be other options for framing a bylaw so as to address the NZMCA's concerns.

However, regardless of which option is chosen, there are likely to be serious practical problems with enforcing any such approaches, given the lack of powers to enter and search self-contained vehicles to determine if they do in fact comply with the Standard or any modifications included in bylaws – this is discussed under Question 3 below.

Local authorities would need to have some evidence showing how poor certification of minimum toilet requirements risks causing harm

If a local authority were to take such an approach in its bylaw, it would need to ensure that it complied with the requirements in section 11(2) of the Freedom Camping Act 2011:

> *(2) A local authority may make a bylaw under subsection (1) only if it is satisfied that—*
>
> *(a) the bylaw is necessary for 1 or more of the following purposes:*
>
> *(i) to protect the area:*
>
> *(ii) to protect the health and safety of people who may visit the area:*
>
> *(iii) to protect access to the area; and*
>
> *(b) the bylaw is the most appropriate and proportionate way of addressing the perceived problem in relation to that area; and*
>
> *(c) the bylaw is not inconsistent with the New Zealand Bill of Rights Act 1990.*

Notably, section 11(2)(a) requires that a bylaw be "necessary" to protect an area or people's health and safety. On that basis, it would be prudent for a local authority to have some evidence which demonstrates how poor certification of minimum toilet requirements risks causing harm to an area or to people's health and safety. If a local authority could not point to such evidence, its bylaw could be vulnerable to challenge on the basis of non-compliance with section 11(2).

Question 2: Can a local authority provide that the only self-contained vehicles permitted under its bylaw are those that meet the substantive requirements in the Standard, but without regard to the transitional provisions in the Standard (ie effectively overriding the transitional provisions)?

Local authorities will be able to override the transitional

Section 16 of the Standard sets out the transitional regime for implementing the changes introduced under the May 2017 amendment. We understand that these transitional provisions allow lead time into the new requirements, in some cases perhaps as long as 4 years. The

provisions in the Standard through bylaws, provided of course there is justification for this position	NZMCA has suggested that a few local authorities may be keen to introduce the requirements sooner than that. As mentioned in the discussion under Question 1, it is open to local authorities to refer to or incorporate the Standard in whole or in part, or in a modified form.[3] It will, therefore, be open to a local authority to incorporate the Standard, but with the exclusion of section 16. This would effectively allow it to bring the new minimum requirements for toilets into force immediately. As already identified under Question 1, the local authority would need to be satisfied that such an approach was necessary in line with section 11(2) of the Freedom Camping Act. Essentially, the local authority would need to have some basis for considering that immediate introduction of the requirements was necessary to protect an area or people's health and safety.

Question 3: Can a local authority enforcement officer enter a vehicle to check whether it complies with the Standard?

Freedom Camping Act does not provide helpful search powers	The Freedom Camping Act gives enforcement officers (appointed under that Act) powers to require certain information,[4] to require people to leave a local authority area,[5] and to even seize and impound property, including a vehicle.[6] However, none of these powers include the ability to enter and search a vehicle.
Search powers in the LGA 02 unlikely to be of much use given the restrictions on searching dwellinghouses	The only search powers in the Local Government Act 2002 (**LGA 02**) that have the potential to be of use to local authorities wanting to enter and search a self-contained vehicle are those set out in sections 171 and 172: ***171 General power of entry*** *(1) For the purpose of doing anything that the local authority is empowered to do under this Act or any other Act, a local authority may enter any land or building other than a dwellinghouse.* ***172 Power of entry for enforcement purposes*** *(1) A warranted enforcement officer may enter land for the purpose of detecting a breach of a bylaw or the commission of an offence against this Act if the officer has reasonable grounds for suspecting that a breach of the bylaw or the commission of the offence has occurred or is occurring on the land. …* *(3) The power in subsection (1) to enter a dwellinghouse must not be exercised unless—*

3 Under section 30 of the Standards Act.
4 Section 35 of the Freedom Camping Act.
5 Section 36 Freedom Camping Act.
6 Sections 37-38 Freedom Camping Act.

(a) the entry is authorised by a warrant given by an issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2012) on application made in the manner provided for an application for a search warrant in subpart 3 of Part 4 of that Act; and

(b) when exercising the power, the enforcement officer is accompanied by a constable.

Whether these search powers are of any use turns largely on whether a self-contained vehicle, such as a campervan, constitutes a "dwellinghouse". If it does, then the search powers are of no real use, given that section 171 will not apply, and the power in section 172 can be exercised only after obtaining a search warrant and in the company of a Police officer.

Unfortunately, we have not been able to identify any case law that considers the meaning of "dwellinghouse" in the context of sections 171 or 172. The case law that does consider whether a caravan or the like is a dwellinghouse is in the context of other legislation and, in any event, is contradictory.[7]

In our opinion, if a court were to consider whether a self-contained vehicle, such as a campervan, were a "dwellinghouse" for the purposes of sections 171 or 172, it is more likely than not that it would consider it to be a "dwellinghouse". It seems to us that the greater protections for dwellinghouses within the search powers are due to people have a greater expectation of privacy in the spaces in which they reside. Despite the fact that a campervan is on wheels and might often be sited in a public place, it is likely that those living in them (albeit on a temporary basis) regard it as their main place of residence at that time. In those circumstances, and bearing in mind the protection against unreasonable search and seizure in the New Zealand Bill of Rights Act 1990 (**Bill of Rights**),[8] it seems more likely that a court would interpret the search powers narrowly, against a local authority.

In our opinion, the search powers in the LGA 02 do not provide a sufficiently safe basis for a local authority to search a self-contained vehicle, such as a campervan.

Serious risks would arise if local authority were to purport to

In the absence of any statutory search powers, a local authority could look to provide itself with additional search powers in its bylaw, if it considered that to be necessary. After all, section 14 of the Bylaws Act 1910 provides that:

7 For instance, in *Auckland Council v Steed* [2013] NZEnvC 10, the Environment Court opined that a "dwellinghouse" did not include a caravan for the purposes of section 315(2)(a) of the Resource Management Act 1991. That section concerned the ability of a person against whom an enforcement order has been made to enter, with the consent of the Court, upon any land or enter any structure, with the proviso that a person entering a structure that is a dwellinghouse must be accompanied by a constable. In comparison, in *Cunningham v NZ Police* (1997) 4 HRNZ 240, the Court considered that a caravan was analogous to a dwellinghouse for the purpose of disallowing evidence obtained by Police after entering a caravan on the occupier's property. Also, in *Hale v Hale* (1985) 3 NZFLR 608, the Court determined that a caravan could be a "household residence" for the purposes of the Domestic Protection Act 1982.

8 Section 21 Bill of Rights.

give itself additional search powers in bylaw

> *No bylaw shall be invalid merely because it deals with a matter already dealt with by the laws of New Zealand, unless it is repugnant to the provisions of those laws.*

There is, however, a serious hurdle to overcome with such an approach. Section 11(2)(c) of the Freedom Camping Act provides that a local authority can make a bylaw "only if satisfied that … the bylaw is not inconsistent with the New Zealand Bill of Rights Act 1990". As mentioned above, section 21 of the Bill of Rights includes a protection against unreasonable search and seizure:

> *Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.*

To successfully demonstrate that a search power inserted into a freedom camping bylaw was not inconsistent with the protection against unreasonable search and seizure, a local authority would have to be able to demonstrate that the power was necessary and a proportionate response to the problem the bylaw was seeking to address.

If our view that "dwellinghouse" in the search powers in the LGA 02 is likely to include self-contained vehicles is correct, this would suggest that giving a local authority the power to enter a self-contained vehicle without a search warrant, or in the company of Police officer, may be excessive, and not in line with the Bill of Rights. In addition, the justification for such a power is weak: entering a vehicle to determine if it complies with the Standard because the local authority is unwilling to rely on certification issued under the Standard does not provide a compelling argument for entering someone's (albeit temporary) home.

Acknowledging that we have limited information about the problems caused by the differing interpretations over the new toilet requirements in the Standard, our opinion is that the introduction of a search power into a freedom camping bylaw to enable enforcement officers to search self-contained vehicles would be found to be inconsistent with the Bill of Rights, and so in breach of section 11(2)(c) of the Freedom Camping Act.

Question 4: How should a local authority cite the Standard in its bylaw to ensure that it captures any amendments made to the Standard?

Bylaws often reference the Standard, and sometimes expressly include any amendments to the Standard

Our understanding is that many local authorities' freedom camping bylaws reference the Standard, usually as part of the definition of "self-contained vehicle" (or equivalent). Most commonly, the definition of "self-contained vehicle" states that a self-contained vehicle is one that complies with the Standard, and the Standard is simply cited by name.[9]

We understand from the NZMCA that some local authorities' bylaws either currently refer to (or local authorities are considering having them refer to)

9 In our experience, this is the common approach in freedom camping bylaws.

the Standard "*and any amendments made to it*". For instance, the definition of a "self-contained vehicle" will provide that a self-contained vehicle is one that complies with "New Zealand Standard 5465:2001, including any amendments".

There is some uncertainty about whether the recent May 2017 amendment to the Standard will automatically apply to these two types of bylaws.

Presumption is that amendments to NZ Standards will apply only if subsequently expressly incorporated

Typically, where a document (eg the Standard) is incorporated by reference into some form of legislation or rule (eg a bylaw), the presumption is that any amendments to the document will have effect only if they are specifically incorporated through some subsequent change to the legislation or rule.[10]

The rationale behind this presumption is that the entity making the legislation or rule should turn its mind to whether particular amendments to a document are desirable and appropriate in the context of the particular legislation or rule before they can be incorporated. If the entity did not specifically undertake such a consideration, then it would effectively allow another agency (being the agency responsible for creating and amending the document incorporated by reference) that is not responsible for making the legislation or rule to dictate the substance of that legislation or rule. This would be an abdication of responsibility by the entity.

Section 29 of the Standards Act deals with this scenario in the context of New Zealand Standards (emphasis added):

> *(1) A New Zealand Standard may be cited in any Act, regulations, or bylaw by the title and number given to it by the NZ Standards Executive.*
>
> *(2) If a New Zealand Standard is cited in an enactment by the title and number given to it by the NZ Standards Executive, that citation must, unless the context otherwise requires, be deemed to include and refer to the latest New Zealand Standard with that citation, together with any modifications to it, promulgated before the enactment in which it is cited was passed or made.*

Section 29(2) makes clear that a reference to a Standard in an enactment can only be to the version of that Standard that applied at the time the enactment was made. So if an entity wants to incorporate an amendment to a Standard into its enactment, it will need to amend the enactment to enable this.

10 See section 53(3) of the Legislation Act 2012, which provides that "Amendments made by the originator of the material have no legal effect as part of the instrument unless they are specifically incorporated by a later instrument made in accordance with this subpart." Section 53(3) does not apply to local authority bylaws (see definition of "instrument" in section 48 of the Legislation Act, which specifically excludes a bylaw that is subject to the Bylaws Act 1910. The Bylaws Act applies to any bylaw made by a local authority – see the definition of "bylaw" in section 2 of the Bylaws Act). In addition to the Legislation Act, various statutory regimes that allow for material to be incorporated by reference into rules generally provide that any amendments to the material incorporated by reference will apply only if the rules are specifically amended to incorporate such a change. For instance, see section 261F in the Local Government Act 2002, and section 406 in the Building Act 2004.

However, section 29(2) does not appear to strictly apply where a Standard is cited in a local authority bylaw. This because a bylaw is not an "enactment".[11]

Interestingly, the reference to "any Act, regulations, or bylaw" in section 29(1) is not repeated in section 29(2) – rather the word "enactment" is used. It is arguable that this indicates Parliament was deliberate in ensuring that the rule in section 29(2) would not apply to bylaws.

Regardless, there may be issues with amendments to a Standard being automatically applied to a bylaw. Such a practice would effectively amount to a potentially significant amendment to the local authority's bylaw, without the local authority carrying out necessary consultation. There would likely be scope to try to challenge such an approach.[12]

Our opinion is that the May 2017 amendment to the Standard will not have effect until a bylaw is amended to incorporate this change

In our opinion, where a freedom camping bylaw simply refers to the Standard (and does not refer to any amendments to that Standard), the recent May 2017 amendments to the Standard will not have effect until such time as the local authority amends its bylaw to expressly reference the amendment.

Where a freedom camping bylaw refers to the Standard, and any amendments to it, we are of the opinion that it is unlikely that the May 2017 amendment to the Standard will have effect until the bylaw is amended. We acknowledge there is less certainty on this point, but a lack of certainty is likely to be problematic for a local authority wishing to enforce its bylaw.

Section 23 of Interpretation Act does not provide a fix

We understand from the NZMCA that some local authorities have taken the view that amendments to the Standard will automatically be incorporated into freedom camping bylaws by virtue of section 23 of the Interpretation Act 1999, which provides: "An amending enactment is part of the enactment that it amends". Presumably, the thinking is that the Standard is an enactment, and any amendment to the Standard is therefore part of the Standard itself.

In our opinion, this interpretation is unsound. The word "enactment" is defined in section 29 of the Interpretation Act as meaning any "Act or regulations". The words "Act" and "regulations" are also defined in section 29, and neither definition includes Standards. So section 23 cannot apply to the Standard.

Also, even if section 23 were to apply, and the amendment to the Standard becomes part of the Standard, this does not mean that the amendments should automatically be incorporated in local authorities' bylaws that cite the Standard. As explained above, this would effectively enable the NZ Standards Executive to dictate some of the substance of local authority bylaws and to alter them at will. In our opinion, section 23 would not be interpreted so as to allow such an outcome.

11 Refer to the definition of an "enactment" in section 29 of the Interpretation Act 1999.
12 For instance, an argument could be made that a provision in the bylaw that purports to automatically adopt amendments to the Standard is repugnant to the consultation requirements that apply to amending freedom camping bylaws under section 11(5) of the Freedom Camping Act.

May not be possible for local authorities to draft bylaws so as to automatically capture any amendments to the Standard

You have asked how local authorities should cite the Standard in their bylaws so as to capture any amendments made to the Standard.

In our opinion, this may not in fact be possible. The proper and prudent approach would be for a freedom camping bylaw to simply cite the current Standard, and to then amend the bylaw so as to expressly incorporate any subsequent amendments to the Standard.

We acknowledge that it is arguable that a local authority could expressly refer to the Standard, and any amendments to it, within its bylaw,[13] and treat that as automatically capturing any subsequent amendments to the Standard. The basis for this argument is the fact that section 29(2) of the Standards Act does not strictly apply to bylaws.

However, in our opinion, such an approach carries considerable risk. A person who was subject to enforcement action, which relied on the amendment to the Standard having been automatically incorporated (eg an infringement notice was issued to someone operating a campervan that did not meet the new toilet requirements in the Standard), could challenge the lawfulness of the bylaw. For instance, they could argue that the bylaw was, in substance, amended by the update to the Standard, and that the local authority failed to consult on this amendment using the special consultative procedure, as is required under section 11(5) of the Freedom Camping Act.

It seems to us that there is a reasonable chance that a court might have some sympathy for such an argument, most particularly if the amendment to the Standard was substantive in nature and directly affected the rights, interests, and liabilities, of those to whom the bylaw applies. Given such a risk, we would not recommend this approach to local authorities.

Please call or email to discuss any aspect of this advice

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13 If they were to do so, we would suggest they be absolutely explicit about their intent, eg "... the Standard and any amendments to that Standard, whether made before or after this bylaw comes into force."