

1 April 2021

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill

Purpose

1. We have considered whether the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 22563/10.0). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (right to freedom of expression), s 21 (right to be free from unreasonable search and seizure), s 25(c) (presumption of innocence until proved guilty) and s 27(3) (right to civil litigation). Our analysis is set out below.

The Bill

4. The Bill amends the Financial Markets Conduct Act 2013 (“the FMC Act”), the Financial Reporting Act 2013, and the Public Audit Act 2001 to introduce mandatory climate-related disclosure requirements for certain financial markets reporting entities that, under s461K of the Financial Markets Conduct Act 2013, are considered to have a higher level of public accountability. These include listed issuers, large banks, large nonbank deposit takers, large insurers, and large managers in respect of managed investment schemes.
5. The specific purposes of the Bill are;
 - a. to rapidly move to a position where the effects of climate change are routinely considered in business, investment, lending, and insurance underwriting decisions;
 - b. to help reporting entities better demonstrate responsibility and foresight in their consideration of climate issues; and,
 - c. to lead to smarter, more efficient allocation of capital, and help smooth the transition to a more sustainable, low-emissions economy.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of Expression

6. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression including the freedom to seek, receive, and impart information and opinions

of any kind in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹

7. Clause 7 of the Bill inserts new Part 7A into the FMC Act to introduce the mandatory climate-related disclosures (“CRD”) regime. new ss 461W-Z of new Part 7A require reporting entities to prepare climate statements that comply with applicable climate standards. New s 461ZN then requires entities to lodge these statements with the Registrar, while new section 461ZO requires entities to provide information about these climate statements as part of their annual report. These reporting requirements limit the right to freedom of expression affirmed in s 14 of the Bill of Rights Act.
8. A limit on a right may nevertheless be consistent with the Bill of Rights Act if the limit is justified under s 5 of the Act. This s 5 inquiry asks:
 - a. does the provision service an objective sufficiently important to justify some limitation on the right or freedom?
 - b. if so, then:
 - i. is the limit rationally connected with the objective?
 - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. is the limit in due proportion to the importance of the objective?²
9. The reporting provisions within the Act support the objective of monitoring compliance with standards set in place to ensure reporting entities are routinely considering the effects of climate change in business, investment, lending, and insurance underwriting decisions. We consider that this is an important objective.
10. The requirements for entities to prepare climate statements, lodge these statements with the Registrar and provide information about these statement in their financial reports are rationally connected to monitoring compliance and deterring non-compliance.
11. We consider that, on balance, the reporting requirements are proportionate to the importance of ensuring the entities are taking their climate obligations seriously. The information that may be required under the Bill is regulatory in nature and of limited expressive value. Reporting entities covered by the Bill are those considered to have a higher level of public accountability. These entities have chosen to engage in business in a commercial area which already has a reasonable expectation of reporting. Entities also have the option of requesting an assessment to prove a right to an exception from reporting requirements, where they disagree with the assessment that they are a reporting entity.
12. For these reasons, we consider that any limits within the Bill on the right to freedom of expression are justified in terms of s 5 of the Bill of Rights Act.

¹ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

² *Hansen v R* [2007] NZSC 7. [At 272]

Section 21 – Freedom from Unreasonable Search and Seizure

13. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, correspondence or otherwise. The right protects a number of values including personal privacy, dignity, and property.³
14. New sections 461ZJ and ZK of new Part 7A allow for an appointed CRD assurance practitioner to require information from a reporting entity, its director, or employees in relation to the CRD records of the climate reporting entity or scheme (as relevant) and any other documents of the climate reporting entity or scheme that are relevant to the assurance process. New section 461V also requires a reporting entity to make its CRD records available for inspection at all reasonable times to the Financial Markets Authority or to any other persons authorised or permitted by an enactment to inspect the CRD records of the climate reporting entity or scheme.
15. Additionally, cl 41 of the Bill amends s 34 of the Public Audit Act 2001 to grant to a CRD assurance practitioner some of the powers granted to auditors under the Act. These powers include the power to require information and documents from reporting entities and the power to enter into, and remain on, a reporting entity's premises, to carry out a search for a document, examine a document, and make copies of a document or parts of a document. We consider that these powers across both Acts constitute a search for the purposes of s 21 of the Bill of Rights Act.
16. Ordinarily, a provision found to limit a particular right or freedom may be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of that Act. However, the Supreme Court has held that an unreasonable search logically cannot be reasonably justified and therefore the inquiry does not need to be undertaken.⁴
17. Rather, the assessment to be undertaken is first, whether what occurs is a search or seizure, and, if so, whether that search or seizure was reasonable. In assessing whether the extension of the search and seizure powers in the Bill are reasonable, we have considered the place of the search, the degree of intrusiveness into privacy, and the reasons why it is necessary.⁵
18. Searches under the Bill relate to commercial, regulatory information that is relevant to monitoring a reporting entity's climate reporting. They take place at an entity's office or place of work, unless otherwise authorised by Court warrant, and have low levels of intrusion on personal privacy. Searches are necessary to support the Bill's objective of enabling monitoring of entities' compliance with climate standards.
19. The powers given to CRD assurance practitioners are aligned with those provided to auditors under the Public Audit Act and are considered reasonable in the context of auditing of financial records. Additionally, the powers are constrained by limits. Searches must be carried out at reasonable times. Information gathered as part of searches under the Public Audit Act has explicit protections against self-incrimination, provided for in s 31 of the Act.

³ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

⁴ Above, n1 at [162].

⁵ At [172].

20. On this basis we consider that any searches authorised by the Bill are reasonable for the purposes of s 21 of the Bill of Rights Act.

Section 25(c) – Presumption of innocence until proved guilty

21. Section 25(c) affirms the right to be presumed innocent until proved guilty. This means that an individual must not be convicted where reasonable doubt as to his or her guilt exists. The proceedings must therefore prove, beyond reasonable doubt, that the accused is guilty.
22. New sections 461ZJ and 461ZK require reporting entities, directors and employees to provide information to assurance practitioners. Failure to provide such information is an offence which can result in a fine not exceeding \$50,000. These are strict liability offences.
23. The Bill also contains four infringement offences.⁶ Infringement offences involve strict liability, however they do not result in a criminal conviction⁷. Because of the lack of a conviction, it is not entirely clear whether the strict liability aspects of infringement offences engage section 25(c) of the Bill of Rights Act. However, in our view it is appropriate to consider the justification arguments as these “offences” can carry a fine of up to \$50,000 if proceedings are commenced by the filing of a charging document under section 14 of the Criminal Procedure Act 2011.
24. These infringement offences arise from a failure by a reporting entity to: keep CRD records in the prescribed manner; make the CRD records available to various entities for inspection; ensure that copies of climate statements are delivered to the Registrar for lodgement within a specified time; include specific information relating to its status as a climate reporting entity in its annual report under the Companies Act 1993.
25. A reporting entity which fails to do any of these is liable on conviction to a fine not exceeding \$50,000.
26. Strict liability offences create a prima facie inconsistency with s 25(c) of the Bill of Rights Act by shifting the onus of proof to the defendant.⁸
27. We consider that the prima facie limits proposed by the Bill are justified in the circumstances. In particular:
- a. strict liability offences are considered more justifiable where they arise in relation to activities that are regulated. They may be an appropriate way to incentivise compliance and hold people accountable for their failure to comply. The limit on the right to be presumed innocent is rationally connected to the objective of ensuring compliance with record keeping and disclosure requirements;
 - b. the offences under new sections 461T, 461V, 461ZN and 461ZO are all infringement offences, meaning that an infringement fee can be imposed but conviction cannot be

⁶ New sections 461T, 461V, 461ZN and 461ZO.

⁷ s 375(1)(a) of the Criminal Procedure Act 2011. We note that the drafting in the Bill refers to a reporting entity that commits an infringement offence being “*liable upon conviction...*”. However, s 375(1)(3A) makes it clear a conviction cannot be recorded for infringement offences, even where there is express reference to a conviction in the infringement offence provision (s 375(3A)).

⁸ *R v Hansen* at [38]-[39] per Elias CJ, [202].

recorded for the offence⁹. The reporting entity, director or employee (as the case may be), may have to pay the infringement fee but will not suffer the disproportionate effect of a criminal conviction;

- c. finally, we note that new section 641ZJ and 641ZK include defences to the offence. These are broad defences, and they relate to matters that are peculiarly within the knowledge of the defendant.¹⁰ This is because the defendant will be in a better position than the prosecution to prove the defences (for example, the reasonable steps were taken to ensure compliance, or that information required was not in the individuals possession).

28. For these reasons, we consider that any limits within the Bill on the right to be presumed innocent until proved guilty are justified in terms of s 5 of the Bill of Rights Act.

Section 27(3) – Right to bring civil proceedings against the Crown

29. Section 27(3) provides that every person has the right to bring civil proceedings against, and to defend civil proceedings by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.
30. Clause 43 of the Bill extends the protections from liability set out in Section 41 of the Public Audit Act to appointed CRD assurance practitioners, where that practitioner is performing functions delegated by the Auditor-General. This provision limits the right of entities to bring civil proceedings against a CRD assurance practitioner.
31. However, s 27(3) has been interpreted by the courts as protecting procedural rights, rather than as restricting the power of the legislature to determine what substantive rights the Crown is to have. We consider these provisions affect substantive law and do not fall within the ambit of s 27(3) which protects procedural rights
32. On this basis, we do not consider that the civil immunity given by the Bill is in conflict with s 27(3) of the Bill of Rights Act

Conclusion

33. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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⁹ Criminal Procedure Act 2011, s 375(1)(a).

¹⁰ See, for example, *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264.