

27 November 2019

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Financial Markets (Conduct of Institutions) Amendment Bill

Purpose

1. We have considered whether the Financial Markets (Conduct of Institutions) 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 22342/9.0). 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 (freedom of expression). Our analysis is set out below.

The Bill

4. The Bill amends the Financial Markets Conduct Act 2013 (“the principal Act”) amongst other enactments to ensure that certain financial institutions and their intermediaries comply with a principle of fair conduct, and associated duties and regulations.
5. The Bill enacts a new regulatory regime for the general conduct of financial institutions and their intermediaries. Specifically the regime:
 - a. establishes a new fair conduct principle that requires financial institutions to treat consumers fairly, including by paying due regard to their interests; and
 - b. requires a financial institution to establish, implement, and maintain an effective fair conduct programme and to comply with it.
6. The purpose of the Bill is to improve the conduct of particular financial institutions in respect of services and products provided to consumers, thereby reducing the risk of harm to those consumers. The regime is the result of a review that identified certain institutions, particularly banks and life insurers, have a lack of focus on good outcomes for customers, and ineffective systems and controls to identify, manage and remedy conduct issues.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of Expression

7. 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

8. Clause 9 of the Bill inserts new subpart 6A of Part 6 into the principal Act. Specifically, proposed new s 446H which implements a new duty on financial institutions to make publicly available a copy of its fair conduct programme and any material changes to it. The new proposed section also requires financial institutions to notify the Financial Markets Authority when the programme is made publicly available, and of any material changes to the programme. These requirements *prima facie* limit the right to freedom of expression of financial institutions.
9. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable under s 5 of that Act. The s 5 inquiry may be approached as follows:²
 - a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?;
 - b. is the limit rationally connected with the objective?;
 - c. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?; and
 - d. is the limit in due proportion to the importance of the objective?
10. The objective of proposed new s 446H is to hold financial institutions to their fair conduct programmes in order to protect consumer interests. The proposal is rationally connected to the objective of ensuring financial institutions treat consumers fairly.
11. The proposal is necessary and proportionate as financial institutions will be required under the Bill to establish and maintain a fair conduct programme and to inform consumers and make public such programmes. The availability of the information will assist in keeping financial institutions publicly accountable to consumers and the industry regulator in order for the policy to be effective in its implementation and to ensure consumers know what they can expect from the conduct of financial institutions.
12. For these reasons, we conclude that any limits to the freedom of expression imposed by the Bill are justified under s 5 of the Bill of Rights Act.

Conclusion

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

Edrick Child
Deputy Chief Legal Counsel
Office of Legal Counsel

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 [123]