

5 December 2019

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Financial Markets Infrastructure Bill

Purpose

1. We have considered whether the Financial Markets Infrastructure 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 18122/20.0). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. The Bill replaces Parts 5B and 5C of the Reserve Bank of New Zealand Act 1989 and establishes a new regulatory regime for financial market infrastructures (“FMIs”). FMIs are multilateral systems that provide trading, clearing, settlement, and reporting services in relation to financial transactions. FMIs are essential to the operation of a sound and efficient financial system and the day-to-day operation of the economy.
4. The regulatory regime in the Bill provides for both the Reserve Bank and Financial Markets Authority, as joint regulators, to:
 - a. make recommendations to the Ministers of Finance and for Commerce and Consumer Affairs on what FMIs should be classed as designated;
 - b. create legally binding standards that apply to designated FMIs; and
 - c. engage in general monitoring and oversight, including the power to require the provision of information, appoint an investigator, or seek warrants to enter premises to obtain evidence on an investigation.
5. The Bill contains crisis management provisions including a tailored statutory management regime for FMIs, and a requirement on FMIs to have contingency plans. The Bill also provides for a range of enforcement actions and penalties for any breaches of the Bill.
6. 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) and s 21 (right to be free from unreasonable search and seizure).

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 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 to freedom of expression has also been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹

8. As is common with regulatory bills, the Bill contains a significant number of provisions that compel the provision of information, which *prima facie* engage the right to freedom of expression under s 14 of the Bill of Rights Act. For example, clause 14 of the Bill gives the regulator the power to require an operator or participant in an FMI to provide any information that the regulator reasonably requires to carry out its functions. Clause 15 makes it an offence to fail to provide this information. The regulator's functions, as set out in cl 12(1) of the Bill, are:
 - to recommend the designation of FMIs;
 - to regulate designated FMIs;
 - to deal with designated FMIs that are 'distressed'; and
 - to perform the other functions of the regulator under the principal Act.
9. Clause 64 of the Bill also gives an investigator appointed by the regulator the power to require any person to provide any documents or information relating to the operator of a designated FMI. An investigator will be appointed where the regulator has reasonable grounds to suspect that an FMI is committing an offence or contravening a regulation under the Bill.
10. We consider that these provisions and the other provisions compelling the provision of information in the Bill are justified under s 5 of the Bill of Rights Act. The provisions relate to the important objectives of regulating FMIs and avoiding the damage that could be caused to the financial system by the disruption or failure of an FMI. We consider that the information that may be compelled is rationally connected and proportionate to the importance of these objectives.

Section 21 – Unreasonable Search and Seizure

11. 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.²
12. Under cl 64 of the Bill, an investigator may, by notice, enter and search any place, vehicle or thing if they have obtained a warrant in accordance with cl 65 of the Bill. We consider that the exercise of these powers constitutes a search under s 21 of the Bill of Rights Act.
13. As the Supreme Court has held that an unreasonable search logically cannot be reasonably justified³ 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.
14. The purpose of the search is to obtain evidence of FMI conduct that the regulator has reasonable cause to suspect constitutes an offence or the contravention of a regulation under the Bill. This is an important objective, and the search powers are rationally connected to it.

¹ RJR MacDonald v Attorney-General of Canada (1995) 127 DLR (4th) 1.

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

15. We also consider that the powers are proportionate to the objective. An investigator can only enter and search a place, vehicle, or thing if the occupier or person in charge consents or if the investigator obtains a warrant, in which case the procedures and safeguards in Part 4 the Search and Surveillance Act 2012 apply.
16. On this basis we regard the searches authorised by the Bill as reasonable, and not in conflict with s 21 of the Bill of Rights Act.

Conclusion

17. 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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