

14 July 2020

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Reserve Bank of New Zealand Bill

Purpose

1. We have considered whether the Reserve Bank of New Zealand 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 18125/7.0). We will provide you with further advice if the final version of the Bill 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), s 21 (freedom from unreasonable search and seizure) and s 27(3) (right to bring civil proceedings against the Crown). Our analysis is set out below.

The Bill

4. The Bill reforms the overall governance and accountability arrangements of the Reserve Bank ('the Bank'). The purposes of the Bill are to provide for the continuation of the Bank, to promote the prosperity and well-being of New Zealanders and to contribute to a sustainable and productive economy.
5. The Bill repeals and replaces the parts of the Reserve Bank of New Zealand Act 1989 that provide for the institutional form, governance, accountability arrangements and central bank powers of the Bank. The remainder of the 1989 Act, which creates a framework for the registration and supervision of banks, remains in force but is renamed the Banking (Prudential Supervision) Act 1989. The Bill also retains the changes made via the Reserve Bank of New Zealand (Monetary Policy) Amendment Act 1989, which introduced maximum sustainable employment as an objective of monetary policy alongside price stability and created the monetary policy committee.
6. The Bill provides for the objectives and functions of the Bank, its governance, accountability and transparency, and funding arrangements. It introduces a new objective of protecting and promoting the stability of New Zealand's financial system, which is relevant to its role as prudential regulator and supervisor of financial institutions. The Bill aims to increase coordination between public agencies responsible for the financial system and to create a new framework to better manage the use of New Zealand's foreign exchange reserves.

7. The new provisions within the Bill:
- a. create a new governance board for the Bank;
 - b. require the Minister of Finance to issue a financial policy remit to the Bank;
 - c. establish a more robust process for the Minister of Finance and the Bank to agree the Bank's funding;
 - d. increase oversight and accountability by bringing the Bank within the scope of the Ombudsmen Act 1975 and the Public Audit Act 2001, allowing the Auditor-General and the Ombudsmen to review the activities of the Reserve Bank;
 - e. provide a department, such as the Treasury, with a formal role as the monitor of the Bank;
 - f. give statutory recognition to the Council of Financial Regulators;
 - g. provide a function for the Bank to cooperate with other law enforcement or regulatory agencies that have a role in the regulation of the New Zealand financial system, including allowing for enhanced information sharing between agencies;
 - h. require the Bank to publish a framework setting out its approach to managing financial risks; and,
 - i. require the Minister of Finance and the Bank to agree a Reserves Management and Co-ordination Framework for the Bank's management and use of foreign reserves.

Consistency of the Bill with the Bill of Rights Act

Section 21 – Unreasonable Search and Seizure

8. 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.¹ The Bill engages s 21 with respect to its information gathering powers and with respect to searches and seizures authorised within the Bank's currency regulation role.

Information gathering powers

9. Clause 259 provides the Bank with the power to require certain persons, by written notice, to provide information or data for the purpose of exercising its functions or powers in formulating and implementing monetary policy, monitoring the financial system and carrying out its other functions set out in clause 113. Non-compliance with information requests is an infringement offence. It is also an offence to intentionally or recklessly fail to comply with a notice to supply information or data. We consider this power constitutes a search for the purpose of s 21 of the Bill of Rights Act.

¹ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

10. Ordinarily, a provision found to limit a particular right or freedom may nevertheless 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.² Rather, the assessment to be undertaken is first, whether what occurs is a search or seizure, and, if so, whether that search or seizure is reasonable. In assessing whether the search powers in the Bill are reasonable we have considered the importance of the objective sought to be achieved and whether the provisions are rationally connected and proportionate to that objective. We have also considered the degree of intrusiveness into privacy, and the reasons why it is necessary.³
11. The purpose of the Bank's information gathering power is primarily to support its function of monitoring New Zealand's financial system and its central bank function of formulating and implementing monetary policy. We consider that these powers are reasonably required to allow the Bank to gather information relevant to these functions. The primary objectives of monetary policy are to achieve and maintain stability in prices and support maximum sustainable employment. These are important public policy objectives, which promote the prosperity and well-being of New Zealanders and contribute to a sustainable and productive economy.
12. Persons who may be required to supply information or data include:
 - a. current and former financial service providers under the Financial Service Providers (Registration and Dispute Resolution) Act 2008;
 - b. persons who provide or have provided a service of processing payments on behalf of other persons; and,
 - c. persons who are or have been involved in the transportation, storage, or distribution of bank notes and coins ('the providers').
13. The providers have knowingly engaged in a regulated industry, which limits the degree of intrusiveness that a regulatory search will have on reasonable expectations of privacy. The power also extends to anyone who is or has been associated with the providers. 'Associated' is defined in clause 259 and is generally confined to persons who have a business interest or association with one of the providers.
14. The Bill also places the following safeguards around the Bank's information gathering powers to ensure that these are proportionate to the importance of the Bank's need for information:
 - a. Clause 259 specifies that the Bank may only require information relevant to the exercise of its functions;
 - b. Clause 266 provides strict rules around the confidentiality and disclosure of information obtained;
 - c. Clause 260 provides that an information request may be refused to protect personal information related to any particular client, customer or natural

² Above n1 at [162].

³ At [172].

person, which protects the privacy rights of individuals and companies whose information is obtained. Clause 260 also stipulates that the Bank must comply with the information privacy principles set out in the Privacy Act 2020 in respect of any information obtained pursuant to clause 259; and

- d. Clause 261 provides that a person who is required to supply information to the Bank has the same privileges as a witness in court.
15. We consider that these safeguards ensure that information gathering by the Bank remains minimal and proportionate to the importance of the Bank's monetary policy and financial system oversight functions.

Searches and seizures related to regulating currency

16. Where a person is convicted of a currency reproduction or imitation offence, clause 154 allows a court to make an order for the seizure and destruction of any reproduction or imitation currency and any thing used in the production of reproduction or imitation currency. In addition, clause 161 allows the Bank to require an operator of a bank note handling machine (such as an ATM) to test the machine and provide a report as to whether it meets the standards for bank note handling machines. We consider that these clauses engage the right to be free from unreasonable search and seizure.
17. However, we consider that these powers are minimal and justified in supporting the objective of ensuring the integrity of New Zealand's currency. Allowing for mandatory testing of bank note handling machines ensures that fraud associated with these machines may be detected and prevented, while allowing for the seizure and destruction of imitation currency and production materials ensures that counterfeit currency may not be circulated.
18. On this basis, we consider that all searches and seizures authorised within the Bill are reasonable and thus not in conflict with s 21 of the Bill of Rights Act.

Section 14 – Freedom of expression

19. 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. Section 14 has been interpreted as including the freedom not to be compelled to say certain things or to be compelled to provide certain information.⁴
20. The Bill requires the provision of information by the Bank, its Board and members of its governance bodies, in a large number of circumstances.⁵ These provisions most commonly relate to reporting requirements of the differing functions of the Bank which are to be provided to the Minister and published for public scrutiny, or to accountability mechanisms, such as requiring Board members to disclose conflicts of interest. Clauses 193-195 also allow broad powers for the Minister to require information from the Bank on any matter relating to its operations or performance.

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

⁵ Requirements to provide certain information may be found within the Bill at clauses 60, 100(4), 101, 105, 126, 128, 141, 144(3), 167, 193-195, 202, 211, 223, 234, 236, 239, 248, 251, 254; Schedule 3: 3, 7, 57.

21. While these requirements *prima facie* limit the right to freedom of expression of the Bank, its Board and members of its governance bodies, we consider that the limit on the right is minimal and justified. The information required to be provided to the Minister and oversight bodies, or to be published, serves to ensure the proper functioning of the Bank in respect of its oversight of the New Zealand financial system and serves the objectives of accountability and transparency with respect to its operations and performance. The Bill tightly prescribes what information may be required from the Bank or its operatives and by whom, and the information required is commercial and regulatory in nature, with limited expressive value.
22. For these reasons, we consider limits on the right to freedom of expression within the Bill to be justified under s 5 of the Bill of Rights Act.

Section 27(3) – Right to civil litigation

23. 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.
24. Clause 178 of the Bill protects the Bank from liability for acts or omissions done or omitted to be done in good faith and in the performance or exercise of the Bank's functions or powers. Clause 179 protects various persons (including Board members, the Governor, and employees) from liability from acts or omissions done or omitted in good faith in pursuance of their duties. In addition, those persons are protected from liabilities of the Bank pursuant to clause 180 (public proceedings for acts or omissions committed in good faith in pursuance of their duties). Other immunities for liability occur in the Bill at clauses 54, 56 and 181.
25. Section 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.⁶ We consider these provisions affect substantive law and do not fall within the ambit of s 27(3) which protects procedural rights.

Conclusion

26. 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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⁶ *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at 55.