

8 February 2019

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Financial Markets (Derivatives Margin and Benchmarking) Reform Amendment Bill

Purpose

1. We have considered whether the Financial Markets (Derivatives Margin and Benchmarking) Reform 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 (PCO20947/4.0). 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.

The Bill

4. The Bill is an omnibus Bill that makes amendments to the Reserve Bank of New Zealand Act 1989, Corporations (Investigations and Management) Act 1989, Companies Act 1993, Personal Property Securities Act 1999 and Financial Markets Conduct Act 2013. The purpose of the Bill is to respond to international reforms related to certain types of financial products, notably derivatives, and the processes used to set the prices or calculate the value of those financial products.
5. The amendments are intended to align New Zealand's regulatory settings with the international reforms. They also seek to reduce risk and ensure integrity in New Zealand's financial markets and ensure that financial market participants can continue to use key financial products affected by the international reforms and have access to critical international financial markets.

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 28 of the Bill amends the Financial Markets Conduct Act 2013 and introduces new s 448C which allows the Financial Markets Authority ('FMA') to direct a contributor to a financial benchmark ('a contributor') to provide information or data to a licensee, authorised body, or other entity, where it is necessary or desirable for the generation or operation of the financial benchmark specified in a licence.

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

8. A contributor is defined to mean a person, usually banks, whose activities have previously resulted in the provision of information or data to a licensee or an authorised body for the generation or operation of the financial benchmark specified in a licence. This provision appears to limit s 14 of the Bill of Rights Act as it compels the provision of certain information.
9. 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. The s 5 inquiry asks whether the objective of the provision is sufficiently important to justify some limitation on the freedom of expression; and if so, whether the limitation is rationally connected and proportionate to that objective and limits the freedom of expression no more than reasonably necessary to achieve that objective.²
10. We consider that the limitations contained in the Bill are justified under s 5 of the Bill of Rights Act because:
 - a. the objective of enabling the FMA to direct a contributor to provide information and data to ensure the accuracy, integrity, and reliability of financial benchmarks to avoid instability or disruption of financial markets is sufficiently important to justify some limitation on s 14;
 - b. requiring contributors to provide information or data to a licensee, authorised body, or other entity where it is necessary or desirable for the generation or operation of the financial benchmark is rationally connected to that objective; and
 - c. clause 28 impairs s 14 no more than is reasonably necessary to achieve its objective and is proportionate to the importance of that objective. For example, the FMA may only direct a contributor to provide information or data if:
 - i. it is satisfied that the contributor has ceased, or is likely to cease, providing information or data relevant to the generation or operation of the financial benchmark specified in a licence; and
 - ii. it is necessary or desirable for one of the purposes set out in s 448B.
11. 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

12. 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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² *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [123].