

22 June 2017

Hon Christopher Finlayson QC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Financial Services Legislation Amendment Bill

Purpose

1. We have considered whether the Financial Services Legislation 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 with the latest version of the Bill (PCO 19873/12.1). We will provide you with further advice if the final version of the Bill includes changes that affect the conclusions of 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) and s 21 (freedom from unreasonable search and seizure). Our analysis is set out below.

The Bill

4. The Bill is an omnibus Bill that makes amendments to the Financial Markets Conduct Act 2013 ('the principal Act') and the Financial Service Providers (Registration and Dispute Resolution) Act 2008 ('the FSP Act'). The purpose of the Bill is to ensure that financial services are provided in a way which promotes the confident and informed participation of businesses, investors, and consumers. To achieve this, the Bill makes amendments to ensure that the conduct and client-care obligations of financial service providers and the regulation of financial markets remain fit for purpose.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of Expression

5. 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
6. The Bill contains a number of provisions that engage s 14. Generally, these provisions restrict who can provide financial advice, control the nature of financial advice, require specified persons to provide information to customers or other organisations in certain circumstances, and provide the Registrar of Financial Service Providers ('the

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

Registrar') with the power to require certain information to be provided in order to ascertain whether a person is in the business of providing financial advice.

7. To the extent that these areas of the Bill limit s 14, we consider the limits justified. The central purpose of the Bill is to ensure that financial services are provided in a way that promotes the confident and informed participation of businesses, investors, and consumers. This purpose is sufficiently important to justify restricting who can provide financial advice, controlling the nature of financial advice, specifying that certain information be provided, and creating a power for the Registrar to require certain information to be provided.
8. We consider that the various limits are rationally connected with the objective of the Bill, that they limit the right or freedom no more than is reasonably necessary for sufficient achievement of the objective, and that the limits are in due proportion to the importance of the objective.
9. The Bill achieves this by introducing new clauses to clearly define what constitutes regulated financial advice under the principal Act and the FSP Act. Clause 26 introduces new definitions for financial advice, financial advisor, financial advice product, financial advice provider and regulated financial advice. Further, clause 56 introduces Part 2 of Schedule 5 into the principal Act, which provides a number of circumstances where the provision of financial advice is not regulated financial advice (e.g. where it is incidental to provision of credit under a consumer credit contract), and where the requirements in the Bill do not apply. These provisions ensure that the limits to s 14 in the Bill do not have general application to the provision of financial advice, but rather they only apply where consumer protection and confidence is of paramount importance.
10. We therefore consider that the Bill appears to be consistent with the right to freedom of expression affirmed in s 14 of the Bill of Rights Act.

Section 21 – Freedom from 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, or correspondence or otherwise. The right protects a number of values including personal privacy, dignity, and property.²
12. 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.
13. In assessing whether the search and seizure 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.
14. Clause 78 of the Bill expands the Registrar's inspection powers in s 37 of the FSP Act to allow the Registrar to require a person to produce a relevant document relating to another person, or confirm the information provided by another person. For example, this could occur where Person A is a director of ABC Limited, and is required to

² See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J; see also *Williams v Attorney-General* [2007] NZCA 52.

produce a document relating to ABC Limited's business or confirm information provided by ABC Limited.

15. The Registrar's powers of inspection ensure, for example, that a person on the register is not providing a financial service in breach of the FSP Act. The expansion of the powers of inspection strengthens the Registrar's ability to ascertain whether financial services are provided to New Zealanders, and whether they should comply with the requirements of the FSP Act.
16. We therefore consider that the expansion of the Registrar's powers of inspection is not unreasonable for the purposes of 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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