

Reserve Bank of New Zealand Amendment Bill

1 November 2007

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: RESERVE BANK OF NEW ZEALAND AMENDMENT BILL

1. We have considered whether the Reserve Bank of New Zealand Amendment Bill (the "Bill") (PCO 8166sg/8) is consistent with the New Zealand Bill of Rights Act 1990 ("Bill of Rights Act"). We understand that the Bill will be considered by the Cabinet Legislation Committee at its meeting on Thursday, 8 November 2007.
2. The amendments in the Bill can basically be divided into two categories. Firstly, those amendments that relate to the institutional arrangements for prudential regulation. These include measures regarding:
 - the purpose, functions and accountability of the Reserve Bank of New Zealand (the "Reserve Bank");
 - the provision of policy advice by the Reserve Bank to the Minister of Finance; and
 - the ability of the Minister of Finance to direct the Reserve Bank to have regard to certain government policy.
3. Secondly, those amendments that relate to the regulation of specified deposit takers. The objectives for the regulation of deposit takers are to promote a sound and efficient financial system and avoid the damage that may occur if a deposit taker fails.
4. We have concluded that the Bill does not appear to be inconsistent with the rights and freedoms affirmed in the Bill of Rights Act.
5. In reaching this conclusion, we considered potential issues of inconsistency with sections 21, and 25(c) of the Bill of Rights Act. Our analysis of these potential issues is set out below.
6. Where an issue arises, a provision may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of section 5 of that Act.^[1] We have reached the conclusion that, upon consideration of these issues under section 5 of the Bill of Rights Act, the Bill appears to be consistent with the rights and freedoms contained in the Bill of Rights Act.

ISSUES UNDER THE BILL OF RIGHTS ACT

Section 21: the right to be secure against unreasonable search and seizure

7. Section 21 of the Bill of Rights Act provides:

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

8. There are two limbs to the section 21 right. First, section 21 is applicable only in respect of those activities that constitute a "search or seizure". Second, where certain actions do constitute a search or seizure, section 21 protects only against those searches or seizures that are "unreasonable" in the circumstances.
9. New Part 5D, to be inserted by clause 11 of the Bill, contains powers of search and seizure that require scrutiny for compliance with section 21.

Clause 11, new section 157ZH – Bank may require report relating to deposit taker

10. Clause 11, new section 157ZH provides that for the purpose of investigating whether a deposit taker is complying with the requirements of new Part 5D, or regulations made under that Part, the Reserve Bank may require the deposit taker to supply a report or series of reports prepared by a person approved or appointed by the Reserve Bank on matters relating to the business, operation, or management of the deposit taker. If requested, the deposit taker must provide the approved or appointed person with access to the accounting and other records of the deposit taker and must provide information relating to those records.
11. A requirement to produce documents under statutory authority constitutes a search for the purposes of section 21 of the Bill of Rights Act.^[2] However, we consider that new section 157ZH is reasonable, and therefore consistent with section 21, because:
 - the purpose of the inspection power is limited to ensuring compliance with the regulatory regime established by new Part 5D and any regulations made under that Part. Because of the significant damage to the financial system and harm to individual investors that could result from the failure of a deposit taker, we agree that it is important to have effective monitoring measures to ensure that deposit takers are acting in a lawful and responsible manner;
 - a deposit taker is not required to provide any information or produce any document that would be privileged in a court of law, or result in a breach of an obligation of secrecy or non-disclosure under an enactment (other than the Official Information Act 1993 or the Privacy Act 1993) (see clause 11, new section 157ZJ); and
 - this section would not apply where the Reserve Bank has reasonable cause to believe a deposit taker has committed an offence. In this situation, new section 157ZI (Power to obtain information and documents), and the procedural safeguards attached to it, would apply.

Clause 11, new sections 157ZI (Power to obtain information and documents)

12. Clause 11, new section 157ZI enables the Reserve Bank to:

- require a deposit taker to supply specified information, papers, documents, records or things within a certain time; or
- appoint a suitably qualified person to (in accordance with a search warrant) enter and search any place and inspect, remove, and take copies of any information, papers, documents, records or things in the possession, custody, or control of any person.

13. We consider that the powers in new section 157ZI are reasonable, and therefore consistent with section 21 of the Bill of Rights Act, because:

- the provision only applies where the Reserve Bank has reasonable cause to believe that a deposit taker has committed an offence under new Part 5D;
- the significant damage to the financial system and individual investors that could result from the failure of a deposit taker make it essential that the regulatory regime is complied with. The integrity of the regime is dependent upon the Reserve Bank being able to effectively gather evidence of non-compliance;
- a deposit taker is not required to provide any information or produce any document that would be privileged in a court of law, or result in a breach of an obligation of secrecy or non-disclosure under an enactment (other than the Official Information Act 1993 or the Privacy Act 1993) (see clause 11, new section 157ZJ);
- a person appointed under new section 157ZI to enter and search any place may only do so with prior authorisation by search warrant issued by a High Court judge (see clause 11, new section 157ZL);
- in issuing a search warrant, the High Court judge must be satisfied that there is reasonable cause to believe that a deposit taker has committed an offence under new Part 5D; and
- new Schedule 4 establishes a robust procedure for the issuing of a search warrant, and puts in place recognised safeguards for a warrant's execution, such as clear parameters on the powers conferred by a search warrant and the powers granted to persons called to assist; the requirement for the person executing the warrant to produce evidence of authority and evidence of identity; and the requirement to produce an inventory of items seized.

Section 25(c) – the right to be presumed innocent until proved guilty

14. Section 25(c) of the Bill of Rights Act provides:

Everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to law.

15. Section 25(c) protects the right of an individual not to be convicted where reasonable doubt as to his or her guilt exists, meaning the prosecution must prove beyond reasonable doubt that the defendant is guilty. Reverse onus offences give rise to an issue of inconsistency with section 25(c) because the defendant is required to prove (on the balance of probabilities) an excuse to escape liability; whereas in other criminal proceedings a defendant must merely raise a defence in an effort to create reasonable doubt. Where a defendant is unable to prove an excuse, then he or he could be convicted even though reasonable doubt exists as to his or her guilt.

16. The Bill contains one reverse onus offence. Clause 11, new section 157ZQ(h) establishes that every deposit taker commits an offence who without reasonable excuse, obstructs or hinders an authorised person in the execution of any powers conferred on that person by or under new Part 5D, or regulations made under new Part 5D. In our view, clause 11, new section 157ZQ(h) constitutes a justified limitation on the right to be presumed innocent as affirmed by section 25(c) of the Bill of Rights Act.

17. In reaching this view, we note that the objective behind the offence is to ensure that persons authorised by the Reserve Bank have unobstructed access to information about a deposit taker. Access to this information will allow the Reserve Bank to effectively monitor and enforce deposit takers' compliance with the regulatory requirements of new Part 5D. Given the significant damage to the financial system and harm to individual investors that could result from the failure of a deposit taker, we consider that this is an important aim.

18. We note the Reserve Bank's explanation that this offence is essential to the efficient enforcement of the law. The offence has been cast with a reverse onus because, while a person may have good reason for failing to cooperate with the search, those reasons are peculiarly within the realm of the individual's knowledge.

19. Given that this is a regulatory offence, it is rational that the defendant be required to prove a reasonable excuse, as the defendant is best placed to adduce evidence as to the reasons for failure to comply with this requirement.

20. Under clause 11, new section 157ZT(2) every deposit taker who commits an offence under new section 157ZQ is liable, on summary conviction:

- in the case of an individual, to imprisonment for a term not exceeding 12 months or to a fine not exceeding \$100,000 or both; and
- in the case of a body corporate, to a fine not exceeding \$1,000,000.

21. Although the penalties are significant, they must be viewed in the context of the harm to individual investors and the wider financial sector occasioned by the failure of a deposit taker. Obstructing authorised access to vital information about a deposit taker may serve to intensify the risk of failure.

CONCLUSION

22. Overall, we have concluded that the Bill does not appear to be inconsistent with the Bill of Rights Act. In reaching this conclusion, we have given particular emphasis to the purpose of the legislation, and the need to create a workable scheme for the regulation of deposit takers.

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Footnotes

1 In applying section 5, the Ministry of Justice has regard to the guidelines set out by the Court of Appeal in *Ministry of Transport (MOT) v Noort* [1992] 3 NZLR 260; *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9; and *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754; as well as the Supreme Court of Canada’s decision in *R v Oakes* [1986] 1 S.C.R. 103.

2 *New Zealand Stock Exchange v Commissioner of Inland Revenue* [1992] 3 NZLR 1 (PC).

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