Financial Service Providers (Registration and Dispute Resolution) Bill

16 November 2007

Attorney-General

LEGAL ADVICE
CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
FINANCIAL SERVICE PROVIDERS (REGISTRATION AND DISPUTE RESOLUTION) BILL

1. We have considered whether the Financial Service Providers (Registration and Dispute Resolution) Bill (the "Bill") (PCO 8142/5) 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, 22 November 2007.

2. We considered potential issues of inconsistency with sections 17, and 21 of the Bill of Rights Act and assessed whether or not these issues are justifiable under section 5 (Justified limitations) of that Act. To that end we examined whether the relevant clauses serve an important and significant objective, and whether there is a rational and proportionate connection between these clauses and that objective.[1]

3. We have reached the conclusion that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

PURPOSE

4. This Bill is part of a wider review of financial services and providers that is designed to promote confidence and participation in financial markets by investors and institutions, and promote a sound and efficient non-bank financial sector.

5. The Bill seeks to contribute to these objectives through two main Parts (Part 2 – Registration; and Part 3 – Dispute Resolution). The purpose of Part 2 is to:

(a) establish a compulsory public register of financial service providers to enable –

(i) the public to access information about financial service providers; and

(ii) the regulation of financial service providers;

(b) prohibit certain people from being involved in the management or direction of registered general financial service providers; and

(c) conform with New Zealand's obligations under the Recommendations of the Financial Action Task Force on Money Laundering (established in Paris in 1989).

6. Part 3 aims to promote confidence in financial service providers by improving consumers' access to redress from providers through the establishment of approved industry-based dispute resolution schemes.

ISSUES UNDER THE BILL OF RIGHTS ACT

Section 17: the right to freedom of association

7. Section 17 of the Bill of Rights Act affirms that everyone has the right to freedom of association. The right to freedom of association is generally interpreted to include not only a right to establish and enter into association with others, but also a right to refuse or cease to do so.[2]

8. Under clause 22 of the Bill, the Registrar of Financial Service Providers (the "Registrar") must deregister a financial adviser service provider who has ceased to be a member of an approved professional body ("APB"). This raises a *prima facie* issue of inconsistency with section 17 of the Bill of Rights Act because it makes registration dependent upon a person entering into and continuing association with others.

9. The obligation for a financial adviser service provider to be a member of an APB stems from the associated Financial Advisers Bill (clause 9 – Prerequisites for performing financial adviser service for member of public).[3] In our advice on that Bill, we conclude that the limit placed on the right to freedom of association by compulsory membership of an APB appears to be justified under section 5 of the Bill of Rights Act.

10. In reaching that conclusion, we note that compulsory membership of an APB is designed to facilitate the monitoring and enforcement of the professional standards of financial advisers. Such action contributes to the important aim of promoting consumer confidence in financial advice. We also observe that the best features of industry self-regulation (including the reinforcement of professional norms, effective industry participation in the standards development process, and high levels of self-monitoring) cannot be captured by a licensing regime without an institution of which licensees are a member.

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

11. 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.

12. 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.

13. Clause 36 of the Bill would grant the Registrar the power to:

- require a person to produce for inspection relevant documents within that person's possession or control;

- inspect and take copies of relevant documents; and

- take possession of relevant documents and retain them for a reasonable time for the purpose of taking copies.

14. A failure to comply is an offence and could lead to a fine not exceeding $30,000 in the case of an individual, or $300,000 in the case of a body corporate (clause 36(6)). A requirement to produce documents under statutory authority is likely to constitute a search for the purposes of section 21 of the Bill of Rights Act, especially where failure to provide the documents results in possible sanction.[4] However, we consider that clause 36 is reasonable, and therefore consistent with section 21, for the following reasons:

- the purpose of the inspection power is limited to ensuring compliance with the regulatory regime established under the Bill. Specifically, the power may only be used to ascertain whether a general financial service provider is (or has been) providing or offering to provide a general financial service; holding out that the person provides a general financial service without being registered; or qualified to be registered. Effective monitoring and enforcement of the regulatory regime is necessary to improve confidence in financial service providers and encourage involvement by consumers and market participants;

- a document is "relevant" only if it contains information relating to these listed lines of inquiry; and

- without the power to require the production of relevant documents, the Registrar would be powerless to monitor compliance with the regulatory regime, placing consumers at risk of receiving unfair, negligent or fraudulent financial services.

15. In reaching the conclusion that clause 36 is consistent with section 21, we also note that the ability to require the production of documents is less of an intrusion into a person's expectation of privacy than a power of entry.[5]

CONCLUSION

16. Overall, we have concluded that the Bill appears to be consistent with the Bill of Rights Act.

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Footnotes

1 In applying section 5, we have had regard to the guidelines set out by the Court of Appeal in *Ministry of Transport (MOT) v Noort* [1993] 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.

2 *Lavigne v Ontario Public Service Employees Union* [1991] 2 SCR 211, 318 (SCC) (La Forest J); *Archibald v Canada* (1997) 146 DLR (4th) 499; *Young v United Kingdom* (1982) 4 EHRR 38; and *Abood v Detroit Board of Education* 431 US 209 (1977).

3 PCO 8190/8.

4 *New Zealand Stock Exchange v Commissioner of Inland Revenue* [1992] 3 NZLR 1 (PC); see also *McKinlay Transport Ltd v R* (1990) 68 DLR (4th) 568 (SCC); and *Thomson Newspapers v Canada* [1990] 1 SCR 425.

5 *Trans Rail v Wellington District Court* [2002] 3 NZLR 780, 791-792.