

Settlement Systems and Futures Bill

25 July 2008

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990
SETTLEMENT SYSTEMS AND FUTURES BILL

Note - the Settlement Systems and Futures Bill was merged with the Emissions Units Bill into the Settlement Systems, Futures and Emissions Units Bill prior to introduction.

1 We have considered whether the Settlement Systems and Futures Bill (PCO 12888/9.0) (the "Bill") is consistent with the New Zealand Bill of Rights Act 1990 ("Bill of Rights Act"). We understand the Bill is likely to be considered by the Cabinet Policy Committee at its meeting on Wednesday, 30 July 2008.

2 The Bill provides a mechanism for trades in securities and other products to be cleared and settled in New Zealand through systems that meet international standards. In addition, the Bill aligns the regulation of exchanges that operate both securities and futures markets.

3 The Bill is split into three parts.

- Part 1 of the Bill amends the Reserve Bank Act 1989 to allow settlement systems operating in New Zealand to apply for designation and receive legal protections to support the integrity of the system. Part 1 names the Reserve Bank of New Zealand and the Securities Commission as the joint regulators of designated systems and outlines their functions and duties.
- Part 2 of the Bill contains consequential amendments to the Securities Act 1978 and the Personal Property Securities Act 1999.
- Part 3 of the Bill amends the Securities Markets Act 1988 to provide a single application procedure for bodies corporate to register as an exchange and operate both securities and futures markets.

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.

ISSUES UNDER THE BILL OF RIGHTS ACT

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

6 Section 21 of the Bill of Rights provides the right to be secure against unreasonable search and seizure. There are two limbs of 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.

7 New section 156ZL, at clause 6 of the Bill, permits joint regulators to require an operator, participant or contact person of a designated settlement system to produce information. The joint regulators may request any information regarding a designated settlement system that the joint regulators consider is "reasonably required to enable them to perform their functions and duties" under the new regime.

8 A requirement to produce documents under statutory authority constitutes a search for the purposes of section 21 of the Bill of Rights Act [1]. However, we consider that new section 156ZL is reasonable, and therefore consistent with section 21 because the search is regulatory in nature and limited to ensuring compliance with the designated settlement system regime. We note that the limited inspection powers are necessary for the joint regulators to oversee the designated settlement system regime. Further, we note that there is no obligation to supply information where the individual has a "lawful justification" not to comply, which includes the right not to incriminate oneself.

Section 25(c): the right to be presumed innocent until proven guilty

9 Section 25(c) of the Bill of Rights Act affirms the right to be presumed innocent until proved guilty. This means that an individual must not be convicted where reasonable doubt as to his or her guilt exists; therefore, the prosecution in criminal proceedings must prove, beyond reasonable doubt, that the accused is guilty.

10 Strict liability offences give rise to an issue of inconsistency with section 25(c) because the accused is required to **prove** (on the balance of probabilities) a defence; whereas, in other criminal proceedings an accused must merely **raise** a defence in an effort to create reasonable doubt. This means, where an accused is unable to prove the defence, that he or she could be convicted even though reasonable doubt exists as to his or her guilt.

11 Section 156ZL(4) creates an offence for failure to provide information to the joint regulators "without lawful justification or excuse". Because an individual must prove the reason for failure to comply, this section creates a strict liability offence.

12 A provision containing a strict liability offence 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. In our view, justification for strict liability provisions can occur where: the offence relates to a public welfare regulatory regime rather than truly criminal behaviour; the information sought is 'peculiarly within the realm of the defendant'; and the penalty for breach is at the lower end of the scale.

13 The objective of the offence is to enforce a regulatory regime by permitting the joint regulators access to the information they require to oversee the designated settlement

system scheme. Further, the defendant is best placed to adduce information regarding his or her "lawful justification or excuse" for failure to supply information. In addition, we note that the offence would apply only to individuals who have chosen to participate in a designated settlement system.

14 The penalty for the offence is set by new section 156ZQ(1). For an individual, the penalty is a term of imprisonment not exceeding 12 months or a fine not exceeding \$100,000. For a body corporate, the penalty is a fine not exceeding \$1,000,000.

15 These penalties are at the high end of what may be considered reasonable for a strict liability offence. However, the penalties must be viewed in the context of the need for security under designated settlement systems and the consequent need for effective oversight of those systems. Further, the penalties are identical to those imposed for other strict liability offences under the Reserve Bank Act.

16 For these reasons, we consider that the offence in section 156ZL is a justified limitation on the right to be presumed innocent until proven guilty.

CONCLUSION

17 We have concluded that the Bill appears to be consistent with the rights and freedoms contained in the Bill of Rights Act.

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Footnotes

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

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