

9 September 2016

Hon Christopher Finlayson QC, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Regulatory Systems (Commercial Matters) Amendment Bill**

### **Purpose**

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1. We have considered whether the Regulatory Systems (Commercial Matters) 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 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 25(c) (presumption of innocence until proved guilty). Our analysis is set out below.

### **The Bill**

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3. This is an omnibus Bill that seeks to amend the following Acts:
  - a. Building Societies Act 1965
  - b. Commerce Act 1986
  - c. Companies Act 1993
  - d. Construction Contracts Act 2002
  - e. Energy Efficiency and Conservation Act 2000
  - f. Fair Trading Act 1986
  - g. Financial Advisors Act 2008
  - h. Financial Markets Authority Act 2011
  - i. Financial Markets Conduct Act 2013
  - j. Financial Service Providers (Registration and Dispute Resolution) Act 2008
  - k. Friendly Societies and Credit Unions Act 1982
  - l. Gas Act 1992
  - m. Insolvency Act 2006
  - n. New Zealand Superannuation and Retirement Income Act 2001

- o. Postal Services Act 1998, and
  - p. Takeovers Act 1993.
4. The purpose of the Bill is to maintain the effectiveness and efficiency of the regulatory systems established by the principal Acts in order to reduce the risk of regulatory failure. The amendments aim to do so by:
- a. clarifying and updating statutory provisions in each principal Act to give effect to its purpose and provisions
  - b. addressing regulatory duplication, gaps, errors, and inconsistencies within and between different pieces of legislation
  - c. keeping the regulatory system up to date and relevant, and
  - d. removing unnecessary compliance costs and costs of doing business.

## **Consistency of the Bill with the Bill of Rights Act**

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### **Section 14 – Freedom of expression**

5. Section 14 of the Bill of Rights Act affirms 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 also been interpreted as including the right not to be compelled to say certain things or to provide certain information.<sup>1</sup>
6. A number of provisions in the Bill seeking to amend the Financial Markets Conduct Act 2013 ('the Act') appear to limit the right to freedom of expression by requiring individuals to provide certain information, or by limiting the disclosure of certain information. These provisions limit that right by, for example:
- a. requiring issuers or managers of a registered scheme to provide information to the Registrar of Financial Service Providers, with failure to do so attracting a financial penalty (cls 46, 48 and 75)
  - b. requiring persons or bodies providing financial market services or products to make specified disclosure information available to prescribed persons or the public (cls 69 and 89(6)), and
  - c. limiting the provision of disclosure documents that contain false or misleading information or omit required information (cls 70 and 89(10)).
7. It is arguable whether these disclosure requirements amount to compelled expression for the purposes of s 14 of the Bill of Rights Act as they require or limit the provision of factual information. However, for the purposes of this advice, we have considered whether the relevant provisions are justifiable under s 5 of the Bill of Rights Act.
8. Regulating to require the provision of relevant information, and to place limits on the disclosure of false or misleading information, ensures financial markets function fairly, efficiently and transparently. The purpose of these provisions is to ensure that investors

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<sup>1</sup> *RJR MacDonald v Attorney-General of Canada* (1995) 127 DLR (4th) 1.

are well informed about the status of their investments. Disclosure of information to regulators ensures that financial service providers engage in ethical conduct. Accordingly, we consider that any provisions in the Bill that limit the right to freedom of expression are rationally connected to the objective of those provisions.

9. The information is of a type that market participants can reasonably be expected to provide in the highly regulated financial markets sector. We therefore consider that any limits placed on the right to freedom of expression appear to be in due proportion to the importance of those objectives and are justified under s 5 of the Bill of Rights Act.

### **Section 25(c) – Presumption of innocence until proved guilty**

10. Section 25(c) 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. The prosecution in criminal proceedings must therefore prove, beyond reasonable doubt, that the accused is guilty.
11. Clause 48 of the Bill amends s 97 of the Act to provide that, where an issuer of financial market services fails to comply with the requirement to make certain information public by providing it to the Registrar of Financial Services, they have committed an infringement offence and are liable to a fine not exceeding \$50,000.
12. Clause 89(14) of the Bill inserts new cl 28A in Schedule 1 of the Act to provide that, where a person fails to comply with the requirement to provide certain information to the Registrar of Financial Services or the Financial Markets Authority, they have committed an infringement offence and are liable to a fine not exceeding \$50,000.
13. The infringement offences created are strict liability offences. Strict liability offences create a prima facie inconsistency with s 25(c) of the Bill of Rights Act by shifting the onus of proof onto the defendant.<sup>2</sup>
14. We have considered whether this prima facie inconsistency can be justified under s 5 of the Bill of Rights Act.
15. The Ministry of Business, Innovation, and Employment has advised that the new offence provisions set out in the Bill are necessary to ensure financial market service providers comply with disclosure requirements. The disclosure requirements ensure that financial markets function fairly, efficiently and transparently. This appears to be a sufficiently important purpose. Strict liability offences may be an appropriate way to incentivise compliance and hold people accountable for their failure to comply. We therefore consider that the limit on the right to be presumed innocent is rationally connected to the objective of ensuring compliance with disclosure requirements.
16. In our view, the strict liability offences can be justified as they relate to matters that are peculiarly within the knowledge of a defendant.<sup>3</sup> This is because a defendant would know when and how the relevant disclosure information was sent to the Financial Markets Authority, and would therefore be able to demonstrate that the disclosure requirements have been met. On the other hand, the Financial Markets Authority would not know whether the defendant sent the information, only that it was not received.

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<sup>2</sup> *R v Hansen* at [38]-[39] per Elias CJ, [202] per McGrath J, [269] per Anderson J.

<sup>3</sup> See, for example, *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264.

Therefore, we consider that it is appropriate in these circumstances for a defendant to explain how he or she complied with the requirement.

17. We note that those working in the highly regulated financial markets sector should expect to be subject to penalties where regulatory compliance is of the utmost importance. Therefore, we consider that the provisions limit the right to be presumed innocent until proved guilty no more than is reasonably necessary and are in due proportion to the objective they are trying to achieve.
18. Accordingly, in our view the strict liability infringement offences can be justified under s 5 of the Bill of Rights Act.

## **Conclusion**

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19. 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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