Financial Markets (Regulators and KiwiSaver) Bill

7 September 2010

ATTORNEY-GENERAL

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
FINANCIAL MARKETS (REGULATORS AND KIWISAVER) BILL

1. We have considered whether the Financial Markets (Regulators and KiwiSaver) Bill (PCO 14355/11.0) (‘the Bill’) 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 Economic Growth and Infrastructure Committee on Wednesday, 8 September 2010. We understand that there may be non-substantive changes to the Bill before it is approved for introduction and we will advise you if any further Bill of Rights Act issues arise.

2. The Bill makes changes to the regulatory system with the intention of restoring investor confidence in New Zealand’s financial markets. It also establishes the Financial Markets Authority (‘FMA’), a single market conduct regulator with a clearly defined role and scope.

3. While the Bill limits some rights affirmed in the Bill of Rights Act, we consider that these limits are justified under s 5 of that Act.

INTRODUCTION

4. Since the onset of the global financial crisis, there have been increasing concerns about the quality of enforcement in securities markets. Failures of a number of finance companies, and concerns around the Kiwisaver regulatory environment, have highlighted the following issues:

   • the fragmentation of the market regulators, leading to concerns about gaps and overlaps
   • the regulators’ willingness to actively and visibly prosecute wrongdoers, and to take cases in order to clarify the boundaries of the law
   • the adequacy of regulators’ powers
   • a potential conflict of interest in NZX Limited’s role both as an operator of an exchange, and as maker and enforcer of rules of that exchange.

In addition to establishing the FMA, the Bill amends the Securities Act 1978, Securities Markets Act 1988, and the KiwiSaver Act 2006. The Bill also makes consequential amendments to other legislation.

Key provisions of the Bill from a Bill of Rights Act perspective include:

   • general information-gathering and enforcement powers
   • powers to compel and suppress certain information
- powers to act on requests of overseas regulators
- statutory defences for certain offences

Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of s 5 of that Act. Following the guidance of the New Zealand Supreme Court decision of Hansen v R, the s 5 inquiry may be summarised as: [1]

(a) does the objective serve a purpose sufficiently important to justify some limitation of the right or freedom?

(b) If so, then:
   i. is the limit rationally connected with the objective?
   ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
   iii. is the limit in due proportion to the importance of the objective?

**Freedom of expression**

- Section 14 of the Bill of Rights Act affirms the right to freedom of expression, which includes the freedom to seek, receive, and impart information and opinions of any kind and 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. [2]
- We note, taking into account the various domestic and overseas judicial pronouncements on the issue, a two-step inquiry has been adopted to determine whether an individual’s freedom of expression has been infringed. The first step involves a determination of whether a particular activity falls within the freedom of expression. The second step is to determine whether the purpose or effect of the proposed government action is to restrict that freedom. [3]
- One of the underlying purposes of the Bill is to gather information about financial markets to assist regulation of the markets and to pass information onto investors. To this end, Part 3 of the Bill contains powers for the FMA to compel market participants and relevant parties to provide information. Clauses 96, 97, 104, 123 and 124 also give the FMA the power to compel a market participant to publish or supply defined information in connection with market participation. While much of the compelled information may be of a purely factual nature, even that information contains expressive content when considering the role of information within financial markets.
- The Bill also has provisions that prohibit the dissemination of information. Clause 42 allows the FMA to make a confidentiality order prohibiting the publication of any information, document or evidence that is provided or obtained in connection with any inquiry, investigation or other proceeding of the FMA. This information would be of interest to financial market participants, investors and the public generally.
- We consider that the above powers in relation to compelling or prohibiting dissemination of information impose a limit on the right to freedom of expression.
Is the limit on the right to expression justified?

- The purpose of the information gathering powers under Part 3 is to allow the FMA to access information necessary to exercise its powers of monitoring and enforcing compliance with the law. We consider this objective to be significant and important.
- As part of Part 3 of the Bill, Clause 42 works in concert with the rest of that Part by allowing the FMA to keep information about inquiries, investigations or proceedings shielded from the public where this is necessary for the FMA to carry out its functions, powers or duties.
- The purpose of clauses 96, 97, 104, 123 and 124 is to better inform participation in financial markets with compelled publishing or supply of defined information in connection with market participation.
- We also consider these purposes to be significant and important in both their specific application and towards the broader purpose of the Bill.
- The powers to compel information under Part 3 of the Bill that do not amount to a search and seizure (those that do will be discussed below) are strictly limited to what is needed for the FMA to carry out its duties. Where the compulsion equates to search and seizure, there are significant procedural protections.
- Balancing the ability of the FMA to make a confidentiality order, cl 43 provides for the publication of information, documents or evidence with the FMA’s consent and that consent may not be unreasonably withheld. In addition, confidentiality orders may only last as long as the inquiry, investigation or proceeding and following the end of the inquiry, investigation or proceeding the Official Information Act 1982 applies to any information, document or evidence that was subject to a confidentiality order.
- The compulsion of information from market participants to investors and the public promotes the confident and informed participation of investors and consumers. The compelled information does not have a high personal privacy value and contributes to a fair, efficient and transparent functioning of financial markets.
- We consider that the provisions of the Bill that create a limit on freedom of expression are rationally linked and reasonably necessary for sufficient achievement of their objectives. Any limits placed on the right to freedom of expression are in due proportion to the importance of those objectives.

Unreasonable Search and Seizure

- Section 21 of the Bill of Rights Act affirms the right to be secure against unreasonable search or seizure, whether of the person, property, correspondence or otherwise.
- Clause 25 of the Bill would grant the FMA the power to require a person to supply information, produce documents or give evidence. The FMA may exercise this power for the purposes of its functions, powers or duties under the Bill or any other provision of the financial markets legislation.
- Clause 29 allows the FMA to authorise a specified person to enter and search a place. The search must be for the purpose of ascertaining whether a person has engaged in or is engaging in conduct that constitutes or may constitute a contravention of the financial markets legislation. The FMA must be satisfied there
are reasonable grounds for the search. A search may only take place if the occupier of the place consents or a warrant has been obtained. For this reason, we consider that a search or seizure under cl 29 is reasonable.

- Clause 25, however, empowers the FMA to compel the provision of information, documents and evidence without consent or a warrant. It is an offence not to comply with a notice under cl 25 punishable by way of a fine that does not exceed $300,000.

- The purpose of cl 25 is to further the objective of the FMA to promote the growth and development of fair, efficient and transparent markets. Participation in financial markets is a highly regulated activity. The timely flow of accurate market information is paramount to the functioning of the markets. This information does not, however, have high personal privacy value.

- The FMA’s functions also include promoting the confident and informed participation of business, investors, and consumers in the financial markets by conducting inquiries, issuing warnings, reports, and guidelines, and providing or facilitating the provision of investment literacy. It is also a function of the FMA to promote awareness by investors that all investment involves risks and that it is not the role of the FMA to remove these risks.

- While cl 25 gives the FMA significant search and seizure powers, persons subject to their exercise have broad protections. Clause 53 provides that every person has the same privileges in relation to providing information and documents to, and answering questions before, the FMA, a member or an employee or a delegate of the FMA, as witnesses have in proceedings before a court. This includes the privilege against self-incrimination.

- Clauses 54 and 55 specifically contemplate the rights of persons to commence a proceeding in any court in respect of the exercise of any powers conferred by cl 25. While the FMA may continue to exercise its powers as if the proceeding had not commenced, any information that is obtained as a result of the exercise of powers to which the proceeding relates is not admissible as evidence in any criminal proceedings against the person to whom the information relates. Clause 55 provides that if any exercise of cl 25 powers is declared to be unlawful, the supplied information, or any information derived or based on that information, is destroyed or returned to the person supplying the information. Clause 55(b) further provides that if the FMA acted unlawfully under cl 25(1), no information or documents supplied under that clause are admissible in evidence in any proceedings.

- We consider that the power of the FMA to compel information and documents without consent or a warrant is limited to the functions of the FMA and there are sufficient procedural safeguards in place for it to constitute a reasonable search and seizure power pursuant to s 21 of the Bill of Rights Act.

**Right to refrain from making any statement**

- Section 23(4) of the Bill of Rights Act provides that everyone who is detained under any enactment for any offence or suspected offence shall have the right to refrain from making any statement.

- Clause 25(1)(d) of the Bill empowers the FMA to compel a person to appear before the FMA to give evidence, either orally or in writing, and produce any document or
class of documents. The purpose of this power is to allow the FMA to exercise its functions, powers or duties under the Bill or financial markets legislation. The FMA does not require consent of the person to be examined or a warrant to exercise this power. Clause 56(1) makes it an offence for a person to refuse or fail, without reasonable excuse, to comply with cl 25.

- We consider that cl 25(1)(d) empowers the FMA to detain an individual in relation to an offence or suspected offence and compel a statement from that person. [4]

_is the limit on the right to refrain from making any statement justified?_

- The objective of cl 25(1)(d) is to compel statements and documents where the FMA considers it necessary or desirable for the purposes of performing or exercising its functions, powers or duties. Functions of the FMA include promoting the confident and informed participation of business, investors, and consumers in the financial markets by conducting inquiries, issuing warnings, reports, and guidelines, and providing or facilitating the provision of investment literacy.
- We consider that the objective of cl 25(1)(d) serves a purpose sufficiently important to justify some limitation of the right to refrain from making any statement.
- It is clear that the power of the FMA to compel statements is rationally connected to the ability of the FMA to carry out its functions. The FMA will be New Zealand’s single market conduct regulator and will have the responsibility for facilitating capital market activity and improving outcomes for investors. The ability to compel information from market participants will be necessary for the FMA to carry out its functions.
- We understand that the ability to compel statements is also necessary where the information is subject to a confidentiality agreement between the party being compelled and a third party. A notice under cl 25 would supersede a confidentiality agreement.
- The FMA may only compel such information that relates to its functions, powers or duties. A person compelled to provide information has the same privileges as a witness in a proceeding before a court. A person may also challenge the requirement to provide information, and if the FMA acted unlawfully, any information collected under cl 25(1)(d) must be destroyed or returned and cannot be adduced as evidence in any proceeding. In addition, as discussed above, any derivative evidence from an unlawfully compelled examination may not be used. [5]
- We note that the FMA’s powers under cl 25(1)(d) may be exercised where an overseas regulator requests the FMA to inquire into any matter related to the functions of that overseas regulator. Clause 53(2) provides that the person subject to a request from an overseas regulator has the privilege against self-incrimination under s 60 of the Evidence Act 2006 as if that provision referred to offences under foreign law. Clause 53(2) does not limit any other privileges the person may have.
- We consider that the FMA’s powers under cl 25(1)(d) appear to impair the right to refrain from making a statement no more than is reasonably necessary for sufficient achievement of the objective of cl 25(1)(d) and the limit is in due proportion to the importance of that objective.
Right to be presumed innocent

- 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. The prosecution in criminal proceedings must therefore prove, beyond reasonable doubt, that the accused is guilty.

- Reverse onus defences give rise to an issue of inconsistency with s 25(c) because the accused is required to prove (on the balance of probabilities) a defence to escape liability. Where an accused is unable to prove the defence, then he or she could be convicted even though reasonable doubt exists as to his or her guilt. In other criminal proceedings an accused must merely raise a defence in an effort to create reasonable doubt.

- The following provisions of the Bill limit the right to be presumed innocent:
  - Subclauses 56(1)(a), 56(1)(g) and 56(2) create offences for persons or body corporates who act inconsistently, without reasonable excuse, with the provisions of cl 25 (FMA may require person to supply information, produce documents or give evidence).
  - New section 43Q(3)(a) creates an offence where an issuer, without reasonable excuse, contravenes their duty to notify relevant matters and provide certain documents and information to the Registrar.
  - Clause 123(6)(a) creates an offence in relation to transitional provisions for including information and documents in the register for a current prospectus.
  - Clause 32 of schedule 2 creates an offence for a person who fails, without reasonable excuse, to assist a person exercising a search power when requested to do so under cl 17 of schedule 2.

Is the limit on the right to be presumed innocent justified?

- The objective of all the provisions that limit the right to be presumed innocent is to place an onus on defendants to justify their allegedly illegal conduct in the highly regulated environment of financial markets. We consider this to be a significant and important objective.

- The objectives of the reverse onus defences are rationally linked to limiting the right to presumption of innocence.

- Common to all the reverse onus provisions is that the knowledge in relation to the excuse may only be known to the person concerned. [6] Furthermore, the offences are regulatory in nature and contain penalties that, while not at the lowest end of the offence scale, reflect the seriousness of the offences. Only cl 32 of schedule 2 contains a possibility of imprisonment. [7]

- We consider that the reverse onus defences of the Bill appear to impair the right to be presumed innocent no more than is reasonably necessary for sufficient achievement of the objective of the reverse onus defences and the limit is in due proportion to the importance of that objective.
CONCLUSION

We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. This advice has been prepared by the Public Law Group and the Office of Legal Counsel.

Jeff Orr
Chief Legal Counsel
Office of Legal Counsel

Footnotes:

1. The proportionality test under s 5 of the Bill of Rights Act, as applied in Hansen v R [2007] NZSC 7 [123], draws on the test articulated by the Canadian Supreme Court in R v Oakes [1986] 1 SCR 103, R v Edwards Books and Art Ltd [1986] 2 SCR 713 and R v Chaulk [1990] 3 SCR 1303. See for example, Hansen, at [42] per Elias CJ; [64] and [79] per Blanchard J; [103], [104] and [120]-[138] per Tipping J; [185] and [217] per McGrath J; and [272] per Anderson J.
5. See, for example, British Columbia Securities Commission v Branch [1995] 2 SCR 3.
6. See, for example, Sheldrake v Director of Public Prosecutions [2005] 1, AC 264.
7. Note that the Search and Surveillance Bill would replace schedule 2 once that Bill receives Royal assent. The reverse onus defence was considered for consistency with the Bill of Rights Act within the Bill of Rights Act advice on that Bill.

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