

15 February 2008

The Chair
Finance and Expenditure Committee
Parliament Buildings
Wellington

FINANCIAL SERVICE PROVIDERS (REGISTRATION AND DISPUTES RESOLUTION) BILL 2007 190-1

1. This submission is from the Legislation Advisory Committee (LAC) which was established to provide advice to Government on good legislative practice, legislative proposals and public law issues. The Committee produces and updates the LAC Guidelines adopted by Cabinet as appropriate benchmarks for legislation.

Relationship with other legislation

2. We understand that this bill is part of a suite of bills to be introduced to regulate the finance industry. We understand that there are likely to be 9 bills in all. One of the companion bills, the Financial Advisers Bill, has been introduced, but awaits a first reading. The others are still to come. The committee is concerned that the separate introduction and passage of individual components of a large suite of bills will place considerable demands on scrutiny processes to avoid inconsistency and lack of cohesion. There will be a considerable risk of this happening. We note that already there are cross-references in both the present bill and the Financial Advisers Bill to each other. This makes comprehension more difficult than it should be.

We believe that there would be merit in combining the Financial Advisers Bill and the present Bill, and indeed the future bills, as parts of a single bill to avoid the need for constant reference from one to the other. Consistency would be better assured by this method. We submit that serious consideration should be given to that mode of proceeding.

Achieving policy objectives

3. The LAC's remit does not extend to policy issues, but it is concerned as to whether a bill adopts an appropriate means of achieving its policy objectives. We have doubts about this Bill in this regard.
4. Para 3 of the Bill provides for the establishment of dispute resolution schemes. They are to be an integral part of the proposed quality control of financial service providers (FSPs) and also financial advisers under the Financial Advisers Bill.

An approved dispute resolution scheme will be one that has satisfied the Minister of Commerce that it meets the criteria of accessibility, independence, fairness, accountability, efficiency and effectiveness. Such schemes will be fully funded by the industry (clauses 46 and 47).

5. The Governor-General, by Order in Council, may appoint an approved scheme to be the reserve scheme, but only if the person responsible for the scheme consents (clause 66). There is provision that regulations may be made to impose a levy to fund the reserve scheme (clause 70).
6. Membership of an approved dispute resolution scheme is to be compulsory to carry on business as a FSP. However, it is a failing of the Bill that there is no requirement that a reserve scheme, or indeed any approved scheme at all, be set up.

Clause 44 provides:

“Every financial service provider must be a member of an approved dispute resolution scheme –

- (a) if the provider provides a financial service to –
 - (i) consumers who are natural persons; or
 - (ii) businesses that have no more than 19 full-time-equivalent employees; and
- (b) if the reserve scheme has been appointed under **section 66.**”

The same point is made in clause 3(2). In other words, there is no binding requirement that a reserve scheme, or indeed any dispute resolution scheme at all, be set up.

While no doubt every effort will be made to ensure that a reserve scheme is appointed, there is no guarantee that this will happen. If it does not, one of the main quality control mechanisms in the Bill will fail to operate.

6. There are also failings in definition in the Bill relating to the ADR provisions:
 - The term “reserve scheme” is not defined. It would assist clarity if there were to be a definition.
 - Although schemes are required to be “independent”, it is not clear how this is to be measured. It would be helpful to have criteria.
 - FSPs will not be in breach of their registration requirements by not being a member of an ADRS unless a reserve scheme is in operation. But there is no provision as to what happens if a FSP has legitimately commenced business in the absence of a reserve scheme, but a reserve scheme is later introduced. What would be the time limit for a registered FSP to join?

Public registers

7. The Bill creates a new public register. Some issues are raised by this:
 - Clause 30 states that searches of the register may only be made by reference to “criteria to be specified in the regulations”. It would be preferable if these criteria were contained in the primary legislation. The ability of the public to search a register is a matter of policy rather than operational detail.
 - Another issue concerning the register arises in cl 24 which provides for the register to be available for access at all times unless the Registrar suspends access or as “otherwise prescribed”. The Registrar may refuse access if he or she “considers that it is not practical to provide access to the register”. The boundaries of these provisions and the

circumstances in which the register may be closed are not clear; nor is the Registrar's power to close the register apparently subject to any time limit. We believe these matters should be subject to more precise definition in the legislation. A public register is hardly public if it can be closed at will.

Creation of a new public power

8. The Bill establishes a new Registrar of Financial Service Providers and Financial Advisers. The Registrar can require a person to produce documents, and inspect and take possession of those documents (cl 36).
9. Clause 35 gives the Registrar the power to delegate any of his or her functions, duties and powers. Clause 35(2) provides that the delegation must be in writing, among other things. Clause 35(4), however, states that "A person who appears to act under a delegation is presumed to be acting in accordance with its terms in the absence of evidence to the contrary." This provision appears to place the onus on the complainant to establish that a person purporting to exercise the Registrar's powers under delegated authority does not in fact have written authorisation. The need for the provision to be framed in this way is not obvious. Some of the powers which may be delegated are quite intrusive; they include a power to inspect documents, for instance. Non-compliance carries a heavy fine. In such circumstances, it seems reasonable that a FSP should be able to require evidence of a delegate's authority, rather than having it presumed.

Exemptions

10. Clauses 6(2)(c) and 42(1)(b) provide for the exempting, by Order in Council, of prescribed Crown Entities from the regime under the Act. There are no criteria for exemption stated in the bill and we believe there should be. A power to exempt from a statutory scheme should be exceptional. Where it is granted the circumstances in which, and reasons for which, it may be done should be spelled out as clearly as possible.

Appeal and review

11. Clause 41(2) imposes a time limit of 20 days on an appeal and states that this may be extended by the High Court. At para 13.2.2 the LAC Guidelines state that there is nothing objectionable about time limits, but that it is desirable to have a provision which allows the appellate body to waive the time limit. “The statute should expressly state the criteria, however broad or narrow, that guide this discretion.” No such criteria are set out in clause 41(2). We submit that they should be.

12. There is a further point in relation to cl 38. That clause provides that if a person appeals to the High Court under cl 41, or seeks review of an order of the Registrar under cl 36, the Registrar may continue to exercise his or her powers, and no person is excused from fulfilling an obligation under that section while the court proceedings are pending. Thus a FSP may be deregistered, or required to produce material, notwithstanding that he or she may have a valid challenge to the exercise of those powers. The justification for this is not clear, and we submit that the Registrar’s powers in this regard should be suspended pending the outcome of the appeal.