

BURROWES and Company

Barristers and Solicitors

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THE FINANCIAL SERVICE PROVIDERS (PRE-IMPLEMENTATION ADJUSTMENTS) BILL

The Financial Service Providers (Pre-Implementation Adjustments) Bill was introduced to the House in December 2009.

The Bill makes technical changes to the Financial Services Providers (Registration and Dispute Resolution) Act 2008 ("FSP Act") and the Financial Advisors Act 2008 ("FA Act") in light of some uncertainties that have arisen since its enactment. The Bill also seeks to reduce compliance costs associated with the new regime, mainly in relation to the Qualifying Financial Entity (QFE) model.

Individual contractors to be named

The FSP Act, as it is now, provides that a QFE is automatically responsible for advice given by all its employees and contractors. The Bill proposes to change this by requiring a QFE to name individual employees and contractors whose advice it will take responsibility for.

Named contractors can give category 1 advice

The current legislation permits only QFE's employees to provide Financial Adviser Services on the QFE's category 1 products (complex products such as shares). The proposed Bill would allow a QFE's employees and named contractors to do so without being individually licensed.

QFE to give advice on Category 1 promoted by QFE

The FA Act limited an advisor, within a QFE who gave advice on category 1 products, to those issued by the QFE. The exception was if they became an Authorised Financial Advisor. The proposed amendments will enable

nominated advisors of QFEs to give advice on Category 1 products issued or promoted by the QFE in the course of its business.

Further amendments to Financial Advisers Act

The Bill makes numerous other changes to the FA Act. This includes clarifying the definition of "insurance products" to exclude life insurance policies other than term life policies. A "nominated representative" has also been clarified as an individual who is formally nominated by a QFE to perform financial adviser services in respect of that QFE.

AITEs

The amendment Bill does not deal with the issue of the handling of client funds by entities which, as a result of the Act's focus on individuals, are not subject to the Financial Adviser regime. It was thought that the new Bill might introduce a separate category of entity, Authorised Investment Transaction Entities (AITEs) but this has not been included in the Bill.

Groups of companies

The Bill also does not cover groups of companies. There had been some discussion over whether the Act should be widened further to cover the fact that a number of potential QFE's operate as a group of companies rather than single companies.

Conclusion

Commerce Minister Simon Power expects that the changes in the Bill will come into effect in the first half of 2010 and the FSP Act is expected to be fully operational from December 2010.

REGISTRATION OF FINANCIAL SERVICE PROVIDER

One of the main requirements of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 is that all Financial Service Providers must be registered in order to legally conduct business in New Zealand. Registration will assist in the effective identification and monitoring of Financial Service Providers.

Registrations open in May 2010 and Financial Service Providers must be registered by December 2010.

Registrations will be available online and the process is intended to be straightforward and

simple. It will involve a criminal conviction background check and individuals will have to join an approved dispute resolution scheme if they provide services to the public.

The register will be publicly accessible and searchable and consumers and investors will be able to check that a person or business is registered and what financial services they can legally provide.

Further information about the register and the Act can be found at www.fspr.govt.nz

FURTHER CHANGES TO THE INJURY PREVENTION, REHABILITATION AND COMPENSATION AMENDMENT BILL

The Injury Prevention, Rehabilitation, and Compensation Amendment Bill that was introduced into Parliament on 22 October 2009, had its second reading in Parliament on 18 February 2010. The Transport and Industrial Relations Committee has reported on the Bill and recommended several minor changes. Each is briefly outlined below.

Changes to cover for injury-related hearing loss

The first change clarifies the provisions relating to cover for hearing loss. The initial proposed definition of personal injury states that injury related hearing loss must reach 6% of binaural hearing loss before a claimant can be considered for cover. This provision would apply only to hearing loss with a covered cause, specifically occupational noise-induced hearing loss or hearing loss as the result of an injury or treatment injury. The proposed new definition provides that the 6 percent threshold relates to hearing loss from a covered cause, rather than hearing loss per se.

Full funding of regime for the ACC residual claims liabilities

The second change concerns the full funding regime for the ACC residual claims liabilities. The Commission recommended extending the waiver for the 2010/2011 levy consultation requirements for the Earners' and Motor Vehicle Accounts to reduce the risk of challenge to the validity of the consultation. This change would affect the 2010/2011 levies, in particular by removing the Residual Claims Account.

Risk sharing and experience rating in the work account

The third change effects the provisions around risk sharing and experience rating in the Work Account. The Bill reintroduced the provision for experience rating that was made possible under legislation from 1974 to 2001. The Bill has been amended to make certain that risk sharing, risk adjustment, and experience ratings are not applied to the portion of the levies that is necessary to fund the residual amount. Although experience rating, which provides incentives for businesses to have a safer work record, should properly apply to current levies, the Select Committee determined that it should not apply to historical residual levies.

ACC financial reporting requirements

Minor changes were made to the financial reporting requirements to ensure that they are effective. The Bill initially required ACC to produce an Annual Financial Condition report and impartial advice on this report. The latter requirement has been removed given ACC's inability to provide impartial advice.

Disentitlement for criminals

The Bill makes changes to disentitle certain criminals from cover. The Bill clarifies that offenders' families are not entitled to compensation for fatal injuries suffered by the offender in the course of committing a crime. Also covered in the disentitlement provisions is a sentence of home detention.

As this publication went to print, the Bill was being passed under urgency in Parliament.

ANTI-MONEY LAUNDERING DISCUSSION DOCUMENT

On 10 February 2010 the Ministry of Justice released an informal discussion document on the Regulations and Codes of Practice under the Anti-Money Laundering and Countering Financing of Terrorism (AML/CFT) Act 2009 ("the Act").

The Act gives the Commission power to supervise issuers of securities, trustee companies, futures dealers, collective investment schemes, brokers and financial advisers. The informal discussion document sets out some Regulations and Codes of Practice to support the Act. It also sets out some options for regulation and invites industry feedback on the preferred approach.

Exemptions, inclusions and thresholds of the Act

The Act provides for partial and full exemption from AML/CFT obligations and outlines criteria for exemption. The discussion document outlines preferred approaches for the exemption of different products and services.

The discussion document outlines two options for exemptions for financial activity on a very limited basis. The first is a general exemption for retailers and other non-Financial Service Providers, the second option is exemption for entities on a case by case basis. Comment is sought on the different approaches.

The document notes that there are some financial products that have low enough AML/CTF risks to warrant partial or full exemption from the Act. For example, it has been proposed that pure risk based life and funeral insurance products should be excluded from the definition of 'financial institution' to ensure that businesses that offer these policies do not have to apply the Act's measures. Some securities, the selling of government bonds, corporate treasury functions and some parts of the security industry are also viewed as potential exemptions.

The discussion document also deals with applicable thresholds for certain products and services. These transactions thresholds may be applicable to, for example, financial institutions, casinos, stored value products, traveller's cheques, currency exchange, beneficial ownership, money orders and postal orders.

Other partial exemptions and reduced obligations may apply to debt collection, certain workplace-based superannuation funds, low value superannuation funds that meet certain criteria, life insurance products that meet certain criteria and insurance products closed to new customers.

Customer due diligence

The Act imposes obligations to collect and verify information relating to customers of Reporting Entities. It sets out circumstances where customer due diligence

must be carried out and provides minimum obligations for information collection and verification.

The discussion document highlights the areas where Regulations and Codes of Practice will be developed and provides approaches for these. The four areas are:

- The basis for verification applying to a specified situation, customer, product, service, business relationship or transaction;
- Circumstances where standard due diligence applies;
- Entities or classes of entity to whom specified due diligence can be applied; and
- Enhanced customer due diligence identity requirements.

Third party relationships

The document also looks at the potential issues that may arise with third party relationships. The preferred approach is that an exemption will exist from the account monitoring and reporting keeping obligations for certain entities. The exception will be applicable to an Entity that conducts an occasional transaction or has a business relationship with an intermediary, who is acting on behalf of customer(s). The parties must be acting through pooled, omnibus or nominee account structures and the Reporting Entity must be satisfied that the intermediary is regulated and supervised and has adequate measures to comply with the Act.

Comment is sought as to the different types of relationships or products that involve intermediaries which the Act's obligations are likely to be problematic.

Institutional arrangements

The Act allows Reporting Entities with a Designated Business Group (DBG) to share elements of an AML/CFT programme as well as record keeping, ongoing customer due diligence and account monitoring systems. The Act's DBG provisions are very similar to those in Australia which should result in a significant reduction in compliance costs for some entities.

The document states the eligibility for membership in a DBG within the money remittance industry should be addressed. The preferred approach is that eligibility for membership is extended to include the private sector agency and also sub agency relationships within the industry. The preferred approach for the conditions for membership of a DBG is also outlined in the document.

Comment

The public document closed for comment on 5pm Friday 19 March 2010. The full document can be viewed at www.justice.govt.nz. Formal consultation for Reporting Entity obligations is expected to take place in early May 2010.

INVASION OF PRIVACY: PENALTIES AND REMEDIES

The Law Commission has issued a final report "Invasion of Privacy: Penalties and Remedies" that seeks to address and make recommendations concerning the gaps in New Zealand's Privacy Law. This report recommends that the use of visual surveillance, interception and tracking devices should be a criminal offence and create a right to civil action. It also recommends that the law in relation to surveillance is constituting harassment is clarified and new offences targeting voyeurism should be developed. Most significantly for insurance companies, recommendations include tidying up the law in relation to surveillance by private investigators. This recommendation is discussed further below.

The current law

The Private Investigators and Security Guards Act 1974 ("the Act") regulates private investigators. A registration and licensing scheme for private investigators and approval of their employees was set up under the Act.

Private investigators are restricted by s52 of the Act to protect the privacy of their subjects. The investigator is not permitted to take or accept photos, cinematographic picture, video recordings or use any other mechanical device that records the voice or speech of another without the written knowledge of that person.

A Private Investigators and Security Guards Bill strengthening those regulatory controls is currently before Parliament. The Bill provides for the same substantive law as in s52 but increases the penalties for breach.

The problem

Several issues have been raised regarding the current restrictions on private investigators provided for by the Act. The most important is that a private investigator has fewer rights than a member of the public. Also, the Act is out of date and has failed to keep up with technology, creating gaps in the legalisation. For example, the use of an electronic or digital device is not banned and nor are tracking devices. Furthermore, security guards do not fall under the section.

Commission's Recommendations

The Commission recommends that Private Investigators should be bound by the proposed new Surveillance Devices Act like everyone else. Therefore, there would not need to be a separate provision for private investigators and s52 of the The Private Investigators and Security Guards Act 1974 should be repealed (or the equivalent in the Bill that is before Parliament).

The Surveillance Devices Act would make it a criminal offence to trespass to install a surveillance device, to use a device to undertake surveillance of the interior of a dwelling and to use tracking devices. This would be restricted to cases where use of the visual surveillance is taken place when the offence takes place

The Commission recommends that the Act should not restrict the private investigator but implement effective licensing and disciplinary procedures. Therefore, private investigators will have the same rights and duties as members of the public.

Exceptions would apply to law enforcement agencies and intelligence organisations acting in accordance with their statutory powers.

To ensure that private investigators do not and are not tempted to breach an individual's privacy, the Private Investigators and Security Guards Act (or its replacement statute) should be amended to include a code of ethics for private investigators and private security personnel. The Bill before parliament does include an empowering provision for Codes of Conduct. A binding Code, the Commission believes, would be a big step forward in the area of private investigation and it should not be left to the industry to develop. The Code would address issues of privacy and the use of surveillance by private investigators.

It is also recommended that that additional offences involving serious invasions of privacy be added to the list of disqualifying offences for private investigators and their employees. The Bill states an individual may be disqualified on the basis of various offences including a "specified offence" under the Criminal Records (Clean Slate) Act 2004; offences of dishonesty and drug dealing; or working while unlicensed. The report recommends including in this list the existing intimate covert filming offences and the new surveillance device offences that are recommend in its report. This suggestion has received general support in submissions on the previous issues paper.

Conclusion

The Law Commission's has now been tabled in Parliament. The Commission will now begin the fourth and final stage of the project. This involves a general review of the Privacy Act 1993 with a view to updating it. The Commission would like to receive comments on its recommendations. Submissions are due by 30 April.

The full paper is available on the Law Commission's website www.lawcom.govt.nz and on www.talklaw.co.nz

SECURITIES TRUSTEES AND STATUTORY SUPERVISORS BILL

The Securities Trustees and Statutory Supervisors Bill ("the Bill") was introduced on 15 December 2009. The aim of the Bill is to "protect the interests of investors and enhance investor confidence in financial markets". It aims to achieve this by enabling the Securities Commission to hold trustees and statutory supervisors accountable for failing to perform effectively.

Requirements of the Bill

The Bill requires that trustees of debt securities, unit trustees, and statutory supervisors of certain collective investment schemes and Retirement Villages be licensed by the Securities Commission. This removes the automatic statutory approval that the six trustee corporations had under the Securities Act 1978, the Unit Trusts Act 1969 and the Retirement Villages Act 2003. It will be an offence to act as a trustee or statutory supervisor without a licence.

The Bill also requires all licence-holders to provide to the Commission six-monthly reports containing information about their compliance with the terms of the license, reporting any actual or potential breaches of obligations and deeds entered into with

the issuers they supervise.

Breach of obligations and directions

The Commission will be entitled to, on behalf of investors, seek pecuniary penalties and compensation orders against trustees and statutory supervisors who have breached their obligations. It would also be an offence if a trustee or statutory supervisor failed to comply with the Commission's directions. Maximum penalties will range from \$100,000 to \$200,000.

Retirement Village inclusion

In recognition of the similar role that they play to trustees of investment products, Retirement Village statutory supervisors have also been included in the regime. The Commissioner would, however, have no power to step in where a Retirement Village under its supervision breached an obligation. This is because the Retirement Villages Act 2003 contains a separate regulatory regime.

The Bill received its first reading on 23 March 2010. Submissions are being called and close 6 May 2010. Further information about writing a submission can be found at www.parliament.nz.

REPARATION AND ACC ENTITLEMENTS

A proposed amendment to the Sentencing Act 2002, s32(5) will clarify that Court Orders of reparation can include consequential injury costs not covered by Accident Compensation Corporation entitlements.

The amendment

The Supreme Court held in *Davies v New Zealand Police* in May 2009 that reparation orders could not include compensation for consequential injury costs if the victim had ACC entitlements. The amendment will do away with that ruling and will ensure the Courts can resume to the including consequential injury costs not covered by ACC in Orders of reparation for victims of crime. **Compensation rate**
For loss of income, compensation is provided by

ACC at a rate of 80 per cent of a claimant's pre-injury weekly earnings. Prior to 2009, the Courts were including in Orders of reparation where appropriate, 20 per cent of earnings not compensated by ACC.

Justice Minister Simon Power says the amendment is consistent with the Government's wider policies relating to victims of crime and ensuring that victims are given support to overcome the significant financial and emotional costs suffered as a result of the crimes committed against them.

This may increase exposure under liability insurers current liability and statutory liability policies.

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