
NEW ZEALAND SECURITIES LAW REVIEW UPDATE - MED TAKES SUBMISSIONS ON BOARD

The New Zealand Government has progressed its reform of securities law (described in Sacha Judd's article in the April edition of this publication) with the introduction into Parliament of the Financial Markets Conduct Bill (the Bill). The Bill is intended to repeal and replace the Securities Act 1978, the Securities Markets Act 1988 and the Unit Trusts Act 1960, as well as making significant amendments to other related legislation. Described by the then-Minister of Commerce Simon Power as a "once-in-a-generation rewrite of securities law", the Bill (together with other recent legislation) will create a comprehensive regime for financial product disclosure and financial service provider licensing which is largely modelled on the Australian Corporations Act 2001.

As most readers will be aware, the Bill was based on an earlier exposure draft released by the Ministry of Economic Development (MED) for public consultation (the Exposure Draft). MED received 71 submissions on the Exposure Draft, and has released a document showing a comparison between the Exposure Draft and the Bill. Although the differences between the two are not extensive, there are some important changes, and it was interesting to see how MED responded to the various submissions. This article describes some of the key changes made in response to submissions:

THE DEFINITIONS OF FINANCIAL PRODUCT CATEGORIES

The definitions of the different financial product categories (equity, debt, managed investments and derivatives) drew many submissions, with the definitions of derivatives and redeemable financial products subject to particular analysis. Changes have been made, but because of the timing constraints MED faced, this part of the Bill has been temporarily placed in the "too hard" basket, with MED stating that the definitions will be the subject of further consideration.

CONSENT FOR EXPERT STATEMENTS AND ENDORSEMENTS

The Exposure Draft included a proposal that a statement by a person quoted in a product disclosure statement (PDS) could only be included with that person's consent. In response to submissions, the Bill has relaxed that requirement somewhat. Consents will now only be required for expert or professional statements and endorsements, and only if the statements or endorsements are not publicly available information. MED is still considering the requirements in relation to credit rating agencies.

UNSOLICITED OFFERS

A ban on unsolicited offers of financial products that was originally proposed in the Exposure Draft will now exclude financial products offered to customers for business purposes. Most non-regulated offers (e.g. those to close business associates or sophisticated investors) will also be excluded from the unsolicited offers ban, while email communications will also now be allowed (subject of course to spam restrictions).

THE ADVERTISING RULES

The new advertising rules set out in part 3, subpart 3 of the Exposure Draft and Bill have changed, in response to submissions, to include a wider defence for publishers and to clarify the treatment of websites containing offers of financial products.

LARGE FINANCIAL INSTITUTIONS AND CENTRALISED LICENSING COMPLIANCE

MED is considering further the relationship between the Part 6 licensing requirements of the Bill, and other related licensing regimes such as that for registered banks, deposit takers, financial advisers and qualifying financial entities.

THE LIABILITY REGIME

Perhaps unsurprisingly, Part 7 of the Bill's (significant) increase in penalties, use of strict liability offences, personal liability for directors, managers and advisers, and breadth of FMA powers all occasioned significant comment. MED has made considerable changes, including to director liability and the due diligence defence. However MED's most relevant comment is perhaps that "Liability is likely to be a focus for [S]elect [C]ommittee..."

THE RULES RELATING TO UNDERWRITERS

Specific liability for underwriters for defective disclosure has been removed from clause 478 (although underwriters could still potentially be liable for aiding and abetting defective disclosure).

THE HAGUE CONVENTION ON INDIRECTLY HELD SECURITIES

Contrary to earlier statements, MED has now indicated that aligning New Zealand law with the convention will be dealt with separately, rather than in the Bill.

THE SCHEDULE 1 LIST OF NON-REGULATED OFFERS

Some clarifications have been made to the proposed exclusions for employee share purchase schemes and quoted derivatives, however the Schedule 1 list of non-regulated offers is not significantly changed from the version in the Exposure Draft. The majority of the many comments received on Schedule 1 are however noted as "further consideration required", so further changes may be made during the Select Committee process.

The current version of the Bill also includes significantly more detail as to the necessary consequential amendments to other financial markets legislation.

It is difficult to treat a 600 page, 700 clause Bill (together with schedules and consequential amendments) as a mere entrée, but perhaps the most significant MED comment is that officials expect to commence work "soon" with industry and other stakeholders on developing the regulations to be made under the Bill. Given the Bill anticipates prescribing at least 250 different matters, and the current Securities Regulations and exemption notices run to hundreds (if not thousands) of pages, it may be that the main course is still to come.

While the current version of the Bill is an important next step in the government's securities law reform, it is by no means the last one. There are likely to be further significant changes to the Bill before it is enacted, and the detail of the regulations will be critical.

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