

To
Ministry of Economic Development

For
Investment Law Team

From
Localist

By
Email: investment@med.govt.nz

Date
5 September 2011

Dear Sir/Madam

Financial Markets Conduct Bill

1. Introduction

- 1.1 Thank you for the opportunity to submit on the Ministry of Economic Development's ("**the Ministry**") Financial Markets Conduct Bill (the "**Bill**").
- 1.2 Localist Limited ('Localist') is part of the New Zealand Post group of companies. This submission reflects the views of Localist, and not necessarily the views of New Zealand Post Limited or other group companies.
- 1.3 Localist is one of New Zealand's most innovative advertising and directories businesses. We publish five print guides, and offer website and mobile applications. Our website and mobile application contain online business free listings and paid advertisements, as well as user-generated content including reviews from consumers. Our books are distributed to five Auckland regions, twice a year. Localist gives people a way to find out what's good in their local area, a chance to champion their community and the opportunity to support local businesses and organisations. Localist takes the best that business directories have to offer, along with the power of social media, to create something new.
- 1.4 We are very concerned at the impact on our business of the Bill's proposed advertising regime and related provisions. Localist does not wish to comment on the other matters contained in the Bill.

2. Publishers' defence

- 2.1 As discussed above, Localist publishes advertisements in physical print guides, on Localist's website and via Localist's mobile application. Although we are a publisher of advertisements, it appears that our business would not be able to rely on the "publishers" defence in clause 78 of the Bill. Our guides are neither newspapers nor magazines, and our website and mobile application would not appear to be a "news

media or financial market commentary Internet site". It seems to us that the categorisations set out in the draft Bill are unnecessarily restrictive and would not apply to Localist's business.

- 2.2 On the face of it, many other forms of advertising would be similarly affected. Providers of search engines, banner advertisements, flyers and brochures would not be entitled to take advantage of the publisher's defence either.
- 2.3 In our view, we do not think there should be a distinction between methods of publishing of advertisements – provided that the publisher is in each case publishing the advertisement in good faith in the ordinary course of its business.
- 2.4 We suggest that the Ministry adopt the equivalent provision in section 44(4) of the Fair Trading Act 1986:

It is a defence to a prosecution for an offence against section 40 of this Act [contravening Parts 1 to 4 of the Fair Trading Act], or to any other proceedings under this Part of this Act, in relation to a contravention of a provision of this Act committed by the publication of an advertisement, if the defendant proves—

- (a) *That the defendant's business is publishing or arranging for the publication of advertisements; and*
- (b) *That the defendant received the advertisement, or the information contained in the advertisement, as the case may be, in the ordinary course of that business and did not know and had no reason to suspect that the publication of the advertisement or the publication of the advertisement containing that information, as the case may be, would constitute a contravention of the provision.*

- 2.5 We further suggest that the defence be extended to apply to alleged contraventions of Part 2 (misleading representations), as well as the advertising prohibition. This would be consistent with the current approach in section 44(4) of the Fair Trading Act.

3. Publishers' liability

- 3.1 We are also concerned that the advertising prohibition combined with clause 461 (compensatory orders) may amount to a statutory reversal of the liability of newspaper publishers under the common law, as expressed by the Court of Appeal in the case of *Fleming v Securities Commission*.¹ That case held that a newspaper publisher has no duty of care to prospective investors for publishing advertisements that contravene the Securities Act 1978. Cooke P (as he was then) observed:

As for the newspapers, in an ideal world the press might perhaps be expected to have a legal obligation to take reasonable care that what is published to its readers is accurate and lawful. But we do not live in Utopia. I accept that in practice such a rule would cripple the media. In general they cannot be held to

¹ [1995] 2 NZLR 514; (1995) 7 NZCLC 260,697.

guarantee the accuracy of claims made in advertisements or the lawfulness of advertisements...

3.2 Similarly, Richardson J (with whom Gault and Ellis JJ agreed) observed:

... there is no evidence of any public expectation that general newspapers assume that kind of responsibility. Or that they routinely check the accuracy of the content of advertisements directed to the general public. Essentially the newspaper is selling space for the advertisers to promote their goods and services. It is economically efficient for the responsibility for the accuracy, quality and legality of the advertising message to rest with the advertiser. The cost structure would have to change if the publisher had to accept or share that responsibility. Higher advertising rates would have a deadweight impact to the detriment of the market...

and

... there is not a strong moral justification for imposing a duty of care to the general readership of newspapers in the discharge of their obligations under the securities legislation... If the media owes a duty of care to the general readership to ensure compliance with the securities legislation, it would surely have similar duties to ensure compliance with any other legislation or common law liabilities affecting the content of advertisements. As a duty of care question accuracy, reliability and lawfulness are all aspects of the publication. The advertisement should be accurate, reliable and lawful. The advertiser may be liable civilly if it is not. To impose a duty of care on the media would open the door to liability in an indeterminate amount for an indeterminate time to an indeterminate class. It could inhibit the free flow of information and change the cost structure of the media to the detriment of commerce and the wider public. Policy considerations weigh strongly against the imposition of a duty of care in such a case.

3.3 It seems to us that the rationale underlying these compelling statements of public policy has not changed; we would therefore submit that the potential civil liability for publishers should be removed.

4. Liability for third party statements

4.1 Localist provides various social media functions on its website and mobile application. In particular, advertisers and members of the public are able to post certain statements including reviews of local businesses on the Localist website and mobile application. While Localist has in place systems to monitoring such statements by way of a post-moderation process the reality is that Localist is not able to monitor the compliance of all such statements with all aspects of all relevant law at all times. It is conceivable that such third party statements could breach the general misleading prohibitions in Part 2 of the Bill, the advertising restrictions in clause 71 and possibly the tipping prohibitions in clause 220.

- 4.2 Given the rise of social media and its widespread use, we suggest that an additional general defence be introduced into the Bill, excluding liability for persons or facilities that:
- (a) provide the ability for third parties to publish statements;
 - (b) remove any third party contravening statements as soon as becoming aware of such statements;
 - (c) immediately action any request or direction by the Financial Markets Authority to remove such statements or publish remedial statements; and
 - (d) act in good faith.

5. Financial products markets licensing

- 5.1 Clause 290 of the Bill provides that a "financial product market" is a facility by which offers to acquire or dispose of financial products are regularly made or accepted. As the definition of "offer" includes "inviting applications", this would appear to be broad enough to include advertisements for financial products. Localist obviously does not provide a facility to accept offers for financial products transactions, however "making" offers would seem to cover straightforward advertising (e.g. "save with bank X" or "choose KiwiSaver Y"). We assume this is unintended; we suggest you clarify this provision.

6. Concluding remarks

- 6.1 We would be happy to discuss any matters of our submission or the impact of the Bill on Localist and other publishers. If you would like to discuss, in the first instance please contact Blair Glubb.
- 6.2 We confirm that we have no objection to the Ministry publishing this submission on the Ministry's website.

Yours sincerely



Blair Glubb
Chief Executive
Localist