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Ministry of Business, Innovation and Employment
PO Box 1473
Wellington 6140

By email: revisionbill@mbie.govt.nz

Contract and Commercial Law Bill Exposure Draft

Introduction

1. The New Zealand Law Society (Law Society) welcomes the release of an exposure draft of the Contract and Commercial Law Bill (the draft Bill) and the opportunity to provide comment at this early stage of the Bill's development.
2. The Law Society considers that there are benefits in the reforms proposed. However this will come at a cost, which the Law Society identifies below. If the reforms go ahead, it would be desirable to undertake the substantive reform that has been identified as necessary at the same time, so that costs are incurred once.

The revision programme

3. The Law Society supports the objective of the revision programme undertaken under Subpart 3 of Part 2 of the Legislation Act 2012 (the Act) to improve access to and clarity of the New Zealand statute book.
4. A revision Bill can change the form of the legislation but not its substantive legal effect.¹ A revision Bill can make "minor amendments to clarify Parliament's intent, or reconcile inconsistencies between provisions".²
5. The Act contains procedural safeguards, in recognition of the potentially significant risks involved in altering well-established legislative phrases and concepts. Certifiers must be satisfied that the revision powers have been exercised appropriately and that the Bill does not change the effect of the law except where authorised.³
6. In light of this independent review process, the Law Society's comments do not address the detail of each proposed revision. There is a significant amount of work to be done in checking and cross-checking each proposed revision against existing statutes and case law, and the Law

¹ Contract and Commercial Law Bill Exposure Draft Explanatory Material and Request for Submissions, page 3.

² Legislation Act 2012, s 31(2)(i).

³ Legislation Act 2012, s 33(3).

Society's volunteers are not in a position to undertake a complete check and cross-referencing of the new provisions. The comments that follow are therefore of a general nature.

Contracts and commercial law – options for reform

7. The Law Society provided comments on the proposed Contracts and Commercial Revision Bill in a submission in 2014 on the first revision programme under the Act.⁴
8. As indicated in its 2014 submission, the Law Society considers that many of the statutes included in the draft Bill currently work well.
9. There are, however, statutes included in the draft Bill that in the Law Society's view are in need of substantive reform. These include:
 - a. The Contracts Privity Act 1982, which should be amended to take into account the recommendations of the Law Commission in its Contracts Statutes Review;⁵
 - b. the Contractual Mistakes Act 1977, which suffers from sufficient lack of clarity in its current form in that the existing case law is conflicting and interpretation is difficult; and
 - c. the Mercantile Law Act 1908 which, as indicated by the large number of comments in the consultation draft, is indeed in need of significant review.
10. In addition, the Law Society notes that the Ministry of Business, Innovation and Employment and the Parliamentary Counsel Office have identified a range of additional areas where substantive reform work may be warranted. These are set out in Part 4 of the Explanatory Material and Request for Submissions document that accompanied the draft Bill.⁶
11. There are a number of options for revising and reforming the statutes identified in the draft Bill, including:
 - a. A revision Bill under Subpart 3 of Part 2 of the Legislation Act (this is the option adopted by the draft Bill): this is a revision exercise, without substantive reform to the statutes in need of it.
 - b. An ordinary Bill: this would allow a revision exercise (albeit without certification that the majority of changes are not substantive) as well as substantive reform of the statutes in need of it.
 - c. A revision Bill together with an ordinary Bill: this would combine the benefits of the revision process under the Legislation Act (in particular, four certifiers to certify that they are satisfied that the revision Bill does not change the effect of the law) while allowing substantive change to be made in areas in need of reform.
12. The Law Society supports improving access to and clarity of New Zealand's statute book. The draft Bill will bring benefits in that respect, for example locating all the basic contract rules in one place. Presently, it is necessary to know that each piece of legislation exists, some of which (for example, the Contracts Privity Act) have relatively narrow application.

⁴ http://www.lawsociety.org.nz/_data/assets/pdf_file/0007/82393/I-PCO-Statutes-Revision-Programme-25-8-14.pdf.

⁵ Law Commission *Contract Statutes Review: Report No 25*
<http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R25.pdf>.

⁶ In addition, the Law Commission made useful recommendations for reform in its Contract Statutes Review (Report No 25) published in 1993.

13. To gauge the extent of those benefits, it is useful to consider the position of users of the legislation covered by the draft Bill:
- a. Lawyers – revisions may provide greater clarity in some areas but given that a revision Act is not intended to change the effect of the law (unless the revision Act expressly provides otherwise),⁷ even after passage of the draft Bill lawyers will need to consult the previous legislation and case law. As noted below, this may increase the cost of providing legal advice.
 - b. Commercial parties – using modernised language will assist commercial parties. However, there is likely to be an initial period of uncertainty and the need to update standard form contracts (see below).
 - c. Consumers – will be assisted by using modernised language.
14. Transactional and other costs associated with the draft Bill include:
- a. Redrafting costs – the statutes revised by the draft Bill are referred to in many standard form commercial contracts. These standard form contracts will need to be updated to refer to the provisions of the draft Bill. Many commercial parties will instruct lawyers to undertake this updating or seek legal advice in relation to it. Those costs are likely to be passed onto consumers.
 - b. Legal advice costs – at least in the short term, the draft Bill is likely to increase the cost of providing legal advice in relation to matters governed by the draft Bill. These costs are also likely to be ultimately passed onto consumers. The costs of providing legal advice may be higher for at least two reasons:
 - i. Commercial lawyers are familiar with many of the existing statutes revised by the draft Bill. Providing advice after the passage of the draft Bill will, in many cases, take longer because lawyers will be advising on a new and unfamiliar Act. In particular, it will be necessary to check whether each provision was intended to effect a change to the law (either as permitted by s 31(2)(i) or (j) of the Legislation Act or because of an amendment to the draft Bill made by the House of Representatives after the introduction of the draft Bill in accordance with s 34(2) of the Legislation Act).⁸
 - ii. As already noted, a revision Act is to be interpreted in light of the fact that it is not intended to change the effect of the law (unless the revision Act expressly provides otherwise).⁹ As a result, those interpreting the draft Bill will be required to consider not only the language of the draft Bill, but also the earlier legislation and the case law associated with that legislation.
 - c. Litigation costs – as a result of the revision there are likely to be arguments that a revision has in fact changed the law. Given section 35 of the Legislation Act, in most cases it seems likely that such arguments will not succeed. However, that will not stop some parties from pursuing such arguments, for example in order to extract a settlement. In addition,

⁷ Legislation Act 2012, s 35.

⁸ As an example, if one has been accustomed to referring to sections 8, 9, 14 and 15 of the Carriage of Goods Act 1979, it will take additional time when it becomes necessary to check sections 246 to 260, and 262 of the draft Bill, even if the new provisions are still presented as a single Act. This is exacerbated by changes in sequence of well understood and fully functional provisions. The rationale for the changes is not obvious.

⁹ Legislation Act 2012, s 35.

there may be cases where it is difficult to reconcile the new statutory language and the courts will be required to grapple with the extent to which section 35 requires the courts to adopt an unchanged meaning.

- d. Unintended consequences – in any reform project where established statutory language with well-settled case law is changed, there is the risk of making unintended changes to the law. The Law Society supports the certification process to minimise the scope for such unintended changes. However, the nature of unintended consequences is that they often only come to light when an actual dispute arises. Where such cases do arise, the effect of the draft Bill may be to decrease access and clarity because although the legislation may appear to mean one thing, a different interpretation may be required in light of the earlier statutory language and case law.
 - e. Reform opportunity costs – there are limited law reform resources (in the way of departmental time to conduct the necessary policy work and limited House time to progress Bills), and there may be an opportunity cost associated with promoting the draft Bill. The Law Society would be concerned if promotion and passage of the draft Bill means that other needed law reform in the contract and commercial law areas is delayed or not pursued. If a choice has to be made between revision (in the form of the draft Bill) or more substantive reform to address substantive issues, the Law Society favours prioritisation of substantive reform.
15. These costs justify undertaking the substantive reform that has been identified as necessary at the same time as the revision work – namely, one of the alternative options outlined at paragraph 11 above: reform using an ordinary Bill, or an ordinary Bill in concert with a revision Bill.

Structure of the draft Bill

16. In some cases the structure employed in the draft Bill will in practice reduce rather than improve access to and clarity of the law. For example, when users are addressing an issue concerning an illegal contract, they will need to look primarily at Part 2, subpart 5 headed “Illegal contracts”. A user (particularly a lay user) might reasonably assume that this is the only relevant part of the draft Bill. But that is not the case. For example, although Part 2, subpart 5 contains two sections defining terms used in the subpart (ss 70 and 71), there are defined terms that are used in Part 2, subpart 5 but defined in other parts of the draft Bill. The phrase “disposition of property” is an example. It is used in section 74 (which is part of Part 2, subpart 5). In order to ascertain the meaning of that phrase, the user will need to consult section 9 (which is not part of subpart 5) where the word “disposition” is defined and also section 70 (which is part of subpart 5) where the word “property” is defined. The Law Society submits that this creates unnecessary complexity, reduces access to and clarity of the law, and increases the risk of errors.
17. The Sale of Goods Act 1908 and the Carriage of Goods Act 1979 are important statutes which relate to a specific category of contracts. The Law Society recommends that for accessibility, clarity and ease of use, the Sale of Goods Act 1908 and the Carriage of Goods Act 1979 not be bundled together with each other or with the contract statutes which deal with basic contractual rules of a generic nature, into a single statute. It suggests an approach similar to that used in the Consumer Law Reform Bill, whereby at the final Committee of the Whole House stage the relevant parts (e.g. Fair Trading Act reforms, Consumer Guarantees Act reforms) were divided into separate bills. Even though this would mean repetition of some definitions in

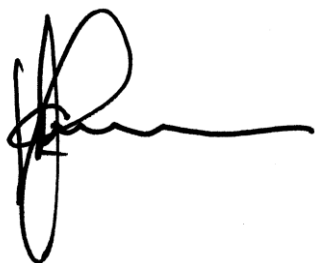
interpretation sections, it would preserve the focus of the existing statutes, and enable the clarity of internal cross-referencing to continue.

Other statutes not included in the draft Bill

18. The title of the draft Bill, "Contract and Commercial Law Bill", suggests the Bill will cover all contract and commercial law. That is not the case. For example, the Fair Trading Act 1986 and the Personal Property Securities Act 1999 apply only in commercial situations. Consumer law statutes such as the Consumer Guarantees Act 1993 and the Credit Contracts and Consumer Finance Act 2003 are also an integral part of commercial law: for every consumer transaction, there is a commercial party on the other side.
19. Other obvious omissions are the Auctioneers Act 2013, the Secondhand Dealers and Pawnbrokers Act 2004 and the Wages Protection and Contractors' Liens Act Repeal Act 1987 (which gives repairers the right to retain possession of goods on which they have carried out work until they are paid, in the absence of a contractual right).

This submission was prepared by the Law Society's Commercial and Business Law Committee. The Law Society would be happy to discuss the issues raised with officials. If that would be of assistance, the committee convenor, Rebecca Sellers, can be contacted through the committee secretary Karen Yates on 04 463 2962, karen.yates@lawsociety.org.nz.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Chris Moore', with a long horizontal line extending to the right.

Chris Moore
President