

22 April 2016

Attorney-General

Contract and Commercial Law Bill
Consistency with the New Zealand Bill of Rights Act 1990
Our Ref: ATT395/251

1. The Crown Law Office and the Ministry of Justice have reviewed the above Bill for consistency with the New Zealand Bill of Rights Act 1990 (the **Bill of Rights Act**). We advise that the Bill appears to be consistent with the Bill of Rights Act.

Background

2. The Contract and Commercial Law Bill is a revision Bill, prepared under subpart 3 of Part 2 of the Legislation Act 2012. The Bill will re-enact, in an up-to-date and accessible form, 11 Acts or parts of Acts. The Acts that will be re-enacted, in whole or in part, are:
 - 2.1 the Carriage of Goods Act 1979;
 - 2.2 the Contracts (Privity) Act 1982;
 - 2.3 the Contractual Mistakes Act 1977;
 - 2.4 the Contractual Remedies Act 1979;
 - 2.5 the Electronic Transactions Act 2002;
 - 2.6 the Frustrated Contracts Act 1944;
 - 2.7 the Illegal Contracts Act 1970;
 - 2.8 the Mercantile Law Act 1908 (other than Part 5);
 - 2.9 the Minors' Contracts Act 1969;

- 2.10 the Sale of Goods Act 1908; and
- 2.11 the Sale of Goods (United Nations Convention) Act 1994.
- 3. The revision power is contained in s 31 of the Legislation Act 2012. Pursuant to that section, a revision Bill may (among other things):
 - 3.1 revise the whole or part of 1 or more Acts, and for that purpose combine or divide Acts or parts of Acts;
 - 3.2 omit redundant and spent provisions;
 - 3.3 renumber and rearrange provisions from the Acts or parts of Acts revised;
 - 3.4 make changes in language, format, and punctuation to achieve a clear, consistent, gender-neutral, and modern style of expression, to achieve consistency with current drafting style and format, and generally to express better the spirit and meaning of the law;
 - 3.5 include new or additional purpose provisions, outline or overview provisions, examples, diagrams, graphics, flowcharts, readers' notes, lists of defined terms, and other similar devices to aid accessibility and readability;
 - 3.6 correct typographical, punctuation, and grammatical errors, and other similar errors;
 - 3.7 make minor amendments to clarify Parliament's intent, or reconcile inconsistencies between provisions;
 - 3.8 make consequential amendments to other enactments; and
 - 3.9 include any necessary repeals, savings, and transitional provisions.
- 4. A revision Bill must not, however, change the effect of the law, except as authorised by s 31(2)(i) or (j) (minor amendments to clarify Parliament's intent or reconcile inconsistencies, or to update any monetary amount). Accordingly, the Bill does not make any substantive policy changes.
- 5. The Bill will be certified in accordance with s 33 of the Legislation Act 2012 before it is introduced.

Part reviewed by the Crown Law Office

- 6. Crown Law has reviewed Part 2 of the Bill for consistency with the Bill of Rights Act. That part re-enacts Acts relating to contracts, which are administered by the Ministry of Justice. In particular:
 - 6.1 the Contracts (Privity) Act 1982;
 - 6.2 the Contractual Mistakes Act 1977;
 - 6.3 the Contractual Remedies Act 1979;

- 6.4 the Frustrated Contracts Act 1944;
- 6.5 the Illegal Contracts Act 1970; and
- 6.6 the Minors' Contracts Act 1969.

Whether s 17 at issue

- 7. We have considered whether any of the provisions in Part 2 of the Bill infringe the right to freedom of association. We have concluded that they do not. In *Turners & Growers v Zespri Group* (2010) 9 HRNZ 365, the Court noted that:

...when two people enter into a contract for the sale and purchase of an item, they may be described as “associating” with each other for the purpose of the contract, but they would not be considered to have an “association”, or at least one deserving of protection, under the Bill of Rights Act.

Whether s 19 at issue

- 8. Section 19(1) of the Bill of Rights Act affirms the right to be free from discrimination on the grounds of discrimination in the Human Rights Act 1993. The grounds of discrimination are contained in s 21 of the Human Rights Act and include discrimination based on age (commencing with the age of 16 years old).
- 9. The key questions in assessing whether there is a limit on the right to be free from discrimination are:
 - 9.1 whether the legislation provides for differential treatment or effects between persons in comparable situations on the basis of a prohibited ground of discrimination; and
 - 9.2 whether that treatment imposes a material disadvantage on the person differentiated against.¹
- 10. The authorities make clear that a broad and purposive approach is to be adopted.² Once a distinction on a prohibited ground is identified, the question of whether a disadvantage arises is a factual one.³
- 11. Clause 86 of the Bill (which re-enacts s 6(1) of the Minors' Contracts Act 1969) provides that every contract entered into by a minor is unenforceable against the minor but otherwise has effect as if the minor was of full age. “Minor” is defined in cl 85 of the Bill as being a person who is under the age of 18 years. Clause 98 (which re-enacts s 9(1) of the Minors' Contracts Act 1969) provides that contracts entered into by minors have the effect as if the minor was of full age if, before the contract was entered into by the minor, it is approved by a District Court.

¹ *Ministry of Health v Atkinson & Ors* [2012] NZCA 184; [2012] 3 NZLR 456 at [109].

² *Ministry of Health v Atkinson & Ors* [2012] NZCA 184; [2012] 3 NZLR 456 at [108].

³ See, e.g., *McAlister v Air New Zealand* [2009] NZSC 78 at [40] per Elias CJ, Blanchard and Wilson JJ.

12. Clause 86 draws a distinction between 16 and 17 year olds and those over the age of 18. It creates a disadvantage for those seeking to contract with a 16 or 17 year old as such a contract will not be enforceable against the minor without applying to the District Court (either for prior approval of the contract, or for an order that the contract was fair and reasonable at the time it was entered into under cl 87), increasing the costs of contracting with minors.⁴ It also creates a disadvantage for 16 and 17 year olds, who might find it more difficult to find parties willing to enter into contracts with them. The provision, therefore, gives rise to a limit on the right to be free from discrimination on the basis of age.
13. We have considered whether this limitation is justifiable under s 5 of the Bill of Rights Act. This inquiry may be summarised as:
 - 13.1 does the limiting measure serve a purpose sufficiently important to justify curtailing the right?
 - 13.2 if so:
 - 13.2.1 is the limiting measure rationally connected with its purpose?
 - 13.2.2 does the limiting measure impair the right no more than is reasonably necessary for sufficient achievement of the objective?
 - 13.2.3 is the limit in due proportion to the importance of the objective?
14. Age restrictions necessarily involve a degree of generalisation using age as a proxy measure of maturity and capacity to act responsibly. This avoids the need to assess each individual's maturity and responsibility.
15. The purpose of the Minors' Contracts Act 1969, which is a code replacing the rules both at common law and equity relating to the contractual capacity of minors, has been described as "a uniquely New Zealand response to the age-old problem of preventing persons taking advantage of youthful inexperience without unduly interfering with the ordinary course of commerce and the rights of innocent adults".⁵
16. We consider the limit imposed by cl 86 of the Bill is justified on three grounds. First, as a former Attorney-General recognised, there is empirical evidence of the vulnerability of people around the ages of 16 and 17.⁶ The imposition of a requirement of judicial oversight of contracts entered into by minors, which may contain onerous terms or involve large sums of money, is rationally connected with the objective of protecting minors from being taken advantage of.
17. Second, a restriction on the capacity of 16 and 17 year olds to enter into enforceable contracts is consistent with other areas of the law in which the age of 18 is the age of

⁴ See, e.g., *Wine Country Credit Union v Rayner & Anor* HC Napier CIV 2007-441-416, 11 February 2008.

⁵ *In the matter of Songs Music Publishing LLC* DC Auckland CIV-2014-004-560, 29 May 2014 at [12] (citing *Morrow & Benjamin Ltd v Whittington* [1989] 3 NZLR 122).

⁶ Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Care of Children Bill.

competence, such as the purchase of alcohol under the Sale and Supply of Alcohol Act 2012, appointment as a director under the Companies Act 1993, and registration as an auctioneer under the Auctioneers Act 2013. The age of 18 is also the default age of the end of childhood under the UN Convention on the Rights of the Child, which requires states party to provide various protections to children.

18. Third, cl 86 does not prevent minors from entering into contracts, but only from having those contracts enforced against them without a review of the fairness to the minor of the contract by a court. We consider this to be a proportionate way of meeting the objective of subpart 6 of Part 2 of the Bill.

Review of this advice

19. In accordance with Crown Law's protocol, this part of the advice has been reviewed by Paul Rishworth QC, Senior Crown Counsel.

Parts reviewed by the Ministry of Justice

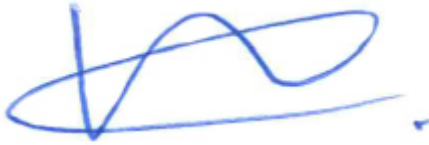
20. In accordance with current arrangements, the Ministry of Justice has considered the parts of the Bill which re-enact Acts that are not administered by the Ministry of Justice for consistency with the Bill of Rights Act. Those parts are:
 - 20.1 Part 3 (re-enacting the Sale of Goods Act 1908 the Sale of Goods (United Nations Convention) Act 1994);
 - 20.2 Part 4 (re-enacting the Electronic Transactions Act 2002); and
 - 20.3 Part 5 (re-enacting the Carriage of Goods Act 1979 and Parts 1-4 of the Mercantile Law Act 1908).

Section 14 – Freedom of expression

21. Section 14 of the Bill of Rights Act affirms the right to freedom of expression, which includes the freedom to seek, receive, and impart information and opinions of any kind and in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.⁷
22. Parts 4 and 5 of the Bill contain a number of provisions which arguably compel people to provide certain information and/or constrain how information may be presented. We have concluded that these provisions engage section 14 of the Bill of Rights Act. However, we consider the limits they place on the right to freedom of

⁷ RJR MacDonald v Attorney-General of Canada (1995) 127 D.L.R. (4th) 1.

expression to be minimal and readily justified under section 5 of the Bill of Rights Act.



Vicki McCall
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Noted



Hon Christopher Finlayson
Attorney-General
24 / 04 / 2016