

15 March 2017

Hon Christopher Finlayson QC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Arbitration Amendment Bill

Purpose

1. We have considered whether the Arbitration Amendment Bill ('the Bill'), a members' Bill in the name of Paul Foster-Bell MP, is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression). Our analysis is set out below.

The Bill

3. The Bill amends the Arbitration Act 1996 ('the Act'). The objectives of the Bill are as follows:
 - a. to ensure arbitration clauses in trust deeds are given effect
 - b. to extend the presumption of confidentiality in related court proceedings under the Act
 - c. to clearly define the ground for setting aside an arbitral award and bring New Zealand's approach into line with foreign arbitration legislation, and
 - d. to confirm the consequence of failing to raise a timely objection to an arbitral tribunal's jurisdiction.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

4. Section 14 of the Bill of Rights Act affirms the right to freedom of expression. This includes the freedom to seek, receive, and impart information and opinions of any kind in any form. The Court of Appeal has held that the principle of open justice is affirmed by s 14. The basis of the principle is the right of the community at large to an open and transparent justice system.¹
5. Currently, s 14F of the Act provides that court proceedings under the Act must be conducted in public except in certain circumstances. Clause 5 of the Bill repeals this and replaces s 14F.

¹ *Lewis v Wilson & Horton* [2000] 3 NZLR 250.

6. The proposed s 14F places restrictions on the reporting of proceedings heard otherwise than in open court. It requires the court, upon application by any party, to make a direction as to what information relating to the proceedings may be published. A court must make directions permitting information to be published if all parties agree and the court is satisfied that the information if published would not reveal any matter a party reasonably wishes to remain confidential, or if the court considers that a judgment is of major legal interest. Subclause (3) provides that if a party reasonably wishes to conceal any matter in published reports, the court must make a direction as to the action to be taken to conceal that matter in those reports and may direct that the report not be published until after the end of a period specified by the court. In this way the proposed s 14F may be seen to place a limitation on the principle of open justice and therefore on freedom of expression.
7. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of s 5 of that Act.
8. We consider that the limitation is justified under s 5 of the Bill of Rights Act because:
 - a. the objectives of preserving the confidentiality of arbitral proceedings and bringing New Zealand's approach into line with foreign arbitration legislation is sufficiently important
 - b. requiring the court to make directions about what information may be published is rationally connected to that objective
 - c. the above clause only allows information that a party reasonably wishes to remain confidential to be concealed so impairs this right no more than is reasonably necessary, and
 - d. given the importance of confidentiality to the use of arbitration to resolve disputes and that any concealment is only made by judicial decision after consideration of the individual facts, the limits are in due proportion to the importance of the objective.
9. For these reasons, we conclude that any limits to the freedom of expression imposed by the Bill are justified under s 5 of the Bill of Rights Act.

Conclusion

10. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

Jeff Orr
Chief Legal Counsel
Office of Legal Counsel