Arbitration Amendment Bill

12 June 2006

Attorney-General

LEGAL ADVICE
CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
Arbitration Amendment Bill
Our Ref: ATT395/3

1. We have considered the Arbitration Amendment Bill 2006 (PCO 4666/17) and conclude that it is not inconsistent with the New Zealand Bill of Rights Act 1990 (BORA). We understand that the Bill is to be considered by the Cabinet Legislation Committee at its meeting on 15 June 2006.

General comments

2. The Bill amends the Arbitration Act 1996 in a number of respects including:

2.1 Modifying the rules as to the confidentiality of information disclosed in the context of an arbitration;

2.2 Requiring that all arbitral proceedings be in private;

2.3 Requiring that court proceedings be conducted in public except in certain circumstances.

3. The purpose of the Bill is to give effect to a number of recommendations of the Law Commission contained in its report improving the Arbitration Act 1996 (Report 83, February 2003). The Bill raises a number of issues regarding the right to freedom of expression contained in s 14 of BORA.

Confidentiality of information

4. At present the Arbitration Act contains a rule relating to confidentiality of information. This was essentially in response to a finding of the High Court of Australia in *Esso Australian Resources Limited v Ploughman* (1995) 128 ALR 391 where the High Court declined to follow the decision of the English Court of Appeal in *Dolling-Baker v Merrett* [1991] 2 All ER 890 and held the confidentiality was not an essential attribute of arbitration. As a consequence of *Esso* the Select Committee, in considering the Bill that led to the 1996 New Zealand Act, recommended the insertion of the present s 14, which implies a term as to confidentiality with limited exceptions into arbitration agreements.

5. However the Law Commission considers that the exceptions in s 14 of the Arbitration Act contain a number of flaws. Firstly, they seem insufficiently wide to deal with many every day

situations where disclosure may be necessary. Arguably, they do not even recognise exceptions that have been developed in England under the common law. Secondly, it is arguable that no statutory implied term can ever set out exhaustively all of the exceptions that may arise and that these need to be determined on a case by case basis.

6. Accordingly, the proposed s 14 provides a number of automatic exceptions to the rule and enables a party to apply to the arbitral tribunal for an order enabling the disclosure of confidential information (an automatic right of appeal to the High Court is provided for where an order is declined).

7. Specifically, proposed s 14E(2) enables the High Court to make an order only if –

(a) It is satisfied, in the circumstances of the particular case, that the public interest in preserving the confidentiality of arbitral proceedings is outweighed by other considerations that render it desirable in the public interest for the confidential information to be disclosed; and

(b) The disclosure is no more than what is reasonably required to serve the other considerations referred to in paragraph (a).

8. The rule prohibiting disclosure amounts to a prima facie breach of the right to freedom of expression protected by s 14 of the Bill of Rights Act.

9. While parties must agree to engage in the arbitration process and therefore to be bound by the implied confidentiality term, that agreement is made at a time when it is not possible for the parties to know exactly what information will be disclosed in the course of the arbitration. Accordingly, we do not think that consent alone can justify the prima facie infringement of the right.

10. However we consider that the limitation on expression can be justified having regard to the policy reasons for prohibiting disclosure (as identified in the Law Commision Report) and to the broadly worded safeguard contained in the proposed section 14E. This provides a discretion, exercisable on a case-by-case basis, that would need to be exercised in BORA consistent manner. For this reason we are of the view that the proposed provisions relating to confidentiality of arbitral proceedings constitute a justified limitation on the right to freedom of expression in s 14 of the BORA.

Arbitrations in private

11. Similarly, the proposed s 14A raises an issue of consistency with s 14 of BORA as it provides that arbitral proceedings must be conducted in private.

12. The Court of Appeal in *Lewis v Wilson & Horton* [2000] 3 NZLR 250 held that the principle of open justice was affirmed by s 14 of the BORA. The basis of the principle is the right of the community at large to an open and transparent justice system (as opposed to being a right of the parties).

13. In its analysis of this issue, the Law Commission took into account the following factors:

13.1 In passing the Arbitration Act 1996, Parliament expressly decided to encourage arbitration as an agreed method of resolving commercial and other disputes. It is this statutory encouragement of a forum for dispute resolution which embraces the principle of confidentiality that can properly distinguish arbitral proceedings from other civil proceedings heard in the courts.

13.2 In enacting s 14 of the Act in its current form Parliament responded swiftly to a perceived need to protect the confidentiality of arbitral proceedings which had been put in issue as a result of the decision of the High Court of Australia in *Esso*.

13.3 The view expressed by Lord Cooke of Thorndon that:

"Far from undermining public policy, the parties to a commercial dispute could be seen to be further in the public interest by selecting and meeting the cost of their own dispute resolution machinery, rather than resorting to facilities provided and subsidised by the State. Certainly the arbitration might well not provide a publicly accessible contribution to jurisprudence; but there was no reason why parties freely contracting should be obliged by public policy to make a compulsory contribution to the worthy cause of the coherent evolution of commercial law." (Lord Cooke of Thorndon "Party Autonomy" (1999) 30 VUWLR 257, at 264.)

14. We note also that while proceedings before an arbitral tribunal must be held in private, the Bill provides that the default position with respect to Court proceedings under the Arbitration Act (such as applications to enforce an arbitral award) will be that such proceedings will be conducted in public, except in certain circumstances (proposed s 14F).

15. For these reasons we conclude that the provision for arbitral proceedings to be conducted in private also constitutes a justified limitation on the right to freedom of expression in s 14 of BORA.

Yours faithfully

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