

Business Law Reform Bill

12 June 2006

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: BUSINESS LAW REFORM BILL

1. We have considered whether the Business Law Reform Bill (PCO 6852/12) (the "Bill") is consistent with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). We understand that the Bill is likely to be considered by the Cabinet Legislation Committee at its meeting on 15 June 2006.
2. Our view is that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching this conclusion, we considered potential issues of inconsistency with sections 14 and 19(1) of that Act.

PURPOSE

1. The Bill amends five business law statutes in order to clarify and update certain provisions to give effect to the intended purpose of the provisions; remove unnecessary compliance costs; and remove conflicts within and between legislation. The five statutes amended are the:
 - Companies Act 1993;
 - Dumping and Countervailing Duties Act 1988;
 - Financial Reporting Act 1993;
 - Friendly Societies and Credit Unions Act 1982; and
 - Insurance Companies' Deposits Act 1953.
4. We discuss three provisions of the Bill (amending the Companies Act and the Friendly Societies and Credit Unions Act) in greater detail below.

SUMMARY OF THE BILL OF RIGHTS ACT ISSUES

5. The Bill, amongst other matters, requires companies to inform shareholders about alternative methods for receiving a copy of the annual report and to supply a copy of that report upon request. If a company fails to satisfy this requirement, every director is liable to a fine. This clause gives rise to an issue under section 14 of the Bill of Rights Act (freedom of expression). In our view, however, this provision appears to be justified in terms of section 5 of the Bill of Rights Act.
6. The Bill retains the obligation for "large companies" with 25% or more overseas ownership to file audited financial statements with the Registrar of Companies. This obligation does not

exist for "large companies" which are New Zealand owned. We have therefore considered whether this clause gives rise to an issue under section 19(1) of the Bill of Rights Act with the right to be free from discrimination on the ground of national origin. Although it creates a disadvantageous distinction between overseas owned companies and New Zealand owned companies, we consider that this is a justified limitation on the right to be free from discrimination.

7. Two clauses of the Bill propose to amend sections in the Friendly Societies and Credit Unions Act 1982 that refer to being an 'adult'. 'Adult' is defined in that Act to mean a person who is at least 20 years old. Although the clauses impact the membership of credit unions by persons who are younger than 20 years, we consider that the provision does not limit the right to be free from discrimination. The possibility of disadvantage to young people is remote and they may still join and participate in credit unions. In any case we do not consider the provisions are without justification.

SECTION 14: FREEDOM OF EXPRESSION

8. Section 14 of the Bill of Rights Act provides:

"Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind and in any form".

9. The right to freedom of expression in section 14 extends to all forms of communication that attempt to express an idea or meaning.^[1] The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.^[2]
10. Clause 8 of the Bill repeals and replaces section 209 of the Companies Act 1993 (sending annual reports to shareholders). New section 209 retains the requirement that companies send an annual report to shareholders. However, the company may instead send a notice to shareholders stating that they have a right to receive a copy of the annual report, free of charge and by electronic means, and whether the company has prepared a concise (summary) annual report. New section 209A requires annual reports to be sent to shareholders on request and new section 209B requires annual reports to be made available by electronic means. If a company fails to comply with any of these new sections, every director commits an offence and is liable on conviction to a fine not exceeding \$10,000.
11. Clause 8 raises an issue under section 14 of the Bill of Rights Act because it requires companies to make certain statements. In this case, the threat of a penalty introduces a clear element of compulsion.
12. Where a potential inconsistency exists, a provision may nevertheless be consistent with the Bill of Rights Act if it is considered to be a reasonable limit that is justifiable in terms of section 5 of that Act.^[3]
13. On balance, we consider the limitation contained in clause 8 to be a justifiable limitation on section 14 of the Bill of Rights Act. In reaching this conclusion we have taken particular account of the right to receive information, which is included within the right to freedom of expression. The limitation on the right of the company needs to be balanced against the right of shareholders to be fully informed about the state of the company in which they hold shares. We also note that the information that must be provided to shareholders is limited

to factual information about the company. It does not compel individuals to state an opinion or say something that they do not believe to be true.

14. It might also be worth noting that clause 8 does not alter the existing obligation of companies to provide annual reports to shareholders. The purpose of this provision is to provide companies with alternative methods of meeting that obligation because the current requirement to provide hard copies can impose unnecessary compliance costs. Overall, the requirements imposed by the new sections are less onerous than those currently in the Act. The penalty level is identical to the existing penalty for failing to provide copies of the annual report.

SECTION 19(1): RIGHT TO BE FREE FROM DISCRIMINATION

15. Section 19(1) of the Bill of Rights Act provides the right to freedom from discrimination on the grounds set out in section 21 of the Human Rights Act 1993. The prohibited grounds for discrimination include:

- ethnic and national origin (which includes nationality or citizenship); and
- age (which means any age of 16 years old and over).

16. In our view, taking into account the various domestic and overseas judicial pronouncements as to the meaning of discrimination, the key questions in assessing whether discrimination under section 19(1) exists are:

i Does the legislation draw a distinction based on one of the prohibited grounds of discrimination?

ii Does the distinction involve disadvantage to one or more classes of individuals?

17. If these questions are answered in the affirmative, we consider that the legislation gives rise to an issue under section 19(1) of the Bill of Rights Act. As noted above, where this is the case, the legislation falls to be justified under section 5 of that Act.

Right to be free from discrimination on the basis of national origin

18. Clause 31 repeals and replaces section 19 of the Financial Reporting Act 1993 which requires companies with 25% or more overseas ownership to file audited financial statements with the Registrar of Companies. This requirement is no longer considered necessary for all companies and the Bill would retain the requirement to "large companies" only. The Bill includes a definition of a "large company" based on the total assets (including intangible assets), turn-over, and number of employees of the company and its subsidiaries.

19. This clause appears to raise an issue under section 19(1) of the Bill of Rights Act because it draws a distinction based on the overseas origin of the owners of the companies concerned. The distinction involves a more extensive reporting regime, and therefore a disadvantage, for these large overseas-owned companies. Accordingly, the provision falls to be justified under section 5 of the Bill of Rights Act.

20. The different treatment of large companies is retained because these companies have a significant effect on the New Zealand economy. The provision is intended to protect New Zealand interests which could be supplanted by the broader interests of the company. This can be considered a significant and important objective.
21. The additional reporting requirements are intended protect New Zealand interests by making larger companies more accountable under New Zealand law. Accordingly, the reporting requirements appear to be rationally connected to the objective.
22. For this reason, to the extent an issue is raised under section 19(1), we have concluded that the Bill appears to be justifiable in terms of section 5 of the Bill of Rights Act.

Right to be free from discrimination on the basis of age

23. Clause 44 of the Bill proposes to amend section 100(a) of the Friendly Societies and Credit Unions Act 1982, which sets out the criteria for registration as a credit union. In order to register as a credit union, a society must have at least 21 members who are either adults, charitable entities as defined by the Charities Act 2005, or incorporated societies registered under the Incorporated Societies Act 1908. Clause 46 of the Bill amends section 104(1)(b) of the Act, which requires an application to register as credit union to be signed by 21 members who are adults, charitable entities or incorporated societies. The Bill retains the definition of "adult" used in section 2 of the Act, to mean a person who is at least 20 years old.
24. The effect of clauses 44 and 46 is to prevent individuals who are less than 20 years old from contributing to its qualifications to form a credit union or from signing an application to register as a credit union. This is clearly drawing a distinction on the basis of age; however, it is not clear that the distinction creates a disadvantage for any particular class.
25. Although individuals under 20 years old are treated differently, the possibility of real disadvantage is remote. In practice it is unlikely that a credit union with more than 21 members would be prevented from registration for a lack of qualifying members. Individuals under the age of 20 would still be able to be members as long as there are 21 members who are 20 years or older (or are charitable entities or incorporated societies). Members under 20 years old are still entitled to take part in the decision-making on registration as a credit union and they can profit from it. Also, in the event that a credit union is prevented from registering, the disadvantage will affect all the members of the society, not just those below the age of 20.
26. Even if persons under 20 were to suffer disadvantage (giving rise to a *prima facie* issue of discrimination), we do not consider that these provisions are unjustified in terms section 5 of the Bill of Rights Act. The operation of a credit union, which involves large sums of money also belonging to other people, is such that a level of financial maturity amongst its membership is very important. Setting a threshold for registration based on a minimum age provides a level of financial stability. People under the age of 20 are able to participate, provided there are a minimum number of adults involved to ensure the financial security of the operation.
27. We therefore consider that the proposed amendments in clauses 44 and 46 of the Bill do not raise an issue of discrimination based on the ground of age as affirmed in section 19(1) of the Bill of Rights Act.

CONCLUSION

28. Overall, we have formed the view that the Business Law Reform Bill appears to be consistent with the Bill of Rights Act.

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Footnotes

1 *R v Keegstra* [1990] 3 SCR 697,729,826

2 *RJR MacDonald v Attorney-General of Canada* (1995) 127 DLR (4th)1

3 In applying section 5, the Ministry of Justice has regard to the guidelines set out by the Court of Appeal in *Ministry of Transport (MOT) v Noort* [1993] 3 NZLR 260 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9; and *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754 and Supreme Court of Canada's decision in *R v Oakes* (1986) 26 DLR (4th)

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