TO: PARLIAMENTARY COUNSEL OFFICE AND MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT

ON: THE CONTRACT AND COMMERCIAL LAW BILL

7 DECEMBER 2015

INTRODUCTION

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ABOUT CHAPMAN TRIPP

3 Chapman Tripp is a national full service firm with a large corporate and commercial contracts practice. We regularly act for and advise domestic and international clients on various aspects of contract and commercial law.

The matters covered by the Bill are of direct interest to us as legal practitioners in this field, and to our clients.

OUR RESPONSE

4 The Parliamentary Counsel Office (*PCO*) and the Ministry of Business, Innovation and Employment (*MBIE*) have requested submissions on the exposure draft of the Contract and Commercial Law Bill (*the Bill*). This submission responds to that request.

5 We set out below our answers to the specific questions asked in the Bill Exposure Draft Questionnaire document (*the questionnaire*). To begin, we also make several high level comments in response to the Bill generally.

Question 1: are the proposed changes minor amendments?

6 The proposed changes listed in Schedule 2 of the Bill amount to "*minor amendments*" in terms of section 31(2)(i) of the Legislation Act 2012.

Question 2: is there any reason not to make those minor amendments?

7 No.

Question 3: should any other minor amendments be made?

8 **Schedule A** to this submission raises a number of additional possible minor amendments for consideration.

Question 4: are there any other changes that should be made to improve the bill?

9 **Schedule B** to this submission recommends changes to a number of specific clauses in the Bill.

10 More generally, if the Bill consolidates a number of Acts into one, a change is required to avoid the risk the Bill may be read as a whole. (Our response to question 11 is pre-emptive in that respect.) It is a common interpretive technique to consider the scheme of a statute as a whole. In deciding between competing interpretations, a reader should prefer the meaning consistent with other provisions or the scheme of the Act as a whole. Obviously the constituent Acts have not been drafted with that approach in mind, so this approach to interpretation may produce unintended results.

11 The risk could be addressed by requiring each Sub-Part of the Bill to be read independently from the others, unless otherwise expressly provided. That is, each Sub-Part should be read in its own context, and not in the context of the Bill as a whole.

Question 5: would accessibility and readability be aided if more legislative examples were given?

12 As a general proposition "*it depends*", but broadly-speaking:

- well drafted examples in technical areas can help illustrate the scheme of a provision in its application;
- excessive (see, for example, s 26(2)(f) of the Legislation Act 2012, which doesn't add anything to the plain words of the provision) or poorly drafted examples detract from readability and accessibility by lengthening legislation or clouding its meaning;
- examples may distract from other possible applications of the relevant provision – potentially a particular problem for lay-people unaware of the relevant rules of statutory interpretation (for example s 5(3) of the Interpretation Act 1999); and
- examples may become redundant over time.

13 Overall, examples should be used sparingly, and only where there is a clear benefit. Competent drafting practices should reduce the need for examples, and the perceived need for an example may signal that the substantive provision should be revisited.

Question 6: do parts 1, 4 and 5 of the Mercantile Law Act bind the Crown?

14 Parts 1, 4 and 5 of the Mercantile Law Act do not bind the Crown. There is no necessary implication from the provisions of Parts 1, 4 and 5 these Parts bind the Crown. Although the Crown could theoretically be involved in activity covered by the Act, the purpose of the Act will not be frustrated if the Crown is not bound. Furthermore, there are no provisions in Parts 1, 4 and 5 that will not make sense if the Crown is not bound.

15 This is reinforced by the express provision Part 2 of the Act does bind the Crown.[1] As the consultation paper notes, in *Province of Bombay* the Privy Council advised "*if it be the intention of the legislature that the Crown shall be bound, nothing is easier than to say so in plain words*".[2] That comment resonates here, given Parliament's contrasting silence as to Parts 1, 4 and 5 when enacting Schedule 1 of the Crown Proceedings Act 1950.

16 The principle of statutory interpretation "*expressio unius est exclusio alterius*" (that to express one thing is to exclude another) is apt in this context. *Bennion on Statutory Interpretation* agrees where it says that if an Act expressly states some of its provisions bind the Crown, but is silent as to others, it may be appropriate to infer that the latter were not intended to bind the Crown.[3]

Question 7: should parts 1, 4 and 5 of the Mercantile Law Act bind the Crown?

17 Parts 1, 4 and 5 of the Mercantile Law Act should bind the Crown. The Legislation and Advisory Committee Guidelines 2014 note "*legislation ought to bind the Crown unless good reasons exist for it not to do so*".[4] There is no good reason why the whole of the Mercantile Law Act should not bind the Crown. The Act essentially regulates commercial activity, and the Crown has no special responsibilities in that respect justifying different rules.

18 However, as Parts 1, 4 and 5 do not bind the Crown, providing for such application would clearly not be a minor amendment, for two reasons:

- such an amendment would be contrary to, not "*clarify*", Parliament's original intent; and
- there may be significant unanticipated consequences, particularly if the amendment effected substantive change to legal relationships between the Crown and other parties.

1 Crown Proceedings Act 1950, Schedule 1.
2 *Province of Bombay v Municipal Corporation of Bombay* [1947] AC 58 (PC) at 63.
3 Oliver Jones *Bennion on Statutory Interpretation* (6th ed, LexisNexis, London, 2013) at 182.
4 Legislation Design and Advisory Committee *LAC Guidelines on Process and Content of Legislation: 2014 edition* (October 2014) at 39-40.

Question 8: should part 5 of the Mercantile Law Act be revised, reformed or repealed?

19 Bonded and free warehouses are no longer aspects of modern commercial practice. The provisions in Part 5 of the Mercantile Law Act are out of date. Possibly the provisions could be "*revised*" by omitting them from the Bill as "*redundant and spent provisions*" for the purposes of s 31(2)(c) of the Legislation Act 2012. If that is considered outside the revision powers, then we see no point in otherwise revising Part 5, which should instead be repealed as part of later substantive reform. Further, any revision other than omission could mislead as to Part 5's ongoing relevance.

Question 9: how should the bill approach transitional arrangements?

20 The new Act should apply prospectively only. That is for the following reasons:

- many existing contracts and other legal documents reference provisions in the existing Acts. Some documents also adopt statutory language. The uninitiated may not readily appreciate the source of the original drafting;
- there will be significant transaction costs involved in updating legal documents adopting or referring to statutory provisions;
- an unintentional change to the substantive law could potentially disadvantage a party to a contract. That party may then be unable to renegotiate the terms of their contract without incurring transaction costs and also losses associated with having a lesser bargaining position. A prospective transitional approach eliminates this risk;
- prospective application would increase certainty for parties; and
- delayed and prospective commencement of any new Act would allow practitioners time to update precedents.

21 As to the arguments for retrospective application raised:

- the commercial environment is vastly more complex than in 1908, when a retrospective transitional approach was taken in respect of some statutes in the last revision and consolidation exercise. The costs of transition will have increased correspondingly given the sheer number of transactions and documents affected; and

- a blanket retrospective transitional approach was not taken even in 1908. This suggests each Act consolidated in the current Bill, or even particular provisions, should be individually assessed as to its suitability for a retrospective transitional approach – although we recognise that approach would increase complexity.

Question 10: other issues in the statutes that may need reform

22 **Schedule C** to this submission identifies a number of provisions additional to those identified in Part 4 of the Explanatory Material that may benefit from reform.

Question 11: other comments

23 We applaud the effort to update and modernise the drafting of the core commercial and contract legislation. However, consolidating these statutes into a single Act should be deferred until after substantive review of the Acts. For now the Bill should be limited to amending the existing Acts to address the drafting issues in relation to each provision.

Amending the Acts without addressing issues requiring substantive reform seems a missed opportunity. Such review should precede consolidation of the Acts, as allowing a proper opportunity to consider how the Acts fit together.

If that reform process is to occur, it seems impractical and premature to consolidate the Acts. Updating precedent documents and – if the new Act has retrospective application – updating legally binding documents will impose significant transactional costs which would be reduced if the Acts are maintained as discrete pieces of legislation.

SCHEDULE A: FURTHER MINOR AMENDMENTS (QUESTION 3)

Carriage of Goods Act 1979[5]	s 11(3)	Section 11(3) should be clarified (if appropriate) to confirm whether an actual carrier is able to exercise the rights conferred on the contracting carrier by s 10 against any other actual carrier.
	s 19(4), (5)	*STL Linehaul Ltd v AB Equipment Ltd* HC Auckland CIV-2006-404-007292 held the claimed mistake of fact or law must appear to have some *reasonable* foundation and must provide a *reasonable* explanation for the failure to bring proceedings. The Bill should clarify the required objectivity of the mistake.
	s 19(4), (5)	It is not clear on the face of the section what period of delay the court must take into account when satisfying itself that the delay has not materially prejudiced the defendant in his or her defence, or otherwise. The court in *STL* held that it is only during the time period after the expiry of the time limit that awareness of a potential claim is relevant to the question of prejudice. The Bill should adopt this interpretation as clarifying Parliament's intent.
Contracts (Privity) Act 1982	s 4	We agree with the Law Commission's views[6] the provision should be amended to clarify Parliament's intent that a non-party may be able to exercise a right or benefit from one (for example, an immunity). Currently the provision may be read as if a non-party may only exercise – *i.e.*, enforce – a right conferred on them.
Contractual Remedies Act 1979	s 6	The new provision should clarify, consistently with authority,[7] the representation has to be made with (actual or constructive) intention to cause the representee to enter into the contract.
Electronic Transactions Act 2002	s 5	Dugan et al identify some ambiguity over the definition of "*electronic*"[8]. Their concern is that "*optical*" may extend the Act to information on paper. Clarification should be considered.

5 Our suggestions in relation to this legislation pick up on commentary in Thomas Gault (ed) *Gault on Commercial Law* (online looseleaf ed, Westlaw).
6 Law Commission *Contract Statutes Review* (NZLC R25, 1993), at 219.
7 As summarised in Burrows, Finn and Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at [11.2.4].
8 Benedict Dugan et al "Electronic Transactions Act 2002" [2004] NZLJ 258.

SCHEDULE B: IMPROVEMENTS TO/COMMENTS ON SPECIFIC PROVISIONS OF THE BILL (QUESTION 4)

cl 200	Omitting the relevant words of s 60(2) should be left until substantive reform of the Sale of Goods Act occurs. There is doubt as matters stand whether "*common law*" includes equity for the purposes of that provision, and omitting the relevant words may create further confusion.
cl 262	The example in clause 262(2)(a) of the Bill – "*for example, bacteria in fish fillets*" should be removed. The example adds nothing to the understanding of the section and may confuse the interpretation of an "*inherent defect in, or the nature of the goods*".
cl 262	Given industry usage, the expression "*vice*" should be retained, instead of substitution by "*defect*".
cl 273	The word "*duly*" should be deleted from cl 273(2)(a). In all other instances in this part of the Bill the word "*duly*" has been removed from the phrase "*duly tendered*".
cl 296	Omitting "*other consideration*" may unintentionally limit the scope of recovery (or give that impression), to the extent "*freight*" doesn't exhaust the consideration flowing to carrier.
cl 332	The meaning of "*holiday*" can be fraught (see, for example, *New Zealand Aluminium Smelters Ltd v Weller* [2014] NZEmpC 74; judgment currently reserved in CA313/14).[9] We accordingly support clarifying Parliament's intent as proposed.

9 Chapman Tripp acts for NZAS in this proceeding. There is a series of appellate judgments (*A and T Burt Ltd v Blair* [1938] NZLR 968, *Labour Inspector v Telecom Networks and Operations Ltd* [1991] 1 ERNZ 492 (CA), *Barrycourt Motel & Tourist Flats Ltd v Mitchell* [1996] 1 ERNZ 158 (CA), and Ports of Auckland Ltd v New Zealand Waterfront Workers Union Inc [1996] 2 ERNZ 25 (CA)) in which the meaning of 'holiday' is discussed.

SCHEDULE C: SUBSTANTIVE REFORM (QUESTION 10)

Carriage of Goods Act 1979	s 19(1)	The limitation period for bringing an action against the carrier under section 19(1) commences on the "*date on which the carriage should have been completed in accordance with the contract*". *Gault* notes,[10] however, the provision does not respond to a contract which does not specify when carriage should have been completed. This issue should be subject to review.
Contracts (Privity) Act 1982	s 4	In our experience, third parties' entitlement to benefit from rights under others' contracts is usually express. However, absent such specific provision, some uncertainty in determining entitlement to insist on their right is inescapable. The designation requirement and the proviso seek to minimise uncertainty but cannot remove it altogether. Greater certainty might be achieved by putting the onus of proof of intention on the beneficiary. This would involve a change in the policy of the Act, but would accord with commercial reality in most cases.
Contractual Mistakes Act 1977	s 6(2)(a)	Under s 6(2)(a) a "*mistake*" for the purposes of an application for relief does not include a mistake in interpretation of a contract. The leading text[11] notes divergent case law on the scope of this exclusion, and the Law Commission[12] recommended removing the exclusion.
Contractual Remedies Act 1979	s 4	Section 4 literally[13] prevents a court from inquiring whether a statement or promise had been made *until* it had first determined whether it was fair and reasonable that the clause precluding such an inquiry should be conclusive. However in other cases[14] the courts have regarded such clauses as prima facie inconclusive and have investigated the making of the statement before deciding whether the exclusion clause should be conclusive. Parliament should clarify the intended approach.
Electronic Transactions Act 2002		The Act as a whole, but particularly its definitions provisions (for example the definition of "*information system*" in s 10(2)), should be subject to regular review for currency in light of emerging technologies.

10 Gault, above n 5, at [CG19.02].
11 Burrows, Finn and Todd, above n 7, at [10.3.4].
12 Law Commission, above n 6, at 140-142.
13 For example, *Ellmers v Brown* (1990) 1 NZ ConvC 190,568 (CA).
14 For example, *PAE (New Zealand) Ltd v Brosnahan* [2009] NZCA 611, (2010) 9 NZBLC 102,862.

Frustrated Contracts Act	s 3(2)	The Law Commission[15] has queried whether it is consistent with the policy of the Act that only expenses incurred prior to the frustrating event are recoverable. This may be arbitrary in some cases, for example in circumstances such as in *Krell v Henry* [1903] 2 KB 740, where the time of frustration was difficult to determine.
	s 3(3)	The Law Commission[16] also suggested extending the scope of restitution available under s 3(3) to include specific property as well as sums of money. This would be consistent with s 9(2)(a) of the Contractual Remedies Act 1979.
Mercantile Law Act 1908		The Mercantile Law Act should undergo more substantial review. We consider the Act in more detail at Questions 6-8.
Minors' Contracts Act 1969		The presumptive position of illegality where a minor purports to enter a contract is unduly harsh. There is clear function in protecting the vulnerable from unfair and unreasonable contracts. Minors, however, enter uncontroversial, low risk, and low value contracts on a daily basis. An example is terms of use contracts for the provision of internet services. Many internet service providers present offers which, along with terms and conditions, may be accepted by clicking "I agree" or similar. Some of these offers, or other terms of use require age verification to ensure that the contract is valid by way of the Minors' Contracts Act. Others require that parental consent is given before the contract is considered valid. The lack of fool-proof verification of age means that some contracts are entered into by minors, without parental consent, and are unenforceable against the minor and the parent. In the same way there is a distinction between contracts of service and other contracts, we suggest a second class of low risk or low value contracts. Such low risk contracts should have a reversed presumption – enforceable unless proven unfair or unreasonable. Value carve outs are not impossible; section 6 (now repealed) of the Sale of Goods Act 1908 is an example. This would mark a policy change and so would need to be considered in more detail.

15 Law Commission, above n 6, at 296.
16 Law Commission, above n 6, at 300.

Sale of Goods Act 1908

The Sale of Goods Act is due for substantive review for a number of reasons, including the following:

- the framework underlying the Sale of Goods Act arose out of a different, simpler commercial environment over 100 years ago. As *Gault* notes,[17] sales arrangements and goods have moved on considerably since that time;
- other consumer law has recently been reviewed and amended;
- there is a large body of case law which could usefully be codified (such as, for example, relating to the meaning of "*merchantable quality*") to make it more accessible;
- cognate jurisdictions (most significantly, the United Kingdom) have reviewed the law relatively recently and diverged in some respects from the New Zealand position; and
- the degree to which equity applies to sales contracts, given s 60(2), remains uncertain (see *Cutelli v Brian Cotter Motors Ltd* (1993) 5 TCLR 500; cf *Thomas Borthwick & Sons (Australasia) Ltd v South Otago Freezing Co Ltd* [1978] 1 NZLR 538 (CA) per Cooke J.

17 Gault, above n 5, at [3A.1.03].

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