MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

PARLIAMENTARY COUNSEL OFFICE
TE TARI TOHUTOHU PĀREMATA

Contract and Commercial Law Bill Exposure Draft

Questionnaire

SUBMISSIONS PROCESS

The Parliamentary Counsel Office and the Ministry of Business, Innovation and Employment are seeking written submissions on the exposure draft of the Contract and Commercial Law Bill by **7 December 2015**.

Please use this submissions template for providing feedback as this will help us to collate submissions and ensure that your views are fully considered. Please also include your name, the name of the organisation that you represent (if applicable), and contact details.

Please email your submission as an attachment to revisionbill@mbie.govt.nz. Any questions that you have in relation to the submissions process can be directed to the same address.

The information provided in submissions will help with preparing the Bill for introduction to Parliament. We may contact submitters directly if we require clarification of any matters in submissions.

Please note that the Parliamentary Counsel Office intends to publish submissions online at www.pco.parliament.govt.nz. See the Explanatory Material for information about the publication of comments, the Official Information Act and the Privacy Act.

Name: Simon Connell

Organisation: Faculty of Law, University of Otago

Contact details (including email and/or phone):

simon.connell@otago.ac.nz

03 479 3781

http://www.otago.ac.nz/law/staff/otago080649.html

Questions

Question 1: Do the changes made in those provisions amount only to "minor amendments to clarify Parliament's intent, or reconcile inconsistencies between provisions" within the meaning of section 31(2)(i) of the Legislation Act 2012?
Yes (aside from the examples in cl 22 and 60, which are discussed in my answer to Question 11).
Question 2: If the Bill does make "minor amendments" to the effect of the law, is there any reason why the amendments should not be made?
No

Question 3: Are there any other "minor amendments" within the meaning of section 31(2)(i) of the Legislation Act 2012 that should be made? If so, please provide a detailed explanation of any proposed amendment and why it is justified.

Yes

Cl 21(3)(b) could be amended to state that nothing in the subpart affects "the law relating to the rectification of contracts *for common mistake*",[1] in accordance with *Tri-Star Customs and Forwarding Ltd v Denning* [1999] 1 NZLR 33.

This change would complement the adding of an explicit requirement of actual knowledge in cl 24(1)(a)(i), which is based on the same case.

Question 4: Are there any other changes that should be made to improve the Bill as a revision Bill? Proposed changes should fall within the powers contained in section 31(2) of the Legislation Act 2012, such as changes to language, format, or punctuation.

No.

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

Yes. Subpart 2 in particular would benefit from the use of illustative examples.

Cl 22 could provide examples of mistakes of fact or law, such as:

> A mistake that a quantity of oats offered for sale are old oats when they are actually new oats.[2]
>
> A mistake that a bedroom in a house could legally be used as a bedroom when it

[1] Or, alternatively using the language in the case, "the law relating to rectification which allows the Court to vary the terms of a concluded contract which does not express the true intention of the parties".

[2] This example is based on *Smith v Hughes* (1871) LR 6 QB 597.

could not.[3]

Cl 25 could provide an example of a mistake in the interpretation of a contract, such as:

A signs an offer under which A personally guarantees the debts of a company.
A mistakenly thinks that the offer does not affect A's personal liability.
A has made a mistake in the interpretation of the contract.[4]

Cl 24 could provide examples of the three different mistake scenarios set out in cl 24(1)(a)(i)-(iii), such as:

For cl 24(1)(a)(i) (unilateral mistake):[5]

A offers to buy B's cow because A wants to use the cow for breeding purposes.
B's cow is sterile.
B has actual knowledge that the cow is sterile and B also has actual knowledge of A's mistaken belief that the cow can be used for breeding.
B accepts A's offer.

For cl 24(1)(a)(ii) (common mistake):

A and B agree to the sale and purchase of an item of jewellery on the basis that the item is genuine.
The item is actually a forgery.[6]

For cl 24(1)(a)(iii) (different mistakes about the same matter of fact or law):

A and B agree to the sale and purchase of a bag of seeds.
A thought that the seeds were carrot seeds and B thought that they were lettuce seeds.
The seeds are actually fennel seeds.

Alternatively, the three scenarios could be illustrated with variations on the same set of facts, such as the following variations on the facts of *Smith v Hughes*:

For cl 24(1)(a)(i) (unilateral mistake):

[3] This example is based on *Bartley v Beale* (1997) 3 NZ ConvC 192,601.
[4] This example is based on *Paulger v Butland* [1983] 3 NZLR 549.
[5] This example is based on *Sherwood v. Walker* 66 Mich. 568, 33 N.W. 919 (Mich. 1887).
[6] This example is given by Prichard J in *Ware v Johnson* [1984] 2 NZLR 518 at 539. This example illustrates that:

> By requiring as a condition of relief that both parties be "influenced in their respective decisions", the Act cannot mean that both parties must be induced by the mistake to enter into the contract. That construction would make nonsense of the provision. If a man sells a piece of imitation jewellery, both vendor and purchaser believing it to be genuine, the purchaser is induced to purchase by his mistaken belief that he is getting a genuine article. But the same cannot be said of the vendor's decision to sell. Indeed his mistaken belief works the other way - it tends not to induce him to sell but to make him more reluctant to sell.

A agrees to buy a bag of oats from B.
A thinks that the oats are new oats. The oats are actually old oats.
B has actual knowledge that the oats are old oats and that A thinks the oats are new oats.

For cl 24(1)(a)(ii) (common mistake):

A agrees to buy a bag of oats from B.
Both A and B believe that the oats are new oats.
The oats are actually old oats.

For cl 24(1)(a)(iii) (different mistakes about the same matter of fact or law):

A agrees to buy a bag of oats from B.
A believes that the oats are all new oats. B believes that the oats are all old oats.
The bag is filled with a mixture of new and old oats.

Question 6: Is an intention to bind the Crown implied from the terms of any of Parts 1, 4, and 5 of the Mercantile Law Act? Does Schedule 1 of the Crown Proceedings Act 1950 indicate a clear intention that only Part 2 of the Mercantile Law Act binds the Crown?

No comment.

Question 7: Is it desirable that any of Parts 1, 4, and 5 of the Mercantile Law Act should bind the Crown? Would expressly providing for these Parts to bind the Crown be a minor amendment within the powers of s 31(2)(i) of the Legislation Act 2012 (ie, the power to "make minor amendments to clarify Parliament's intent, or reconcile inconsistencies between provisions")?

No comment.

Question 8: Should we revise Part 5 of the Mercantile Law Act 1908 or leave it for subsequent reform or repeal?
No comment.
Question 9: How should the Bill approach transitional arrangements?
Since the Bill is a revision Bill, it is appropriate for it to apply to all arrangements before and after it comes into force.
Question 10: Are there other issues in the statutes that may need reform that we have not identified in Part 4 of the Explanatory Material?
• With respect to cl 35, an additional matter for possible future reform is the question of whether there is a general requirement reasonableness requirement on a representee seeking damages for misrepresentation, as suggested in the case law.[7] This could be achieved by the section stating that "If a party to a contract (A) has been *reasonably* induced to enter into the contract by a misrepresentation…"

[7] *Vining Realty Group Ltd v Moorhouse* [2010] NZCA 104 at [46], citing *Savill v NZI Finance Ltd* [1990] 3 NZLR 135 (CA) and *Harrison v Amcor Trading (NZ) Ltd* HC Auckland HC167/97, 13 May 1999.

- A number of the contract statutes have provisions that give the court a wide discretionary power to grant relief. Consideration could be given to whether it would be possible to simply have one relief section that various subparts of the statute refer to.

Question 11: Do you have any other comments relating to the Bill?

I have serious concerns about the use of examples in cl 22 and cl 60. I suggest that no examples be given of non est factum or frustration.

In both cl 22 and cl 60, the Bill gives an example of a set of facts to which a common law doctrine applies. Cl 22(3) gives an example of a case of non est factum and cl 60 gives an example of a frustrated contract. In my view, there are serious problems with this use of examples that makes it inappropriate in general for a statute to give such examples. In addition, there are problems with the particular examples used.

Examples can be a helpful tool for illustrating the operation of statutory provisions. For example, cl 71 defines "illegal contract" for the purpose of the subpart and provides examples of illegal contracts under that statutory definition.

In contrast, non est factum and frustation are complex common law doctrines which exist independent of statute. There are serious problems with giving examples in a statute of facts to which complex common law doctrines might apply. Common law doctrines are subject to change and it might be that examples that are valid at the date the Bill is passed become invalid at a later time because of subsequent case law. Providing one example of a case to which a common law doctrine applies does little to illuminate the general principles behind the doctrine. Furthermore, illuminating the general principles behind these common law doctrine is not an legitimate function for a Revision Bill. Cl 22(3)(a) provides that the Bill does not affect the doctrine of non est factum – attempting to describe non est factum is dangerously close to doing exactly that.

The examples given in both cl 22 and cl 60 have the potential to mislead the reader as to the general functioning of the doctrines involved. A reader who is not familiar with non est factum could be left with the incorrect impression that, as a general rule, the plea is available only to parties who cannot read and must rely others to explain documents to them. A reader who is not familiar with frustration could be left with the incorrect impression that, as a general rule, contracts involving buildings will be frustrated if the building burns down. The doctrine of frustration is particularly unsuitable for illustration by the use of a single example.[8] In both cases, a reader who is already familiar with the common law doctrine in

[8] The Supreme Court recently considered frustration in *Planet Kids Ltd v Auckland Council* [2013] NZSC 147, [2014] 1 NZLR 149. Elias CJ at [8] and Glazebrook J (with whom McGrath J and Gault J agreed) at [62] endorsed a multi-factorial approach to the assessment of frustration. The case involved a settlement agreement under which the appellant was to surrender land that it had leased from the respondent. The dispute arose after a building on that land burnt down. The settlement agreement was not frustrated.

question is unlikely to be assisted by an example. In addition, the description of non est factum as rendering a signature “invalid” is not a typical description of the effects of the plea in the case law or literature.