CONTRACT AND COMMERCIAL LAW BILL

EXPOSURE DRAFT

COMMENTS ON SUBMISSIONS

SUBMISSIONS

The exposure draft Contract and Commercial Law Bill was released for submissions on 21 October 2015 by the PCO and MBIE. The Attorney-General issued a media statement announcing the consultation.
The first revision Bill on the Government's revision programme for the 51st Parliament, the Contract and Commercial Law Bill revises and consolidates 11 contract and commercial statutes.

The Government sought submissions from the legal community and other interested organisations.
The exposure draft Bill contained notes and questions about specific provisions and the accompanying explanatory material set out some general questions about the Bill (in Part 2 of the explanatory material). We also invited submitters to comment on other matters relating to the Bill.

The closing date for submissions was 7 December 2015.

Submissions were received from:

1 Auckland District Law Society
2 Chapman Tripp
3 Simon Connell, Lecturer, Law Faculty, Otago University
4 Insurance Council of NZ
5 Professor David McLauchlan, Victoria University
6 New Zealand Law Society (NZLS)
7 Rae Nield Marketing Law
8 George Wardle, MBIE, in his personal capacity.

The submissions are available on the PCO website.

GENERAL COMMENT

Submitters raised some general concerns about the revision Bill and the revision process. We understand their concerns, but the concept underlying revision is important – that is to improve access to, and clarity of, the NZ statute book.

The revision reforms in the Legislation Act 2012 are based on the Law Commission recommendations in its 2008 report *Presentation of New Zealand Statute Law.* Parliament agreed to the requirement in the Legislation Act 2012 for a 3-yearly revision programme for each new Parliament.

Public consultation was undertaken in 2014 on the revision programme, which was then approved by the Government and presented by the Attorney-General to the House in accordance with the Legislation Act requirements.

The advantages of revision are that modernisation of the statute book will improve access for people by enhancing its clarity and navigability.

The NZ Productivity Commission noted in its 2014 report *Regulatory Institutions and Practices* that the initiatives to improve the stock of regulation needed to build on and work with other initiatives already underway such as the revision reforms. Revision will reduce regulatory costs by assisting individuals and businesses to understand more easily the rules that apply to them.

Preserving legal effect is required under the Legislation Act 2012. We are aware of the risks of inadvertent change, but these risks are minimised by a prudent drafting approach and safeguards, such as departmental and peer review scrutiny, the revision bill certification process, and select committee scrutiny.

Which Acts to include in the Contract and Commercial Law Bill is a matter of judgement. The Acts being revised were selected by the administering departments on the basis that they are generally older Acts expressed in language that is out of date that contain many repealed provisions. There are links between the Sale of Goods Act and the Carriage of Goods Act and the other legislation. The Law Commission recognised this and made recommendations about the Sale of Goods Act 1908 in its 1993 report *Contract Statutes Review*.

The revision exercise has identified issues for future reform.

SUBMISSIONS: GENERAL ISSUES/COMMENTS

Revision See our comments above on page 3.	**Chapman Tripp** applauds the effort to update and modernise the drafting of core contract and commercial legislation, but thinks the consolidation should be deferred as a substantive review should happen first, making it easier to update documents (if the Acts are separate). The **Insurance Council of NZ** supports the intent of the Bill to make old Acts more accessible, readable, and easier to understand. The **NZLS** supports the objective of the revision programme to improve access to, and the clarity of, the NZ statute book. It submitted though that the benefits of the reforms will come at a cost and that substantive reforms should be undertaken at the same time to save costs. **Professor McLauchlan** submitted that the revision is unnecessary and will complicate and confuse well-settled law with unintended consequences. Some Acts need a comprehensive overhaul. **Rae Nield** commented that there are potentially serious consequences in carrying out the revisions, and questions the need for the review of the Carriage of Goods Act 1979 and the Sale of Goods Act 1908.
Whether changes are of minor effect within s 31(2)(i)?	The **ADLS** agrees that, for the most part, the changes amount to minor changes within s 31(2)(i). **Chapman Tripp** agrees that the amendments in Schedule 2 are minor within s 31(2)(i).

	Simon Connell considers the changes are minor, apart from the examples in clauses 22 and 60.
Binding the Crown	The **ADLS** considers that, in relation to Parts 1, 4, and 5 of the Mercantile Law Act 1908, it is not clear that there is an intention to bind the Crown because of the express inclusion of Part 2 in Schedule 1 of the Crown Proceedings Act 1950. But acknowledges that there is no good reason why Parts 1, 4, and 5 should not bind the Crown. However, this would be more than a minor amendment. **Chapman Tripp** submits that Parts 1, 4, and 5 of the Mercantile Law Act 1908 do not bind the Crown as there is no necessary implication from the provisions that they do. That interpretation does not frustrate the purpose of the Act. This is reinforced by the express inclusion of Part 2 in Schedule 1 of the CPA 1950. "Expressio unius est exclusio alterius": to express one thing is to exclude another. Parts 1, 4, and 5 should bind the Crown as the Crown has no special responsibilities in relation to its commercial activities that require it not to be bound. However, this change would not be a minor amendment as it would be contrary to Parliament's original intent. There may be significant unanticipated consequences, if changes effected substantive changes to legal relationships between the Crown and other parties.
Part 5 of the Mercantile Law Act 1908	**Chapman Tripp** submits this is out of date and there is no point revising it as this could mislead as to its ongoing relevance.
Transitional arrangements	The **ADLS** submitted that, given the object is to make minor amendments to clarify intent and reconcile inconsistencies; it is difficult to see that any transition periods would be necessary or useful. The changes could take effect immediately following Royal assent.

	Chapman Tripp supports prospective and delayed application and considers this will increases certainty. Precedents can be updated. Notes we have a more complex commercial environment today compared to 1908. In 1908 there was not a blanket retrospective transitional approach. **Simon Connell** supports retrospective application as the Bill is a revision Bill and it is appropriate for it to apply to all arrangements before and after it comes into force.
Use of examples	The **ADLS** considers the examples are useful and increase accessibility and readability generally. But where legislative intent is well established and accepted, it is doubtful that the inclusion of examples would be helpful. **Chapman Tripp** submits that, if well-drafted, examples can generally help. But if excessive and poorly drafted, they can detract from readability. They may become redundant over time. They should be used sparingly and to clear benefit. **Simon Connell** thinks more examples would help Subpart 2.

SUBMISSIONS: SUMMARY AND ANALYSIS

Auckland Law District Society Incorporated (Commercial Law Committee)			
Issue No.	**Submission**	**MBIE/PCO comment**	**Change or No Change**
1 1.1	Changes that amount to 'more than minor' Contractual (Privity) Act 1982 Cl 20 'Savings': Reference to the effect of section 7 of the Property Law Act 1952 (repealed) and in particular that it continues to apply, despite its repeal effected by section 13 of the Act, in respect of any deed made before 1 April 1983 has been omitted.	This point is wrong as we have included the savings provision in clause 2 of Schedule 1.	No change.
1.2	Contractual Mistakes Act 1977 Cl 31 'Rights of third persons not affected': The definition of "disposition" in this section has been omitted.	The definition of "disposition" has been moved to clause 9 (Interpretation) and applies to Part 2 of the Bill (Contracts legislation) unless the context otherwise requires. A "signpost" cross-reference has been added to assist readers.	Change.
1.3	Contractual Remedies Act 1979 Cl 39 'Parties with substantially same interest': subsections (2) and (3) largely repeat the wording of the current section 7(7) except in respect of the following highlighted words - which have been omitted: "The Court may, **in its discretion**, on application made for the purpose, grant leave under subsection (6) of this section, subject to such terms and conditions the Court thinks fit, **if it is satisfied that the granting of such leave is in the interests of justice.**"	Clause 39(2) in the exposure Bill: "The court may, on application made for the purpose, grant leave under subsection (1) if it thinks it is just to do so". We omitted "in its discretion" as these words are unnecessary (and inconsistent with other references to a discretion). We simplified "if it is satisfied that the granting of such leave is in the interests of justice" to "if it thinks it is just to do so".	

	The above changes are much more than just minor amendments to clarify intent or reconcile inconsistencies and arguably do not fall within the ambit of s31(2(i) of the Legislation Act 2012.	We have modernised the wording and do not agree that there is a change in legal effect. However, we reinstated "is satisfied that" in place of "thinks".	Change.
1.4	<u>Minors' Contracts Act 1969</u> On the whole, the amendments proposed with this Act are of a minor nature. However, there are some amendments that go too far. Clause 92 proposes to amend Section 5(1)(c)of the Minors Contract Act 1969, by replacing the term, "contract of service", with that of "employment agreement". This proposed amendment is of a more significant nature and extends beyond clarifying Parliament's intent or reconciling inconsistencies between provisions. "contract of service" is not defined in the Minors' Contracts Act 1969. The Courts have attempted to define the term (see L.J. Denning in *Stevenson Jordan and Harrison Ltd v McDonald and Evans* [1952] 1 T.L.R 101 – "It is often easy to recognise a contract of service when you see it, but difficult to say wherein the difference lies.")		
	Whilst an employment agreement is a contract of service, not every contract of service is necessarily an employment agreement. "Contract of service" has the advantage of having slightly hazy boundaries. It is this quality that had in the past given judges a degree of latitude in its interpretation of the term. If the amendment were to be adopted it may leave no room for a New Zealand court to hold enforceable against a minor any type of contract which involves a minor providing services and being paid for such services even if the contract is for the minor's benefit	The words "contract of service" are reinstated in Subpart 6. The definition of "employment agreement" in clause 85 has been omitted.	Change.

	other than in circumstances where there is a collective agreement or a signed written individual employment agreement (as required by section 65 the Employment Relations Act 2000).		
1.5	<u>Sale of Goods Act 1908</u> The amendments are of a minor nature and aid in tidying up outdated language, removal of repealed and spent provisions, reconciling inconsistencies in terminology between the various sections. Amendment of s 41 of the Act (cl 173 of the Bill) is agreed with – that is replacing "stoppage in transitu" with "to stop the goods in transit". It is a good idea to replace Latin phrases with more practical and conventional language.		
2 2.1	<u>Other changes</u> Clause 302 (Interpretation) (1) (a) – query whether the first use of the word "and" is superfluous?	Clause 302(1) (document of title) brings forward the definition of document of title to goods, carrying forward very closely the existing wording that includes "and". The word "and" is deliberately used.	No change.
2.2	Clause 314 (3) – query whether "specified" person should refer to a receiver?	We do not agree as this would be a significant substantive change. The clause carries forward s 11 MLA that refers to a "trustee in bankruptcy", which is an outdated expression and we have replaced this with today's equivalent, an "Official Assignee". A mercantile agent can be a body corporate so we have also included a "liquidator".	No change.

2.3	Clause 318 – definition of "ship's delivery order – contains a full stop at the end of the definition and yet other definitions do not. Should this be removed? You have asked for comment on definition of "goods". A general comment is why does the Act not have an interpretation section which contains the definitions used throughout the Act rather than having to repeat definitions in each part?	Current drafting punctuation practice requires us to keep the full stop at the end of the last definition in the subclause. To a large extent, the Parts and subparts of the Bill operate independently. It makes sense to have the definitions relating to a particular Part or subpart in the Part or subpart. For example, it makes sense to have the Sale of Goods Act definitions at the beginning of Part 3 (rather than at the beginning of the Bill). In addition, there are no definitions that have application across the whole Bill.	No change.
2.4	Clause 318 – definition of "holder" query whether the word "and" should appear after the phrase "possesses the bill"?	We agree and added “and” into paragraph (a) of the definition of “holder”.	Change.
2.5	Clause 332(4) – you have asked for comment as to the definition of "holiday". Query whether this should include regional holidays?	The current provision that is being revised does not define “holiday”. Regional anniversary days may or may not be holidays depending on particular contexts, so the proposed definition would not assist. The approach in the current provision is reinstated and the proposed definition of “holiday” has been omitted. Any question about the meaning of “holiday” will be determined by the courts.	Change.
2.6	Clause 339(1) – recommend that the following words appear after "equal to the sum" – "specified in the notice given by the ship owner pursuant to section 337". We believe this would make for clearer drafting.	We agree. The provision has been redrafted along similar lines.	Change.
3	<u>Legislative examples</u> Generally, legislative examples are useful and increase accessibility		

	and readability for general public, although where legislative intent is well established and accepted, it is doubtful that inclusion of examples would be useful.		
4	Is the Crown impliedly bound under Parts 1, 4, 5 of the Mercantile Law Act? It is not clear whether it can be implied that there is an intention to bind the Crown in Parts 1, 4 and 5 of the Mercantile Law Act. This is because Schedule 1 of the Crown Proceedings Act 1950 only refers to Part 2 of that Act.		
5	Should the Crown be bound under Parts 1, 4, and 5 of the Mercantile Law Act? We can think of no good reason why Parts 1, 4 and 5 of the Mercantile Law Act should not bind the Crown, however, given that Schedule 1 of the Crown Proceedings Act 1950 only refers to Part 2 of the Mercantile Law Act we consider that this would not be a minor amendment.	We agree that this would not be a minor amendment. Clause 8 provides that subparts 2 and 4 (Parts 1 and 4 Mercantile Law Act) do not bind the Crown. (Part 5 of the Mercantile Law Act is not being revised as it appears to be of no or little continued relevance. Part 5 will remain in the MLA until it can be reviewed.)	Change.
6	How should the Bill approach transitional arrangements? Given that the object of the Bill is simply to make minor amendments to clarify intent and reconcile inconsistencies, it is difficult to see that any transition periods would be necessary or useful. Changes could simply take effect immediately following Royal Assent.	Another submitter commented that there should be a lead in time of 6 months to allow for changes to be made to existing documentation. Clause 2 provides the new Act will not come into force until 6 months after Royal assent.	Change.

Chapman Tripp			
Issue No.	**Submission**	**MBIE/PCO comment**	**Change or No Change**
1	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.	See our general comments about revision on page 3. This would be inconsistent with the Revision Programme that has been consulted on and presented to Parliament in accordance with the Legislation Act 2012.	
2	If the 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.	There will be a lead in time of 6 months before commencement to allow documents to be changed. Clause 2 provides that the new Act will not come into force until 6 months after Royal assent.	Change.
3	**Reading of statute as a whole**: 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. 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.	We disagree with the submitter and think each subpart would be read independently. We do not think there is any risk of a problem. In addition, there is no precedent for the proposed provision and including it could introduce new risks.	No change.
4	**Legislative examples** Legislative 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.	We have used examples sparingly and only where there is a clear benefit. Providing an example for clause 25 (“Mistake does not include mistake in interpretation of contract”) as recommended by Simon Connell will have a clear benefit. We will refine the examples for frustration and “non est factum” that Simon Connell did not support.	Agree.

5 5.1	<u>How should the Bill approach transitional arrangements?</u> 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;	In the exposure draft explanatory material (on pages 9 to 10) the PCO and MBIE discussed the arguments for and against applying the new Act to all arrangements, including contracts, regardless of whether they were entered into before or after the new Act comes into force. PCO and MBIE indicated support for application to all arrangements as this is consistent with, and reflects,- • the revision powers under the Legislation Act 2012 • the revision Bill certification process • the new fast-track parliamentary process under Standing Orders of the House of Representatives (because there would be no substantive law change). The transitional approach taken during the last revision and consolidation of statutes in 1908 was in some cases also similar to that approach.	
5.2	• there will be significant transaction costs involved in updating legal documents adopting or referring to statutory provisions;		
5.3	• 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;		
5.4	• prospective application would increase certainty for parties; and		
5.5	• delayed and prospective commencement of any new Act would allow practitioners time to update precedents.		
5.6	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.		
6 6.1	<u>Carriage of Goods Act 1979</u> 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.	We have asked the submitter to get back with more information about a possible scenario and solution.	
6.2	In regards to 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.	We do not agree that we need to amend this provision as case law deals satisfactorily with the matter and the matter is easily capable of resolution by the courts. We will look at this issue in a substantive policy review of the law of mistake.	No change.
6.3	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 the *STL* case 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.	We do not think the intent is unclear and do not see a need to make further changes to codify the court's approach, particularly as this may take it out of step with other similar provisions across the statute book. We consider that we do not need to clarify what the "relevant date" is in each case. The court's discretion in clause 286(3),(4) is consistent with others across the statute book.	No change.

7	<u>Contracts (Privity) Act 1982</u> Section 4 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.	We have already removed the words "by suit" from section 4 (in clause 12(2)), which may help to address this point. We do not think there is a significant problem here. An amendment may require a significant reformulation of the provision, and the degree of present difficulty is not enough to merit further change.	No change.
8	<u>Contractual Remedies Act 1979</u> In regards to section 6, the new provision should clarify, consistently with authority, the representation has to be made with (actual or constructive) intention to cause the representee to enter into the contract.	We do not agree. There is a risk in attempting to codify the case law on the meaning of "inducement", and there is no need for amendment as the courts have settled this issue without difficulty. Professor Burrows (in the Law Commission's 2001 report no. 25) noted that a literal reading of section 6 could lead to the conclusion that the representor's state of mind is irrelevant. However, the courts have held that it is not enough for a party to say that a representation caused them to act in a certain way. They must also show that the representor intended them to do so or that they wilfully used language calculated, or of a nature, to induce a normal person in the circumstances of the case to act as the representee did. The Law Commission in its 2001 report did not support a change. Professor Burrows said it is doubtful whether the section requires amendment and there is considerable virtue in not disturbing the simplicity of the drafting. It is not easy to think of the statutory words that could resolve this difficulty. The courts have already resolved the problem and it is not necessary to rewrite the provision merely to reflect the gloss placed on the Act by the courts. The problem is not a pressing one, and its resolution can	No change.

		safely be left to the courts. (See pages 67-68, and 96 of the Law Commission report no. 25 *Contract Statutes Review* 1993).	
9	<u>Electronic Transactions Act 2002</u> In regards to section 5, Dugan et al (Benedict Dugan et al "*Electronic Transactions Act 2002*" [2004] NZLJ 258) has identified some ambiguity over the definition of "*electronic*". Their concern is that "*optical*" may extend the Act to information on paper. Clarification should be considered.	We do not agree with the submitter as the meaning of electronic is clear from the other words in the definition. Also its meaning is clear from the purpose provision – the Act only applies to electronic transactions.	No change.
10 10.1	<u>Other changes needed</u> Clause 200 omits the relevant words (in bold) of s 60(2) of the Sale of Goods Act. This should be left until substantive reform of the SGA 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. *S 60(2) The rules of the common law,* ***including the law merchant,*** *save in so far as they are inconsistent with the express provisions of this Act,* ***and in particular the rules relating to the law of principal and agent, and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause****, shall continue to apply to contracts for the sale of goods*	The words in bold (dating back to the predecessor enactment of 1895) are omitted because they are redundant and their removal will not change the law. The phrase "law merchant" is out-dated and adds nothing substantive given that it is only an "including" reference. The other words may be seen as only particular examples of the "rules of the common law". In some respects, statute law now has effect in place of the rules of the common law (see, eg, s 5(1) of the Contractual Mistakes Act 1977). Including these words may, therefore, cause confusion.	No change.
10.2	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".	We think the example is helpful and have explained it more fully, setting it out clearly in a box (rather than within round brackets in the text).	Change.

10.3	In regards to clause 262, the expression "*vice*" should be retained, instead of substitution by "*defect*". This is due to industry usage of the term "*vice*".	Submission 4 supported this point also and the expression "inherent vice" has been reinstated.	Change.
10.4	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*".	We agree and the word "duly" has been removed to be consistent with its removal elsewhere.	Change.
10.5	Clause 296 omits the term "other consideration". This may unintentionally limit the scope of recovery (or give that impression), to the extent "*freight*" doesn't exhaust the consideration flowing to carrier.	Section 25 of the CGA - *If the goods are sold, the carrier may deduct from the proceeds of sale the amount of freight* ***or other consideration*** *owing to him in respect of the carriage of the goods and all reasonable expenses incurred by him in holding the goods and in conducting the sale, and shall tender the balance (if any) to the consignee.* The omitted wording is reinstated in clause 289(4)(a)(i).	Change.
10.6	In regards to clause 332(4), 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.	The current provision does not define the term "holiday". This approach is reinstated and the proposed definition of "holiday" (derived from the Interpretation Act 1999 definition of "working day") has been omitted. The courts will determine any question that arises about the meaning of "holiday".	Change.

Simon Connell (Otago University, Faculty of Law) – Personal Submission			
Issue No.	**Submission**	**MBIE/PCO comment**	**Change or No Change**
1	Clause 22(3)(b) should be amended to state that "nothing in this subpart affects –the law relating to the rectification of contracts for common mistake" (as per *Tri-Star Customs and Forwarding Ltd v Denning* [1999] 1 NZLR 33.	The case law is not settled. The courts should decide the parameters of rectification.	No change.
2	Clause 23-25 (contractual mistake) should include more examples.	We will use the submitter's example of a mistake in the interpretation of a contract (based on *Paulger v Butland* [1983] 3 NZLR 549) in clause 25. We will not use the examples for mistake of fact or law. See comments from submitter 2 regarding the sparing use of examples.	Change.
3	The use of examples in clause 22 (non est factum) and 60 (frustration) should be removed due to the specific and narrow nature of the examples whereas these common law doctrines are inherently complex and are liable to change by future court rulings. The examples may also mislead lay people into thinking that non est factum is limited to blind people, and frustration will always arise if a building, that is involved in a contract, burns down.	The examples regarding "non est factum" in clause 22(3) and frustration in clause 60(1) have been omitted. The provisions state merely that the common law doctrines are not affected. There are risks with examples. Risks are minimised by clause 7, which makes it clear that an example is only illustrative.	Change.

Insurance Council of New Zealand			
Issue No.	**Issue Summary**	**Official Response**	**Change or No Change**
1	Clause 245 removes the reference to "unit of bulk" from s 3 of the Carriage of Goods Act 1979. This creates a less clear and less specific definition of risk. Bulk and weight are different measurements of units. The status quo should not be changed.	We omitted the reference to "bulk" and "weight" as unnecessary because both are units of measurement. We reinstated the words in view of the submission. (Note: submitter 7 supported the change.)	Change.
2	Under clause 247, if a label is used, but conflicts with the terms of the actual agreement, then the use of the correct label should not be absolutely necessary and the original intention of parties to contract out of "Limited Carriers Risk" should take precedent.	We think section 8(3) was not intended to allow the express terms of a contract to override a label use, but rather to confirm that parties can choose between the contract types. This interpretation is consistent with the legislative history of the 1979 Bill, the Minister's second reading speech, and the report of the Statutes Revision Committee on the 1979 Bill.	
3	Clause 262 should not replace "inherent vice" with "inherent defect in, or the nature of, the goods". "Inherent vice" is a standard term used globally in contracts of insurance and contracts for carriage of goods. It also has a long history of domestic and international case law. Change would put NZ out of step with domestic and international practice. The change also results in a narrower meaning than the status quo and is therefore a fundamental change outside the scope of the PCO.	This was also raised by submitter 2 and the term "inherent vice" has been reinstated.	Change.

New Zealand Law Society			
Issue No.	**Submission**	**MBIE/PCO comment**	**Change or No Change**
1	Many of the statutes included in the draft Bill currently work well. A number of statutes in the draft are in need of substantive reform. These include: • the Contracts Privity Act 1982, which should be amended to take into account the recommendations of the Law Commission in its Contracts Statutes Review (Law Commission *Contract Statutes Review: Report No 25*); • the Contractual Mistakes Act 1977, which suffers from sufficient lack of clarity in its current form in that the existing case law is conflicting and interpretation is difficult; and • the Mercantile Law Act 1908 which, as indicated by the large number of comments in the consultation draft, is indeed in need of significant review.	Amending section 6(b)(iii) of the CPA to pick up the LC recommendation to extend the provision to cover actions of another person connected to the beneficiary would be a substantive change and not permitted under the revision powers under the Legislation Act. This is not what Parliament intended when the CPA was enacted. The revision has identified areas needing review and we hope substantive reform will follow the revision. Many terms used and practices described in Part 5 of the MLA are now of no or little continued relevance. Part 5 will not be revised in the Bill and will remain in the MLA until MBIE can review it.	No change.
2	Costs on community There will be a period of uncertainty, if the Bill is enacted, for lawyers and commercial parties. This will increase the cost of providing legal advice. While consumers will be assisted by using modernised language, these costs are also likely to be ultimately passed onto consumers.	We disagree. The revision programme modernises these old Acts and makes them more accessible. There will be a lead-in time of 6 months before the new Act is brought into force to allow people to become familiar with the changes and to change existing documentation. See comments on page 3.	

2.1	Providing advice after the passage of the draft Bill will, in many cases, take longer because lawyers will be advising on a new and unfamiliar Act. In particular, it will be necessary to check whether each provision was intended to effect a change to the law (either as permitted by s 31(2)(i) or (j) of the Legislation Act or because of an amendment to the draft Bill made by the House of Representatives after the introduction of the draft Bill in accordance with s 34(2) of the Legislation Act). Those interpreting the draft Bill will be required to consider not only the language of the draft Bill, but also the earlier legislation and the case law associated with that legislation.	The Standing Orders Committee noted in its 2011 report that the scope of a revision Bill is limited to restating the existing law and to clarifying its intent. Amendments that go beyond that purpose may be outside the scope of the Bill. The scope rules apply to Bills being considered in committee. In the event of a dispute about the meaning of a revised provision, a court is likely to refer to the interpretation rule in section 35 of the Legislation Act 2012 (that a provision of a revision Act is not intended to change the effect of the law). As a result of section 35, a court would be reluctant to find that the meaning had been inadvertently changed. It is expected that a court would interpret the new words in the same way as the old words have been interpreted, given that the Act is a revision Act and so should not be materially changing the law.	
2.2	There are likely to be arguments that a revision has in fact changed the law. Given section 35 of the Legislation Act, in most cases it seems likely that such arguments will not succeed. However, that will not stop some parties from pursuing such arguments, for example in order to extract a settlement. There may be cases where it is difficult to reconcile the new statutory language and the courts will be required to grapple with the extent to which section 35 requires the courts to adopt an unchanged meaning.		
2.3	Standard form contracts will need to be updated to refer to the provisions of the draft Bill. Many commercial parties will instruct lawyers to undertake this updating or seek legal advice in relation to it.		

2.4	There is the risk of making unintended changes to the law. The nature of unintended consequences is that they often only come to light when an actual dispute arises. The effect of the draft Bill may be to decrease access and clarity because although the legislation may appear to mean one thing, a different interpretation may be required in light of the earlier statutory language and case law.		
2.5	There are limited law reform resources (in the way of departmental time to conduct the necessary policy work and limited House time to progress Bills), and there may be an opportunity cost associated with promoting the draft Bill. If a choice has to be made between revision (in the form of the draft Bill) or more substantive reform to address substantive issues, the Law Society favours prioritisation of substantive reform.		
3	In some cases the structures employed in the draft Bill will in practice reduce rather than improve access to and clarity of the law. Lay people will need to navigate their way through the different areas of the Bill to understand the law e.g. "disposition of property" (from cl 74) where "disposition" is defined in cl 9, but "property" is defined in cl 70. This creates unnecessary complexity, reduces clarity and access to the law, and increases the risk of errors.	We disagree that there is a problem here. A lot of work has gone into creating a clear and logical structure. A "signpost" cross-reference to clause 9 has been inserted where the definitions are used (see, eg, clause 74(3).	Change.
4	For accessibility, clarity and ease of use, the Sale of Goods Act 1908 and the Carriage of Goods Act 1979 should not be bundled together with each other or with the contract statutes which deal with basic contractual rules of a generic nature, into a single statute.	Which Acts to include is a matter of judgement. There are links between the Sale of Goods Act and the Carriage of Goods Act and the other legislation. We think we have the balance about right. The Fair Trading Act 1986, the Consumer Guarantees Act 1993,	

	Consumer Guarantees Act reforms were divided into separate bills. Even though this would mean repetition of some definitions in interpretation sections, it would preserve the focus of the existing statutes, and enable the clarity of internal cross-referencing to continue.	and the Credit Contracts and Consumer Finance Act 2003 are consumer protection legislation. This area of law was reformed in recent years.	
5	The Bill does not include all of New Zealand's contractual or commercial Acts. For instance, the Fair Trading Act 1986, the Personal Property Securities Act 1999, the Consumer Guarantees Act 1993, the Credit Contracts and Consumer Finance Act 2003, the Auctioneers Act 2013, the Secondhand Dealers and Pawnbrokers Act 2004, and the Wages Protection and Contractors' Liens Act Repeal Act 1987.	The Auctioneers Act 2013, the Secondhand Dealers and Pawnbrokers Act 2004 regulate professions/industries with consumer protection objectives. The Personal Property Securities Act 1999 provides a regime dealing with special personal property interests. This Act has a closer relationship to the Property Law Act 2007. Whether to include the Wages Protection and Contractors' Liens Act Repeal Act 1987, which contains one substantive provision that is similar in subject matter to other provisions of the Bill, has been referred to the administering department. Folding in too many more Acts would make the new Act unwieldy. We have tried to strike a balance and we think we have got it about right. It is easier for users to have important consumer legislation (like the FTA and the CGA) separate from other pieces of legislation.	

Professor David McLauchlan (Victoria University, Faculty of Law) – Personal Submission			
Issue No.	**Submission**	**MBIE/PCO comment**	**Change or No Change**
1	The creation of the Bill is unnecessary and will complicate and confuse already well-settled law as reference to old provisions will no longer be relevant.	This is the case with any new statute repealing and replacing another. Parliament has decided that revision is worthwhile following the Law Commission's recommendations. We now have to implement the revision programme that has been consulted on and tabled in the House in accordance with the Legislation Act 2012.	
2	Unintended consequences may arise.	The revision safeguards will help to protect against unintended consequences.	
3	A comprehensive overhaul of some of the individual Acts is needed, not a compilation and revision exercise of them.	This project has identified areas needing reform. This will follow the revision.	
4	The Bill is not comprehensive as it lacks the Consumer Guarantees Act and the Fair Trading Act (amongst others). It is no answer to say that these provisions are consumer law measures.	The Bill will be unwieldy if we include too many statutes. The Acts selected by the administering departments sit naturally together.	
5	The Bill has failed to include uncontentious aspects of the Law Commission's recommendations that it made in the Contract Statutes Review (particularly section 6 of the Contracts (Privity) Act).	The Law Commission report has been reviewed. Most recommended changes were picked up in 2002. Remaining Law Commission recommendations (eg, alignment between the Contractual Remedies Act and the Sale of Goods Act, section 6 of the CPA) are too substantive for a revision Bill.	

	Rae Nield – Personal Submission		
Issue No.	**Submission**	**MBIE/PCO comment**	**Change or No Change**
1	Important commercial law statutes have been left out, such as consumer law, employment law, and health and safety statutes. The Secondhand Dealers and Pawnbrokers Act is also absent.	It would be unwieldy. The Bill revises the contract statutes and key commercial statutes. There are links between the Sale of Goods Act and the contract statutes. The Law Commission's 1993 "*Contract statutes review*" included recommendations about the SGA and the MCA.	
2	The 'single Act' structure raises concerns: This is because the different statutes are a mixture of ex-post, ex-ante, and operational. Different audiences use them. • The Contracts (Privity) Act 1982, Contractual Remedies Act 1979, Contractual Mistakes Act 1977, Frustrated Contracts Act 1944 and the Illegal Contracts Act 1970 all operate ex post; whereas • The Minors' Contracts Act 1969 and the Electronic Transactions Act 2002 are mainly used ex ante; whereas • The Sale of Goods Act and the Mercantile Law Act 1908 are operational statutes rather than dispute resolution statutes. Most of the contract law statutes could be bundled together, this is because they are used post-transaction – that is, they are used by the Courts and by lawyers to assist with the clarification of contract disputes.		

3	The key exception is the Minors' Contract Act 1969. To bundle the Minors' Contracts provisions into a "Contract and Commercial Law Act" raises significant accessibility issues. A complex search would be required to locate the relevant provisions if that Act were to be even renamed.		
4	There are real concerns that the revised wording will have unintended consequences in that they appear to change the statutes. It is not sufficient to hide changes behind an interpretation clause which states that previous case law/interpretation prevails. The development of future case law would be frustrated by a clause of that kind, which would effectively freeze existing interpretations regardless of innovations in the commercial environment.		
5	The Mercantile Law Act requires a complete overhaul, not just a change in wording. It should not be included in this review.	The revision work has identified areas for later reform.	
6	<u>The Sale of Goods Act 1908</u> This Act is central to commercial and private life and to the economy. Its language is by no means archaic. Any revision to this Act which changes the wording of key sections has the potential to significantly disrupt settled case law and to require new case law. Changes to the Sale of Goods Act would have a severe impact on the New Zealand economy.		
7	<u>Carriage of Goods Act 1979</u> The revision of the CoGA, should it continue, has such a significant ability to change the law that no matter how pure the motives, it should at least be separated out and sent to Select Committee for		

	public submissions. The CoGA currently works and the relative lack of case law indicates that it is efficient.		
	It was confusing to find the former sections split up and scattered throughout the proposed revisions If the changes were to be made, it is likely that this will prove costly for the carriage industry, the legal profession (although for litigators there might well be counterbalancing benefits), and therefore consumers. These costs should be taken into account.	We will consider the structure again and consolidate some of the provisions where helpful to reduce the extent of change.	Possible change.
8	Analysis of the first 8 sections of the Carriage of Goods Act 1979 (emphasis is made of the fact that four hours was put into this exercise, pointing to the amount of time needed for the whole Bill):		
8.1	Cl 240 – Check that this does happen		
8.2	Cl 240(1)(e) – Insert "to" between "payable and" and "exercise".	We disagree that this is necessary.	No change.
8.3	Cl 241-242 – These would be better combined into a single section to improve clarity of analysis.	We disagree. The provision would be too lengthy.	No change.
8.4	Cl 242(1)(c) and 242(4) – "any other State" is unclear without analysis and referral to definitions in (f). Revert to previous wording: s 4(2)(a). This gives a complete picture.	We will clarify "any state other than NZ" in clause 242(4).	Change.
8.5	Cl 243 – Change is agreed with here. The submitter supports the replacement of "a carrier is not liable as such" with "a carrier is not liable in its capacity as a carrier".		

8.6	Cl 244 - "actual carrier" definition is difficult wording. Former wording distinguished clearly between the whole carriage or any part of the carriage. Suggest adding "whole" or "entire" eg "for the purpose of performing the entire carriage, any stage". "carriage": refer to "carry".	We disagree as we think the provision remains very close to the original wording (which did not refer to any part of the carriage) and is clear. We do not agree that it is necessary to note that "carry has a corresponding meaning". We can rely on the Interpretation Act 1999 rule in section 32.	 No change.
	"carrier".	We are not sure of the concern.	
	"Checked baggage" - Delete the word "check" which has no current usage: "form of receipt" or just "receipt" is better. "goods" – in Sale of Goods Act and other statutes includes software. Either exclude software or refer to tangible goods.	We agree and will amend the wording to "(whether or not a receipt is issued)". We do not agree. We have carried forward the existing wording which is clear in its context. The CGA applies to physical and tangible goods and software is not expressly excluded or included. Expressly excluding software would potentially raise more questions than it would resolve (eg, as to the position for damage if the hardware were damaged.)	Change. No change.
8.7	Cl 245 - Agree with "unit of measurement" change in 245(1).	Submitter supports clause 245(1), which omits references to bulk and weight in "unit of bulk, weight, or measurement" being carried forward from section 3. The NZ Insurance Council opposed this change and the wording has been reinstated.	Change.
8.8	Cl 245(2) - This amendment changes the scope of "unit of goods" significantly. Eg see *Wolters Cartage* case [1993] BCL 403 (CA) which would have had a different outcome under this definition. Cl 245(2) should refer to subs (1)(a) only: bulk freight.8.	We agree that clause 245(2) should only apply to bulk freight as set out in current section 3(1)(a) of the CGA. The provision has been changed along the lines of – "for the purposes of subsection (1)(a)".	Change.

8.9	Cl 246 - All of these are subject to the inherent vice etc provisions: see s 14 CGA. Please amend to include.	We don't agree with this point. Section 8(13) provides section 14 (*Carrier not liable in certain circumstances*) does not apply to contracts for carriage at owner's risk or to contracts for carriage on declared terms. Sections 8 and 14 appear to be in conflict. However, section 8(13) is specific and should prevail. Clause 262 carries forward section 14.	No change.
8.10	Cl 247 - Re note: s 8(3) applies only where there is not a label? No. S 8(2) is very specific. It gives the safe harbour. Eg see use of "deemed" in s 8(2) and "purport" in s 8(4). S 8(2) is subject to s 8(3) inter alia. It's limited carrier's risk if it isn't one of the others. That is the default provision.	We have not allowed terms of agreement to override labels. The Bill provides parties can choose whichever contract they want (as set out in section 8(3)). The Bill preserves the position that the use of labels is definitive as long as the formal requirements are met and that, if they are not, the default position is that the contract is of limited carrier's risk.	No change.
8.11	Cl 247(2) - This makes sense. Maybe should be a separate section after cl 251 or at end of cl 246.	We disagree. We think the provision as drafted is clear.	No change.
8.12	Cl 248 - Agree with "prominent" which covers online contracting as well. But you have "additional cost": actually, it is a reduction in cost for "owner's risk": see CGA s 8(9). Replace "additional cost" with "difference in cost".	We agree and the words "additional cost" have been changed to "difference in amount", which is more neutral. Clause 248(1)(b) "the additional cost is fair and reasonable under section 251" has been clarified to read (now clause 249) "the requirement in section 252 is met." Clause 252 refers to "difference in amount".	Change.
8.13	Cl 249 - Do you want to update "adduce"?	The term "adduce" has been updated to "bring".	Change.
8.14	Cl 250(b) - Agree with "prominent" which covers online contracting as well. But you have "additional cost": actually, it is a reduction in cost for "owner's risk": see CGA s 8(9). Replace "under" with "as set out in", also as for cl 248.	We agree and the words "additional cost" have been changed to "difference in amount" which is more neutral. Clause 250(b) "the additional cost is fair and reasonable under section 251" has been clarified to read "the requirement in section 252 is met."	Change.

8.15	Cl 251 - Agree with "prominent" which covers online contracting as well. But you have "additional cost": actually, it is a reduction in cost for "owner's risk": see CGA s 8(9). Replace "under" with "as set out in", also as for cl 248. Replace "additional cost" with "difference in cost" in each case. The former s 7 (now cl 288) should be here. It applies to contracts of carriage between consignor and contracting carrier as well as contracts between carriers.	"Additional cost" has been changed to "difference in amount". We are unclear about the submitter's concern. However, we have amended the draft to include one consolidated provision equivalent to section 7 at the front of the subpart. The effect of section 8(4) is preserved by clause 248(3)(a).	Change. Change.
8.16	Cl 253 - Disagree with exclusion of reference to former s 7. CGA s8(4) applies to contracts which do not have specific wording. They then become "limited carrier's risk".	We have separated out section 7 and inserted where relevant (clauses 244 and 281).	

George Wardle – Personal Submission			
Issue No.	**Submission**	**MBIE/PCO comment**	**Change or No Change**
1	The submitter identified this as an issue for future reform. Consideration should be given to repealing section 191 of the Trade Marks Act 2002 in relation to "relevant persons", such as guardians, taking action on behalf of minors in respect of the registration of trade marks. The phrase is unnecessary in light of the provisions contained in the Minors' Contract Act 1969. There is no corresponding provision in the Patents Act 2013 or the Designs Act 1953.	Section 191 of the Trade Marks Act provides that declaration may be made by "any of the relevant persons" on behalf of people under 18 years or who are unable to make a declaration. This is an issue to consider during any future reform of the Trade Marks Act.	No change.