LEGISLATION NOTES

The Arbitration Act 1996

The Arbitration Act 1996 ("the Act") sets out a new framework for the functioning of arbitration proceedings in New Zealand. It contains two different sets of rules; the First Schedule applies to all commercial arbitrations, while the Second Schedule relates specifically to domestic commercial arbitrations. The Act applies to all arbitrations commenced on or after 1 July 1997.

The Purposes of the Act

The primary purpose of the Act is to encourage the use of arbitration.[1] The Act seeks to make arbitration a preferred method of resolving commercial and other disputes. In order to achieve this primary purpose the Act has two identifiable groups of subsidiary goals:

(i) To promote international and domestic consistency between arbitral regimes, and to give effect to New Zealand's international obligations.[2] These twin goals are achieved by adopting an arbitral model based on the Model Law on International Commercial Arbitration ("Model Law") adopted by the United Nations Commission on International Trade ("UNCITRAL") on 21 June 1985.[3]

(ii) To redefine and clarify the limits of judicial review of the arbitral process, and to facilitate the recognition of arbitral agreements and awards.[4]

Operation of the Act

The First Schedule to the Act applies to all arbitrations carried out in New Zealand.[5] It sets out a comprehensive set of rules governing the entire arbitral process including, inter alia, appointment of arbitrators, principles guiding arbitration, and conduct at arbitral hearings. The First Schedule also establishes a somewhat limited role for the High Court in such matters as enforcement of arbitral awards, and appeals against those awards.

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1 Section 5(a), (b), and (c).

2 As set out in the Third Schedule of the Act.

3 This model is the basis for the First Schedule of the Act.

4 Section 5(d) and (e).

5 Section 6(1)(a).

The Second Schedule is presumed to apply to domestic arbitration.[6] Parties to such an arbitration can expressly opt out of the Second Schedule. When the arbitration is an international arbitration held in New Zealand, the parties may choose to opt in to the Second Schedule. There is however, no presumption to that effect.[7] Parties may elect to be bound by some or all of the clauses set out in the Second Schedule. The Second Schedule sets out some additional optional rules relating to the way in which arbitral proceedings are to be conducted, but its main purpose is to provide a framework within which the High Court has a greater role in overseeing and reviewing proceedings.

The optional nature of the rules set out in the Second Schedule recognises the importance of consent within the concept and framework of arbitration. In particular, the Act encourages international arbitration within New Zealand, by allowing parties to such an arbitration to choose the extent to which the domestic courts will have jurisdiction to review both the manner in which the arbitration is conducted, and the content of the arbitral award.

The Act, in its substantive provisions, clarifies a number of issues relating to arbitration. Section 10 of the Act outlines the types of disputes which are able to be resolved by arbitration. Again consent is a key element within the definition of an arbitrable dispute. The ability of parties to submit disputes to arbitration is limited under s 10 only by "public policy"[8] and when "... under any other law, such a dispute is not capable of determination by arbitration".[9]

Prior to the Act coming into force, the potential liability of arbitrators in negligence was not clear. Section 13 of the Act clearly states that an arbitrator is not liable in negligence in respect of anything done or omitted in his or her capacity as arbitrator. In the enactment of s 13 Parliament has expressed its preference for the view that arbitrators should be afforded a similar level of immunity as judges. This view seems to be in stark contrast with the judgment of Tipping J in *Pickens v Templeton.*[10] There it was held that the liability of an arbitrator in a particular case should be dependent on the extent to which he or she could be said to have departed from the role of a judge. There is however, a possible rationalisation of the two views.[11] First, s 13 may be recognition that, given the optional nature of the Second Schedule to the Act, the Court has a lesser role in overseeing arbitral proceedings and less scope to review the substance of arbitral awards. The role of the arbitrator is therefore more like that of a judge, and greater immunity on that basis is appropriate. The second possible rationalisation is that under cl 3 of the Second Schedule to the Act, an arbitral tribunal has the power to "[a]dopt

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6 Section 6(2)(b).
7 Section 6(2)(a).
8 Section 10(1).
9 Ibid.
10 [1994] 2 NZLR 718.
11 Notwithstanding the primacy of legislation.

inquisitorial processes"[12] and "[d]raw on its own knowledge and expertise".[13] These powers sanction an arbitrator departing from the role of a judge. When read in light of the redefined role of arbitrators under the Act, the *Pickens* test becomes unworkable, and the inclusion of s 13 necessary.

Policy

Underlying the operational provisions of the Act, and the content of the First and Second Schedules, are a number of identifiable policy principles. The first is the principle of consent. The rationale is that, if parties are able to design the procedure which any arbitration will follow, as well as choosing whether or not to submit to arbitration, then it will become a more attractive method of dispute resolution. Further, parties are likely to be more content with the outcome of an arbitration if they have consented to the procedure governing that arbitration.

The principle of consent is put into practice throughout the Act. Parties will, for the most part, have submitted to arbitration through the express terms of a contract. The only exception is where arbitration is provided as the method of dispute resolution under another statute, in which case the provisions of the other statute are to be read as if the statute were an arbitration agreement.[14] As discussed above, parties are able to opt in or out of the Second Schedule to the Act, in effect determining the extent to which the High Court will have jurisdiction over the form and content of any arbitration.

The principle of consent is also apparent within the First Schedule, notwithstanding the uniform application of the First Schedule to all arbitrations heard in New Zealand. Clause 5 of the First Schedule limits court intervention to that specifically provided for within the Schedule. Clause 9 of the First Schedule sets out the grounds on which a court may grant interim relief in respect of a matter being legitimately determined by arbitration. Further, cl 9 sets out in detail the type of interim injunction. The combined effect of cls 5 and 9 is to limit court involvement under the First Schedule to interim relief of the type specifically contemplated by cl 9. The extent to which a court may review the procedure agreed to in an arbitration agreement is governed by cl 34 of the First Schedule. The grounds for setting aside an arbitration award, other than for lack of contractual capacity, are twofold:

(i) If there has been inadequate notice of the appointment of an arbitrator, or of the commencement of arbitral proceedings, or one party is, for some other reason unable to present that party's case;[15] and

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12 Clause 3(a), Second Schedule.

13 Clause 3(b), Second Schedule.

14 Section 9(2).

15 Clause 34(2)(a)(ii), Second Schedule.

(ii) If the composition of the arbitral tribunal, or the procedure operated under in the arbitral hearing, is outside that contemplated in the arbitration agreement.[16]

Both of the above grounds are consistent with the principle of consent within the Act. Pursuant to cl 34(2)(b)(ii) of the First Schedule, the courts may set aside an award where it is in conflict with the public policy of New Zealand. Guidance in cl 34(6) of the same Schedule, establishes that an award is in conflict with public policy if, *inter alia*, the making of the award was induced or effected by fraud, or if a breach of natural justice occurred. The role of the courts in terms of the review of awards is confined to those circumstances where judicial intervention is consistent with the principle of consent.

Conclusion

The Act succeeds in giving more power to arbitrators and arbitral tribunals. The immunity given to arbitrators for negligence, along with the guidance provided in the Schedules to the Act in respect of appointment of arbitrators and the conduct of arbitral hearings, should ensure that arbitrations are run effectively and efficiently. In this respect the Act is well placed to achieve the goal of encouraging arbitration as a method of resolving commercial and other disputes.

The operation of the Act, and in particular the interplay between the First and Second Schedules, will have significant impact on the drafting of "submission to arbitration" clauses in commercial contracts. Practitioners will need to be aware, both of the status of any likely arbitration (that is, whether it is international or domestic), and of the specifics of the Second Schedule in determining whether to opt in or out of some or all of the rules contained therein. Parties can, under the Act, be confident that their expressed intentions will be given effect, unless they are contrary to public policy.

Saul Holt

16 Clause 34(2)(a)(iii) and (iv), Second Schedule.

Financial Transactions Reporting Act 1996

As a member of the Financial Action Task Force, and a signatory to the 1988 Vienna Convention,[1] New Zealand is committed to the international fight against money laundering.

The Crimes Amendment Act 1995 and the Financial Transactions Reporting Act 1996 ("the Act"), have been enacted in order to satisfy these international obligations. The Crimes Amendment Act 1995 makes money laundering, and the intention to launder money, criminal acts in New Zealand.[2] The Financial Transactions Reporting Act 1996 provides efficient measures for preventing and detecting money laundering through financial institutions, and assisting the police in the location and confiscation of proceeds of crime.[3]

Money Laundering

Money laundering is the process by which income and assets derived from criminal activity are converted into, or disguised as, legitimate income. It can be difficult to detect, because often it involves a long and complex series of transactions which disguise the illicit activity. By depriving criminals of the proceeds of criminal activity, legislation against money laundering is regarded as a means of preventing other serious crimes, especially drug trafficking.

The Act makes some important changes to the New Zealand position on money laundering, and will have a major impact on those who come within the inclusive definition of "financial institution" in s 3.

Central to the Act is the recognition that "financial institutions ... who deal with client funds on a daily basis, have a front-line role in the war on money-laundering and organised crime".[4] These institutions are in a unique position to detect money laundering, and are themselves particularly vulnerable to money laundering activity. Financial institutions should be aware of their increased liability and the ways in which they should alter existing business practices in order to ensure compliance.

Impact on Banks

Prior to the enactment of the Crimes Amendment Act 1995, there was no specific criminal liability for engaging, or assisting in, money laundering activities. However, banks were already voluntarily implementing procedures to

1 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.

2 Crimes Act 1961, s 257A.

3 See, for example, Hon D A M Graham 547 NZPD 6683 (4 April 1995).

4 Ibid, 6684.

prevent money laundering.[5]

The three basic types of obligations imposed on financial institutions are to: verify identity;[6] report suspicious transactions;[7] and retain business records.[8]

Identifying Customers and Keeping Records

The requirement to identify customers and keep certain records is designed to enable the police to follow a paper trail to identify money launderers. Financial institutions have an obligation to verify the identity of a person in a number of situations.[9] The main objective is to prevent the keeping of anonymous accounts, or accounts in obviously fictitious names.[10]

The effect of the requirement to verify the identity of a potential customer is not particularly onerous for banks, as it makes good business sense to identify clients. Most customers can be dealt with face to face so that documents can confirm their identity. Furthermore, certain precautions taken by banks may be appropriate because banks are the primary means of accessing the financial market. However, the Act will have a major impact on other financial institutions which conduct their business only by mail, or carry out transactions for trustees or employees on behalf of numerous, and sometimes unidentified, beneficiaries or employers.

There is concern that the Act's measures needlessly affect people acting in good faith. Law-abiding customers may, for reasons of privacy or practicality, prefer to conduct transactions on an anonymous basis. The Act will prevent them from doing so. The Act places the onus of obtaining appropriate identification on people who wish to open an account or transact in amounts of cash exceeding the limit prescribed in regulation. This may place certain communities at a disadvantage if, because of religious, cultural, or financial reasons, they do not have suitable documentation. The Privacy Commissioner has therefore emphasised that care must be taken that the requirements are not needlessly inflexible or strict.[11]

Other privacy concerns about the Act arise from the requirement that financial institutions keep records of every transaction in a suitable form so as to allow the Commissioner of Police to reconstruct a transaction at any time. There is an apprehension that large amounts of personal information, irrelevant to the financial institutions' activities, may end up being kept on file. For example,

5 In 1991, banks adopted a self-regulatory comprehensive set of minimum money laundering procedures.
6 Part II.
7 Part III.
8 Part IV.
9 Sections 6-9 and 11.
10 O'Gorman, "The Financial Transactions Reporting Bill 1995" (1995) 7 Auckland U L Rev 1083.
11 *Report by the Privacy Commissioner to the Minister of Justice on the Financial Transactions Reporting Bill 1995*, 5.

financial institutions may feel that they should photocopy passports or birth certificates and keep them, in order to satisfy s 30 of the Act.[12] The Privacy Commissioner has therefore emphasised that only the retention of certain details should be allowed.[13]

The blanket verification requirements have been criticised as being counterproductive, where there is a suspicious transaction involved. Making inquiries may alert the people co-ordinating transactions, and therefore may make further investigation more difficult.[14] Nevertheless, the provisions are an important deterrent for criminals as well as a way of facilitating apprehension. If criminals choose not to use a financial institution because a trail would be created, then the objectives of the legislation are to some extent being achieved.

Reporting Suspicious Transactions

The requirement to report suspicious transactions ensures that authorities are alerted to possible criminal activity at an early stage, so an investigation can commence. New Zealand has not followed the North American or Australian approaches of requiring every transaction above a certain threshold to be reported. It was found that this requirement imposed high compliance costs on financial institutions without any real increase in the detection of crime.[15] Instead, New Zealand has adopted a mandatory reporting requirement where a transaction is objectively suspicious.[16] An advantage of this flexible standard is that the regime can adapt to new money laundering techniques. The changing nature of laundering techniques, and the large number of methods used, make it inappropriate to define a "suspicious transaction" in legislation. This adaptability, however, may come at the expense of certainty. To reduce this uncertainty, financial institutions must have regard to guidelines as to what constitutes a suspicious transaction. These guidelines will be issued by the Police[17] in consultation with the Privacy Commissioner,[18] and relevant industry organisations.[19] The guidelines are a way of assisting employees of financial institutions to comply with the legislation, even if they do not have the specialist knowledge required to identify objectively suspicious behaviour.

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12 Section 30 of the Act requires banks to keep information for the purposes of verifying customers' identity.

13 Supra at note 11.

14 Life Office Association, *Submissions to the Justice and Law Reform Select Committee on the Financial Transactions Reporting Bill 1995*, 4.

15 Supra at note 3, at 6684.

16 Section 15(1)(b).

17 Section 24(1)(a).

18 Section 25(1)(a).

19 Section 25(1)(b)(ii).

The obligation to report suspicious transactions will have a negative impact on innocent persons who are not laundering money. Some people carrying out legitimate transactions or opening accounts for bona fide reasons will be reported on. This may lead to investigations of the private affairs of innocent persons. The Privacy Commissioner has therefore considered the legislation in the light of these concerns, and the objectives of the legislation.[20] The Privacy Commissioner has concluded that, with the suspicious transaction reporting obligation, there is a more serious risk of infringing privacy, than with any other obligation the Act contains. The success of the Act will largely depend on the guidelines. The Privacy Commissioner is to take an active role in the drafting of the guidelines so as to minimise the problem of over-reporting, and to balance privacy concerns with the objectives of the Act.[21]

Prior to the passing of the Act, in reporting a suspicious transaction, banks faced potential liability at common law. Breach of the duty of confidentiality, the risk of an action in defamation, and liability in equity for handling or receipt of illicit funds, could all potentially arise from the banks' behaviour in relation to a suspicious transaction report.[22] The Act expressly protects financial institutions if they act genuinely, and on reasonable grounds to assist the police in detecting and preventing money laundering. No civil, criminal, or disciplinary proceedings shall lie against a person for the disclosure of information as required by the Act, or for any consequences following from that disclosure.[23]

Although protection is provided in the Act for any consequences of a report being made pursuant to the provision in the Act, this does not necessarily make the option of reporting "just in case" the best one.[24] A bank should only make a report or take action which would undermine the relationship of confidentiality, if it is expressly required by the Act. Section 17 protects a person who discloses or supplies information in a suspicious transaction report made "pursuant to" s 15 of the Act. Section 15 has a basic requirement that the transaction falls within paras (i) or (ii) of s 15(b) of the Act. The relationship between the objective requirement of reasonable grounds, and the subjective element of actual suspicion, creates problems for financial institutions. Although this obviously creates a risk for such institutions if they make a report where there are no reasonable grounds to suspect money laundering, the requirements of reasonable grounds for making a report should not be too onerous for a financial institution to establish.

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20 Section 14(b) of the Privacy Act 1993 requires the Commissioner to take account of international obligations accepted by New Zealand.

21 Section 25(1)(a).

22 O'Gorman, *Anti-Money Laundering Legislation and its Impact on Banks* (1995) LLB (Hons) Dissertation, University of Auckland, 40.

23 Section 17(1).

24 Supra at note 22, at 42.

Failure to Comply with the Act

It is an offence not to verify identity in a situation where it is required,[25] not to report suspicious transactions,[26] or to fail to retain business records.[27] An individual will be liable for a fine not exceeding $20,000, and a body corporate will be liable for a fine of not more than $100,000.[28]

The Act is aimed at encouraging the co-operation of the financial industry with law enforcement agencies, and is not targeting international money launderers since they will be caught by the Crimes Amendment Act 1995.[29] Although the penalties are sufficient to ensure the Act is effective, the primary aim is not to punish banks.

Defences

A defence is available to banks and other financial institutions where the financial institution proves that it took such steps as were reasonably practicable to prevent employees from breaching the Act.[30] Therefore, financial institutions have significant incentives to invest in effective procedures in order to reduce or avoid the threat of breaching the Act.

The sheer volume of transactions processed by financial institutions will make the use of electronic data processing the only realistic option for most financial institutions to comply with the Act.[31]

Conclusion

Neither money laundering, nor the narcotics trade are as well established in New Zealand as in other countries. Therefore, given the nature of New Zealand's money laundering problems, the Act, in conjunction with the Crimes Amendment Act 1995, should be a disincentive for foreign criminals to use New Zealand for money laundering, as well as preventing domestic money laundering to the greatest feasible extent.

New Zealand has adopted a mandatory reporting requirement when a transaction is objectively suspicious. This flexible approach reduces compliance costs while enabling the regime to adapt to new money laundering techniques.

Financial institutions will have to be aware of their new obligations. In order to reduce the risk of liability, those institutions will have to put in place adequate systems and training for staff to ensure compliance with the Act.

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25 Section 13.
26 Section 22.
27 Section 36.
28 Sections 13(2), 22(2), and 36(2).
29 Supra at note 2.
30 Section 53(3).
31 Supra at note 22, at 45.

Neither financial institutions, nor the legislature, can assume that currently effective anti-money laundering measures will remain effective in the future. The means by which illicit funds can be concealed and "cleaned" are innumerable. It is a serious challenge for law enforcement authorities to keep up with the potentially infinite variety of techniques, especially given the rate at which technology is currently changing. For the moment, the Act ensures that New Zealand is fulfilling its obligations in the international efforts against money laundering.

Steven Woolford

Investment Advisers (Disclosure) Act 1996

Background to the Act

In December of 1992 the Todd Task Force on Private Provision for Retirement ("the Todd Task Force"), which had been engaged to review New Zealand savings for retirement, issued its final report entitled *The Way Forward.*[1] This led to The Multi-Party Accord on Retirement Income Policies ("the Accord") signed by the three political parties then represented in Parliament. Part IV of the Accord dealt with the need to improve the level of disclosure in the securities market. A body comprised chiefly of industry personnel, entitled the Working Group on Improved Product and Investment Adviser Disclosures ("the Working Group"), was formed to draft Part IV of the Accord in statutory form. It was the finding of the Todd Task Force that:[2]

> [S]avers' needs for information are currently not being met. Information necessary for informed decision making must be available to savers.

Two areas had been identified as wanting: first, the level of product disclosure; second, the degree to which investment advisers disclosed relevant information. To resolve the first issue, amendments to existing securities laws were made. The broad effect of these was to provide for a consistent level of disclosure across all

1 The Todd Task Force produced three substantive reports: *The Issues* (December 1991), *The Options* (August 1992), and *The Way Forward* (December 1992).

2 *The Options*, ibid, 43.

forms of investment products used by savers.[3] On the second issue and after extensive consultation with both investors and industry participants, the Todd Task Force concluded that the problem with investment advisers was that:[4]

> [M]any people [did] not know where to go for advice or how to assess the potential advisers.

To remedy this the Investment Advisers (Disclosure) Act 1996 ("the Act") was passed in September 1996 and came into effect on 1 October 1997.

To Whom does the Act Apply?

The Act applies to two groups: investment advisers and brokers. An investment adviser is defined as "a person ... who, in the course of the person's business or employment, gives investment advice"[5] whereas a broker is defined as someone who in the course of business "receives investment money or investment property."[6] The scope of the Act is intentionally wide, as the Todd Task Force found investment advice was given by a diverse range of professionals. Not only should industry participants familiarise themselves with the requirements of the Act, but others such as lawyers and accountants may find this necessary. In all cases, employers themselves are deemed to be investment advisers or brokers if their employees fall within the definitions.[7] Issuers, Promoters, Trustees, Statutory Supervisors, and Security Registrars are expressly excluded.[8] Further, in the case of investment advice, work by journalists that might otherwise be deemed "advice" is excluded.[9] However, an article by an investment adviser in a newspaper would still be covered.

In applying the Act the interpretation of "investment advice" is likely to be critical. The Justice and Law Reform Committee suggest that if the information is merely factual it will not be deemed advice. Certainly "facts" are not included in the definition of investment advice. However, as the common law has demonstrated the distinction between providing facts and advice is often tenuous.[10]

Disclosure by Investment Advisers and Investment Brokers

The Act imposes a two tier disclosure requirement. Investment advisers and

3 The specific Acts are: the Securities Amendment Act 1996, the Unit Trusts Amendment Act 1996, the Superannuation Schemes Amendment Act 1996, and the Financial Reporting Amendment Act (No 2) 1996.

4 Supra at note 2, at 45.

5 Section 2.

6 Ibid.

7 Ibid.

8 Sections 2(b) and (c) respectively.

9 Supra at note 5.

10 *The Royal Bank Trust Co, (Trinidad) Ltd v Pampellonne* [1987] 1 Lloyds Rep 218.

brokers must make an initial compulsory disclosure before giving investment advice or receiving public funds. Only on request by the investor does the adviser have to disclose second tier elements.

(a) Compulsory Disclosure

Before dealing with the public (through giving advice or receiving funds), brokers and investment advisers must disclose whether, in the last five years, the broker or adviser:[11]

(i) Has been convicted of an offence against the Act, or of a crime involving dishonesty (as defined in s 2(1) of the Crimes Act 1961);
(ii) Was a director or principal officer of a body corporate at the time the body corporate committed such an offence;
(iii) Has been adjudged bankrupt; or
(iv) Has been prohibited by an Act or by a court from taking part in the management of a company or a business.

Where money or property is received, the broker or adviser must first disclose the procedures used for receipt and disbursement. The Act gives a list of the disclosures required. They are:[12]

(i) How the payment should be made;
(ii) Whether it will be held on trust;
(iii) What record will be kept;
(iv) What audit procedures are in place; and
(v) The extent, if any, to which the funds may be used for the benefit of the initial receiver.

Finally, there is provision that further information must be disclosed should it be deemed necessary.[13]

(b) Requested Disclosure

On request, investment advisers must disclose, within five working days, the following: any relevant organisation with which the adviser has a relationship;[14] the types of securities the adviser gives advice about, and anything that restricts their scope (such as only advising on particular products);[15] any relevant

11 Section 3(1).
12 Section 3(2).
13 Section 3(2)(f).
14 Section 4(1)(a).
15 Section 4(1)(b).

qualifications, the details of them, and the extent to which the adviser has kept up to date in that field;[16] a description of the adviser's experience in investment advice;[17] the nature and extent of any interest (pecuniary or otherwise) received from the transaction;[18] where they receive remuneration from a person, other than the investor, in connection with the investment advice, the extent of that remuneration and from whom it is received.[19] Pursuant to s 4(2), even if the request only extends to one of the above, the remainder must also be disclosed.[20] This last requirement is likely to have a significant impact on an industry characterised by kickbacks and trail commissions.

A number of submissions were received by the Justice and Law Reform Committee concerning the separation of disclosure requirements.[21] It was submitted that separation would result in less disclosure and would potentially be detrimental to the very class of persons the Act sought to protect. This ignores the underlying policy rationale of the securities law identified by both the Todd Task Force and Working Group. The separation of disclosure requirements serve two purposes. They attempt to minimise the compliance costs for advisers and brokers. Cost-effective rules were specifically identified as one of the underlying policies of the new Act.[22] More significantly, the aim of the Act is not to provide extensive regulation of the industry:[23]

> The purpose of the disclosure regime relating to investment advisers is to encourage investors to ask questions about the professional attributes of an adviser or broker; [and] to become more discerning about from whom they take investment advice and to whom they pay or deliver investment property or money.

The separation strikes a critical balance between informing investors of events likely to be crucial to their decision making process (and which, therefore, should be compulsory), and additional information that, while useful, may be outweighed by the detriment associated with greater compliance costs.

Method and Manner of Disclosure

Whether the disclosure is compulsory or requested, the procedure for

16 Section 4(1)(c).

17 Section 4(1)(d).

18 Section 4(1)(e).

19 Section 4(1)(f).

20 Although the information under ss 4(1)(e) and (f) need not be disclosed if it did not influence the adviser, it is recommended advisers err on the side of caution as this will rarely be the case.

21 *Commentary by the Justice and Law Reform Committee on the Investment Product and Adviser (Disclosure) Bill* (1996) ix.

22 Ministry's Working Group Report, *Recommendations for Improved Investment Product and Investment Adviser Disclosure* (December 1995) Part IV, 24.

23 557 NZPD 14256 (22 August 1996).

disclosing is governed by s 5. This requires the disclosure to be in writing,[24] to state contact details of the adviser or broker concerned, and to either be handed to the investor, or posted in a specified manner. The latter includes electronic mail.

The Act also provides that the manner in which the disclosure is made cannot be deceptive, misleading, or confusing.[25]

Enforcement

There are a variety of responses an aggrieved investor can make within the scope of the Act. Under s 9 a person can apply for an order to have the required information disclosed where the adviser or broker has not been forthcoming. Criminal liability may entail fines of up to $10,000 for an individual and $30,000 for a company, but cannot be punished by imprisonment.[26] If the conduct constitutes a significant contravention of the Act then the aggrieved investor can make an application to the court to receive the fine themselves. This can occur irrespective of whether or not the person has suffered any loss as a result.[27] It is anticipated that requiring leave of the court will ensure vexatious claims are not made. This could have been achieved in a more cost effective manner, by retaining the common law requirement of economic loss.

Finally, s 7 provides for more serious contraventions, or repeated breaches of the Act. The court may prohibit the broker, adviser, or director of a contravening company from acting in a number of industry roles. These range from being an employee or agent of an investment adviser or broker, to taking part in the management of a business involved in investment advice or broking.[28]

This form of blacklisting is likely to be the biggest deterrent. A court order under s 7 has the potential to indefinitely suspend a rogue adviser or broker. For this reason it is hoped it will be used sparingly. Injunctions are available under s 8.

Conclusion

The Act confirms that the underlying policy of securities law is regulation by disclosure. Advisers and brokers are not required to be registered or to meet minimum levels of experience or qualification. This is a different approach from that taken in many jurisdictions. For example, both Australia and the United States have more formal licensing or registration requirements. The Act is proactive in that it seeks to prevent, rather than address, breaches. Elizabeth Hickey, Convenor for the Working Group, noted: "[t]he consequences of unwise or imprudent investment decisions can be severe. However, if no responsibility for the

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24 Section 5(a).
25 Section 6.
26 Section 11.
27 Section 10.
28 Section 7(d), (e), and (f).

consequences lies with the investor there is not the incentive to treat such decision making seriously."[29] This seems a sensible approach to an area of law that already contains a wide range of remedies in the case of a breach, be they equitable,[30] tortious,[31] contractual,[32] or arising from other statutory instruments.[33]

Michael Lang

Killing for Profit

Succession Law - Homicidal Heirs: Report 38 of the Law Commission.

The Law Commission ("the Commission") begins its report on Homicidal Heirs by stating the ancient common law maxim: *nullus commodum capere potest de injuria sua propria*. This is the principle that no-one may profit from his or her own wrongdoing, and it forms the foundation of the Commision's draft Succession (Homicide) Act ("the draft Act").

The Commission accepts that it is well settled in most jurisdictions, including New Zealand, that a killer may not receive any benefit under the victim's will, nor alternatively, under the victim's intestacy. Nevertheless, it proposes that Parliament codifies this principle into "one plain language statute", to enable administrators and trustees to perform their duties without court action being required.

The Commission believes this is necessary for four main reasons, all based around the need for certainty, and the preference for avoiding costly court

29 Hickey, "Commentary on paper presented by Waters, QC: A Canadian looks at the Investment Product and Adviser Disclosure Law". Both papers were delivered at the conference on "Investment Advice and Current Issues in Superannuation Law" held by the Research Centre for Business Law, (18 November 1996).

30 Investment advisers and brokers who handle investors' money will, in most cases, be subject to fiduciary duties. These may also arise from giving investment advice; see *Standard Investments Ltd v Canadian Imperial Bank of Commerce* (1986) 22 DLR (4th) 410.

31 Primarily negligence, but also potentially the tort of assumption of responsibility; see *Henderson v Merrett Syndicates Ltd* [1994] 3 WLR 761 per Lord Browne-Wilkinson.

32 The relationship between an investment adviser and an investor will normally be governed by a contract, whether written or oral.

33 The principal ones being: the Fair Trading Act 1986, Consumer Guarantees Act 1993, Secret Commissions Act 1910, and Insurance Intermediaries Act 1994.

proceedings. First, while the general principle stated above is well settled, a statute would ensure that it was applied consistently in all cases; for example, in deciding where the bequest made to the killer ultimately goes. Second, an unambiguous statute is important for the practical reason that the costs of litigating each uncertain point of law are too great for the majority of estates. Third, the Commission cites the increase in murders of a domestic nature (increasing the probability of a killer being a beneficiary in a victim's will) as a factor supporting the need for greater certainty. Fourth, a statute would clarify the relationship between the law of homicidal heirs, which is currently judge-made, and the Administration Act 1969, which expressly governs distribution on intestacy.

The draft Act is intended to be a complete and exhaustive code relating to killers who stand to benefit from their victim's death. However, guardianship issues in relation to the victim's children still fall to be decided under the Guardianship Act 1968, which the Commission sees as adequate for this task.

Killings Under the Draft Act

The Commission sees the line between those killings which will attract the bar on profits, and those which will not, as being set by policy. As such, the line should be drawn "clearly and completely" by Parliament. The Commission's starting point was that the criminal law should define the types of killings that prevent the killer from profiting. Thus, the definition of killers who would fall within the draft Act is based on the definition of homicide in s 158 of the Crimes Act 1961:

> Homicide is the killing of a human being by another, directly or indirectly, by any means whatsoever.

This definition includes the killing of an unborn child, and under current law, instances where battered women kill their abusers. The draft Act, however, expressly excludes negligent killings, assisted suicides, suicide pacts, and infanticide from its field of operation. As the draft Act is based on public policy, a victim's deathbed forgiveness of his or her killer will have no legal effect and will not allow a killer to profit from his or her wrongdoing.

Negligent Killings

Negligent killings are excluded from the draft Act on the grounds that the moral repugnance felt towards someone profiting from an intentional killing does not extend to accidental killings. In particular, because a negligent killing is not intentional, there can be no incentive to negligently kill in order to profit. The Commission preferred this blanket exclusion to a discretionary approach which allows the possibility of significant inconsistencies in the exercise of the discretion (as reportedly occurs in the United Kingdom under the Forfeiture Act 1982).

Assisted Suicides, Mercy Killings, and Suicide Pacts

While assisted suicides and mercy killings are without doubt deliberate, the Commission distinguishes the former killings from murder by reference to whether it is the victim or the killer who decides if the victim is to die. This distinction is supported by the definition of homicide in the Crimes Act, which specifically excludes the offence of assisting a suicide (which is covered by s 179 of that Act).

A conviction of assisting a suicide does not, however, automatically mean that the killer may profit from the victim's will or intestacy. Under the draft Act, a dissenting third party may still attempt to prove homicide in civil proceedings, on the balance of probabilities. The Commission considered, but ultimately rejected as unworkable, any requirement that the person who assisted the suicide had to show that they were not financially motivated.

The Commission also looked at the apparent paradox of mercy killings (which amount to murder) being subject to the bar on profits rule, while assisting suicide is not. The difference was justified on the basis of the distinction drawn earlier between whether it is the victim or the killer who decides that the victim is to die. In some mercy killings, the decision will be made by the killer, who is motivated to relieve the victim's suffering. The Commission saw the real issue in such cases as being whether a selfless motivation for killing required a special rule, and ultimately decided that it did not. It decided this against the background that "the protection of life is, and will remain, a primary function of the criminal law"; quoting from *Re L: Auckland Area Health Board v Attorney-General.*[1]

With assisting suicide being excluded from the draft Act, the Commission saw it as consistent to similarly exclude those who kill under a suicide pact. Interestingly, no comment was made on the seeming paradox this creates between those mercy killings in which the victim makes the decision to die, and killings pursuant to a suicide pact.

Infanticide and the Killing of an Unborn Child

The Commission recommended that infanticide be expressly excluded from the bar on profiting, because conviction of this offence appeared sufficiently proximate to acquittal on the grounds of insanity. However, with regard to killing an unborn child, the Commission thought it advisable that the bar on profiting should apply, as no insanity considerations were relevant to this offence.

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1 [1993] 1 NZLR 235, 244.

Battered Women

Under present law, battered women's syndrome ("the syndrome") is potentially relevant to the issues of self-defence, provocation, or duress - but it is not a defence in and of itself. This means that if the syndrome is used to establish the complete defence of self-defence, then there is no conviction, and thus the bar to profiting under the draft Act does not arise. However, if the syndrome is used to establish the incomplete defences of provocation or duress, a conviction for the reduced offence of manslaughter results, and the bar to profiting would apply.

The Commission looked at the issue of whether a special rule should preclude the bar against profiting from applying to battered women, as it would against any other killer who established provocation or duress. Ultimately, it was decided that as this was a policy question; the onus was on Parliament to amend the Crimes Act to treat battered women and mercy killers more leniently. The draft Act has been constructed in such a way that the bar on profiting would not apply to these killers if the Crimes Act was so amended.

Evidence

The Commission recommends a change in the current law, to provide that convictions of culpable homicide would be conclusive proof under the draft Act that the killer is guilty of the victim's homicide. This is consistent with the aim of avoiding court proceedings, as it allows an administrator or trustee sufficient certainty to perform their duties. Similarly, a finding of not guilty by reason of insanity would mean that the draft Act would not apply.

In cases where a person is acquitted of homicide, interested parties are permitted to re-litigate this issue in civil proceedings under the draft Act, where the accuser must satisfy the court of the killer's guilt on the balance of probabilities. The Commission appears to give cautious support to importing a third general standard of proof from the United States; that of "clear and convincing evidence" for cases where "serious" allegations are made in civil proceedings. Should it be imported, it would undoubtedly apply to the draft Act.

Provision is made for cases where the alleged killer has not been prosecuted for the crime in New Zealand. In such circumstances, the draft Act empowers the court to determine whether the alleged killer would have been guilty of homicide, or not guilty by reason of insanity, if tried in a New Zealand court. Similarly, a conviction of homicide outside New Zealand is admissible for proceedings under the draft Act, although the weight to be given to this evidence is left to the court.

Distribution of the Property

The draft Act provides for uniform distribution of the property which the killer is barred from taking by treating the killer as predeceasing the victim (unless the victim's will provides or implies otherwise). The killer is also prevented from benefiting from the victim's non-probate assets (such as nomination of a bank account, or of a superannuation benefit) by the same method.

The problem arising when the killer and victim are joint tenants in a property is solved, again, by treating the killer as having predeceased the victim. The Commission was of the opinion that once the killer deprived the victim of their property rights under the joint tenancy, it was just that the killer's own property rights were similarly terminated. To protect the victim's interest in the interim, the ability to lodge a caveat (under s 137 of the Land Transfer Act 1952) against the transmission of interests in land held by the killer and the victim as joint tenants, is imported into the draft Act.

Preserving Killers' Prior and Independent Rights

The Commission also addressed the principle that a killer should not be deprived of property or rights which they possessed before the killing. The response to this is contained in ss 10 and 11 of the draft Act. The proposed s 10 deals with the three types of claims available to the killer against the victim's estate: matrimonial property, testamentary promises, and restitution. These claims are permitted on the basis that they are sufficiently removed from the killing. The proposed s 11 deals with property that is not in the victim's estate, and non-probate assets.

Together, these sections preserve a killer's rights which existed before the killing, but simultaneously ensure that the killer gains no more "certain, immediate or valuable benefit" than they would otherwise have received.

Acts Amended

The draft Act would amend three existing statutes: the Administration Act 1969, the Criminal Justice Act 1985, and the Proceeds of Crimes Act 1991.

The amended Administration Act provides that a killer (under the draft Act) would not be competent to be granted (nor could they be granted) probate of the victim's will, or letters of administration of the victim's estate. Whilst administrators' distributions under the draft Act are protected in the event of the killer being granted a full pardon, administrators breach their duty to the estate if they make a distribution when they have reason to suspect that the deceased's death was a homicide, and the distribution is made to the deceased's killer.

The Criminal Justice Act would be amended to allow for certification by criminal courts, either on application or of their own volition, that a killing is a homicide. This is conclusive evidence of that fact for the purposes of the draft Act. The Proceeds of Crimes Act is amended to prevent the property which killers may not receive due to their crime from being forfeited to the state.

Conclusion

Overall, the draft Act is consistent with the common law principle that no-one should profit from his or her own wrongdoing. Its wording largely succeeds in its aim to provide administrators and trustees with sufficiently certain statutory guidelines to render court proceedings unnecessary. Most importantly, effect is given to the presumed intention of the deceased that his or her killer should in no way benefit as a result of their death, whilst simultaneously protecting the victim's estate from having to litigate to prove this point.

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