Illegal Contracts (Unlawful Limitation on Regulators' Powers) Amendment Bill

Member's Bill

Explanatory note

General policy statement

This Bill will amend the Illegal Contracts Act 1970, to extend the coverage of the Act to prohibit attempts to limit the power of any regulator to award any remedy or distribute the proceeds of any settlement or court order to any individual.

This issue came to light with the ING/ANZ settlement, where ING had set a deadline for investors with money caught up in the frozen funds, (ING Diversified Yield Fund (DYF) and the ING Regular Income Fund (RIF)) to sign up to a partial compensation deal, but in so doing the investors were forced to sign away their right to take further legal action against ING, or even participate in the benefits of someone else taking action against ING. This was despite the fact that the matter was still being investigated by the Commerce Commission. The offer letter contained a release clause which included the following terms:

"*By accepting this Offer you agree to surrender, settle and release all other rights or claims you may have against certain parties in connection with the relevant Fund... including any claims or the extent of any claims of which you are not currently aware, and any claims brought on your behalf or for your benefit by another person.*

"*...It also means you are agreeing not to benefit from any claim made by any other person in connection with the Funds...*"

A Release Disclosure Document was annexed to the Offer Letter and this contained a list of those covered by the release (essentially ING, ANZ, NZ Guardian Trust, and all of the financial advisers who had advised on the investment in the Fund) and referred to the investigations being undertaken by the Banking Ombudsman and the Commerce Commission.

The question that arises is whether, as a matter of public policy, companies that may have transgressed the regulatory framework they operate under should be allowed to make a settlement conditional on these terms.

There is no problem making a settlement conditional on not proceeding with a civil cause of action, but where a regulator has identified a breach of the very rules designed to protect investors, no such agreement should be allowed to stand. It simply exacerbates the wrong should it transpire that these rules were broken.

Over half a billion dollars were stranded in the ING product funds, with a lot of it representing the life savings of elderly people who continue to be angry and confused at the way they were treated.

It is not fair that people were forced to take their chances on accepting a deal that would prevent them benefiting from any action that could follow a finding that ING had breached its statutory obligations.

If the Commerce Commission inquiry produces no findings of wrongdoing on the part of ING or those offering investments in the two Funds (DYF & RIF) then there is no problem. If on the other hand they are found wanting by the Commerce Commission in terms of their legal responsibilities to their investors, this Bill will have retrospective application. A public statement was made prior to the closing of the settlement offer, making it clear that a private member's bill with retrospective application would be introduced.

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 is the commencement clause and provides that the Bill comes into force on 10 July 2009. This is the date that the intention to produce a private member's bill was publicly announced.

Clause 3 states that this Act amends the Illegal Contracts Act 1970.

Clause 4 adds a definition of a regulator.

Clause 5 declares illegal any provision in any contract which purports to limit or oust a regulator's power to award a remedy or distribute the proceeds of any settlement or to obtain judgement on behalf of any individual.

Hon Lianne Dalziel

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Contents

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Illegal Contracts (Unlawful Limitation on Regulators) Amendment Act **2012**.

2 Commencement

This Act is deemed to have come into force on 10 July 2009.

3 Principal Act

This Act amends the Illegal Contracts Act 1970 (the **principal Act**).

4 Interpretation

Section 2 of the principal Act is amended by adding—

"**Regulator** means the Commerce Commission, the Securities Commission, an approved dispute resolution scheme, within the meaning of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 or similar voluntary schemes including the Insurance and Savings Ombudsman and the Banking Ombudsman."

5 New Section 8A inserted (Unlawful Limitation on Regulators Powers)

The principal Act is amended by adding a new section 8A—

"8A Unlawful Limitation on Regulators' Powers

Notwithstanding any other provision in this Act, or in any other enactment or rule of law, where any provision in any contract purports to oust or to limit the power of a regulator to award any remedy or distribute any proceeds of a settlement or order of the court to any individual, the provision shall be void and of no effect."

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