



ANALYSIS

<p>Title</p> <ol style="list-style-type: none"> 1. Short Title and commencement 2. Interpretation 3. Act to bind the Crown 4. Deeds or contracts for the benefit of third parties 5. Limitation on variation or discharge of promise 	<ol style="list-style-type: none"> 6. Variation or discharge of promise by agreement or in accordance with express provision for variation or discharge 7. Power of Court to authorise variation or discharge 8. Enforcement by beneficiary 9. Availability of defences 10. Jurisdiction of District Courts 11. Jurisdiction of Small Claims Tribunals 12. Amendments of Arbitration Act 1908 13. Repeal 14. Savings 15. Application of Act
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1982, No. 132

An Act to permit a person who is not a party to a deed or contract to enforce a promise made in it for the benefit of that person
[16 December 1982]

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title and commencement—(1) This Act may be cited as the Contracts (Privity) Act 1982.

(2) This Act shall come into force on the 1st day of April 1983.

2. Interpretation—In this Act, unless the context otherwise requires,—

“Benefit” includes—

- (a) Any advantage; and
- (b) Any immunity; and
- (c) Any limitation or other qualification of—

- (i) An obligation to which a person (other than a party to the deed or contract) is or may be subject; or
 - (ii) A right to which a person (other than a party to the deed or contract) is or may be entitled; and
- (d) Any extension or other improvement of a right or rights to which a person (other than a party to the deed or contract) is or may be entitled:
- “Beneficiary”, in relation to a promise to which section 4 of this Act applies, means a person (other than the promisor or promisee) on whom the promise confers, or purports to confer, a benefit:
- “Contract” includes a contract made by deed or in writing, or orally, or partly in writing and partly orally or implied by law:
- “Court” means—
- (a) The High Court; or
 - (b) A District Court that has jurisdiction under section 10 of this Act; or
 - (c) A Small Claims Tribunal that has jurisdiction under section 11 of this Act:
- “Promisee”, in relation to a promise to which section 4 of this Act applies, means a person who is both—
- (a) A party to the deed or contract; and
 - (b) A person to whom the promise is made or given:
- “Promisor”, in relation to a promise to which section 4 of this Act applies, means a person who is both—
- (a) A party to the deed or contract; and
 - (b) A person by whom the promise is made or given.

3. Act to bind the Crown—This Act shall bind the Crown.

4. Deeds or contracts for the benefit of third parties—Where a promise contained in a deed or contract confers, or purports to confer, a benefit on a person, designated by name, description, or reference to a class, who is not a party to the deed or contract (whether or not the person is in existence at the time when the deed or contract is made), the promisor shall be under an obligation, enforceable at the suit of that person, to perform that promise:

Provided that this section shall not apply to a promise which, on the proper construction of the deed or contract, is not intended to create, in respect of the benefit, an obligation enforceable at the suit of that person.

5. Limitation on variation or discharge of promise—

(1) Subject to sections 6 and 7 of this Act, where, in respect of a promise to which section 4 of this Act applies,—

- (a) The position of a beneficiary has been materially altered by the reliance of that beneficiary or any other person on the promise (whether or not that beneficiary or that other person has knowledge of the precise terms of the promise); or
- (b) A beneficiary has obtained against the promisor judgment upon the promise; or
- (c) A beneficiary has obtained against the promisor the award of an arbitrator upon a submission relating to the promise,—

the promise and the obligation imposed by that section may not be varied or discharged without the consent of that beneficiary.

(2) For the purposes of paragraph (b) or paragraph (c) of subsection (1) of this section,—

- (a) An award of an arbitrator or a judgment shall be deemed to be obtained when it is pronounced notwithstanding that some act, matter, or thing needs to be done to record or perfect it or that, on application to a Court or on appeal, it is varied:
- (b) An award of an arbitrator or a judgment set aside on application to a Court or on appeal shall be deemed never to have been obtained.

6. Variation or discharge of promise by agreement or in accordance with express provision for variation or discharge—Nothing in this Act prevents a promise to which section 4 of this Act applies or any obligation imposed by that section from being varied or discharged at any time—

- (a) By agreement between the parties to the deed or contract and the beneficiary; or
- (b) By any party or parties to the deed or contract if—
 - (i) The deed or contract contained, when the promise was made, an express provision to that effect; and
 - (ii) The provision is known to the beneficiary (whether or not the beneficiary has knowledge of the precise terms of the provision); and

(iii) The beneficiary had not materially altered his position in reliance on the promise before the provision became known to him; and

(iv) The variation or discharge is in accordance with the provision.

7. Power of Court to authorise variation or discharge—(1) Where, in the case of a promise to which section 4 of this Act applies or of an obligation imposed by that section,—

(a) The variation or discharge of that promise or obligation is precluded by section 5 (1) (a) of this Act; or

(b) It is uncertain whether the variation or discharge of that promise is so precluded,—

a Court, on application by the promisor or promisee, may, if it is just and practicable to do so, make an order authorising the variation or discharge of the promise or obligation or both on such terms and conditions as the Court thinks fit.

(2) If a Court—

(a) Makes an order under subsection (1) of this section; and

(b) Is satisfied that the beneficiary has been injuriously affected by the reliance of the beneficiary or any other person on the promise or obligation,—

the Court shall make it a condition of the variation or discharge that the promisor pay to the beneficiary, by way of compensation, such sum as the Court thinks just.

8. Enforcement by beneficiary—The obligation imposed on a promisor by section 4 of this Act may be enforced at the suit of the beneficiary as if he were a party to the deed or contract, and relief in respect of the promise, including relief by way of damages, specific performance, or injunction, shall not be refused on the ground that the beneficiary is not a party to the deed or contract in which the promise is contained or that, as against the promisor, the beneficiary is a volunteer.

9. Availability of defences—(1) This section applies only where, in proceedings brought in a Court or an arbitration, a claim is made in reliance on this Act by a beneficiary against a promisor.

(2) Subject to subsections (3) and (4) of this section, the promisor shall have available to him, by way of defence, counterclaim, set-off, or otherwise, any matter which would have been available to him—

(a) If the beneficiary had been a party to the deed or contract in which the promise is contained; or

(b) If—

(i) The beneficiary were the promisee; and

(ii) The promise to which the proceedings relate had been made for the benefit of the promisee; and

(iii) The proceedings had been brought by the promisee.

(3) The promisor may, in the case of a set-off or counterclaim arising by virtue of subsection (2) of this section against the promisee, avail himself of that set-off or counterclaim against the beneficiary only if the subject-matter of that set-off or counterclaim arises out of or in connection with the deed or contract in which the promise is contained.

(4) Notwithstanding subsections (2) and (3) of this section, in the case of a counterclaim brought under either of those subsections against a beneficiary,—

(a) The beneficiary shall not be liable on the counterclaim, unless the beneficiary elects, with full knowledge of the counterclaim, to proceed with his claim against the promisor; and

(b) If the beneficiary so elects to proceed, his liability on the counterclaim shall not in any event exceed the value of the benefit conferred on him by the promise.

10. Jurisdiction of District Courts—(1) A District Court shall have jurisdiction to exercise any power conferred by section 7 of this Act in any case where—

(a) The occasion for the exercise of the power arises in the course of civil proceedings properly before the Court; or

(b) The value of the consideration for the promise of the promisor is not more than \$12,000; or

(c) The parties agree, in accordance with section 37 of the District Courts Act 1947, that a District Court shall have jurisdiction to determine the application.

(2) For the purposes of section 43 of the District Courts Act 1947, an application made to a District Court under section 7 of this Act shall be deemed to be an action.

11. Jurisdiction of Small Claims Tribunals—(1) A Small Claims Tribunal established under the Small Claims Tribunals Act 1976 shall have jurisdiction to exercise any power conferred by section 7 of this Act in any case where—

(a) The occasion for the exercise of the power arises in the course of proceedings properly before that Tribunal; and

(b) The value of the consideration for the promise of the promisor is not more than \$500.

(2) A condition imposed by a Small Claims Tribunal under section 7 (2) of this Act shall not require the promisor to pay a sum exceeding \$500 and an order of a Tribunal that exceeds any such restriction shall be entirely of no effect.

12. Amendments of Arbitration Act 1908—The Second Schedule to the Arbitration Act 1908 is hereby amended by inserting, after clause 10B (as inserted by section 14 (2) of the Contractual Remedies Act 1979), the following clause:

“10c. The arbitrators or umpire shall have the same power as the Court to exercise any of the powers conferred by section 7 of the Contracts (Privity) Act 1982.”

13. Repeal—Section 7 of the Property Law Act 1952 is hereby repealed.

14. Savings—(1) Subject to section 13 of this Act, nothing in this Act limits or affects—

(a) Any right or remedy which exists or is available apart from this Act; or

(b) The Contracts Enforcement Act 1956 or any other enactment that requires any contract to be in writing or to be evidenced by writing; or

(c) Section 49A of the Property Law Act 1952; or

(d) The law of agency; or

(e) The law of trusts.

(2) Notwithstanding the repeal effected by section 13 of this Act, section 7 of the Property Law Act 1952 shall continue to apply in respect of any deed made before the commencement of this Act.

15. Application of Act—Except as provided in section 14 (2) of this Act, this Act does not apply to any promise, contract, or deed made before the commencement of this Act.