

Contract (Third Party Rights) (Scotland) Bill

Financial Memorandum

Introduction

1. As required under Rule 9.3.2 of the Parliament's Standing Orders, this Financial Memorandum is published to accompany the Contract (Third Party Rights) (Scotland) Bill, introduced in the Scottish Parliament on 31 January 2017.
2. The following other accompanying documents are published separately:
 - statements on legislative competence by the Presiding Officer and the Cabinet Secretary for Justice (Michael Matheson MSP) (SP Bill 5–LC);
 - Explanatory Notes (SP Bill 5–EN);
 - a Policy Memorandum (SP Bill 5–PM).
3. This Financial Memorandum relates to the Contract (Third Party Rights) (Scotland) Bill (“the Bill”). It has been prepared by the Scottish Government to satisfy Rule 9.3.2 of the Parliament's Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament. The Memorandum summarises the cost implications of the Bill.
4. The Scottish Government has a track record of supporting sustainable economic growth and business competitiveness. The Scottish Government want to ensure that Scotland is an attractive place for both business and citizens. The reforms contained in the Bill will ensure that Scots law in this area remains comprehensive and attractive for Scotland's citizens and business people alike. The provisions in the Bill have the potential to make a positive impact on commerce - in particular the construction and energy sectors; family agreements; and individuals.
5. The Bill establishes a statutory basis for the operation of third party rights in Scotland. The existing common law rule known as *jus quaesitum tertio*, where the parties to a contract can create an enforceable right in

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favour of a third party, will be abolished. The Bill implements the recommendations contained in the Scottish Law Commission's Review of Contract Law: Report on Third Party Rights (SLC No 245) which was published in July 2016.

Overview of the Bill

6. By way of an overview the Bill:

- sets out the circumstances in which a person who is not a party to a contract acquires a third-party right under it. The 'right' provided is to enforce or otherwise invoke an undertaking that one or more of the contracting parties will do, or not do, something for the person's benefit;
- affirms that contracting parties can modify or cancel a third-party right, subject to exceptions set out in the Bill;
- provides a third party with the same remedies that would be available to a contracting party unless there is express provision contained in the contract to the contrary;
- provides contracting parties with the same defences against third party claims that they would have had against any other contracting party's claim where the defence is relevant to the undertaking being enforced, unless there is express provision contained in the contract to the contrary;
- provides a mechanism whereby any arbitration agreement between the contracting parties can operate in respect of third party rights;
- enables a third party to renounce their third-party right either expressly or implicitly, (the effect of such a renunciation being that the right is extinguished);
- confirms that a third-party right is an obligation which prescribes after 5 years under the Prescription and Limitation (Scotland) Act 1973.

7. There are no financial or resource implications. The legislation will bring some much needed modernisation to the law in this area. The provisions in the Bill are mainly default and permissive and do not place any new obligations on individuals; organisations or business. Indeed if these provisions are used instead of existing tools such as collateral

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warranties there could potentially be savings to the contracting parties dependent upon the size and complexity of the project.

Costs on the Scottish Administration

8. The proposals are not thought to have the potential to result in any costs to the Scottish Administration other than those associated generally with the enactment of any new legislation, for example, printing and publication and these are regarded as routine running costs rather than being attributable to the Bill.

Costs on local authorities

9. The Scottish Government does not anticipate any costs related to the proposals to be borne by local authorities. The proposals update Scots law generally, and are not of particular relevance to any part of Scotland or any local authorities.

Costs on other bodies, individuals and businesses

10. No significant cost implications are anticipated to result from the commencement of the Bill, other than the costs which will be borne by law firms in making their staff aware of the changes to the law affected by the Bill. However, these types of cost result from any reform of the law. In the case of the Bill, the Scottish Government believes that these costs would be very small.

11. There is the potential for some of these costs to be offset by any savings generated by using the new statutory framework as opposed to collateral warranties. Further information and detail is set out in the Business Regulatory Impact Assessment as published by the SLC.¹

¹ Scottish Law Commission Business Regulatory Impact Assessment
https://www.scotlawcom.gov.uk/files/8114/6857/7407/Business_and_Regulatory_Impact_Assessment_-_Review_of_Contract_Law_-_Report_on_Third_Party_Rights_No_245.pdf page 6-7

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