

Departmental Disclosure Statement

Brokering (Weapons and Related Items) Controls Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Foreign Affairs and Trade.

The Ministry of Foreign Affairs and Trade certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

7 June 2017

Contents

Contents.....	2
Part One: General Policy Statement.....	3
Part Two: Background Material and Policy Information	4
Part Three: Testing of Legislative Content.....	6
Part Four: Significant Legislative Features	9

Part One: General Policy Statement

This Bill establishes a regime to regulate the brokering of weapons and related items by New Zealanders and New Zealand entities.

Brokering involves negotiating, arranging or facilitating the international movement of arms and military equipment from one foreign country to another foreign country.

It does not include imports, exports or internal movements of arms and military equipment within New Zealand, which are already regulated by the Arms Act 1983 and by the exports control regime under the Customs and Excise Act 1996. Weapons and related items covered are arms, military equipment, and civilian goods that may have a military end-use (dual-use goods) included on New Zealand's strategic goods list.

The purpose of the Bill is to prevent New Zealanders and New Zealand entities from engaging in brokering where there is a risk of the movement of weapons or related items to illegitimate users or undesirable destinations.

The Bill will require all New Zealanders and New Zealand entities wishing to engage in brokering to register with the Secretary of Foreign Affairs and Trade (the Secretary) and obtain a permit for each brokering activity. The Secretary may grant permits if satisfied that the activity is consistent with New Zealand's international obligations and would not prejudice the security, defence, or international relations of New Zealand. The Secretary may impose conditions on the broker's registration or permit, for example, to ensure that the transaction is consistent with New Zealand's international obligations.

The regime will have extraterritorial effect and apply to New Zealanders and New Zealand entities operating abroad, given the globalised economy and the cross-border nature of brokering.

The Bill creates offences for engaging in conduct that contravenes its requirements, including engaging in brokering without being registered as a broker and having a permit, breaching the conditions of the registration or permit, failing to keep or produce records or to answer questions, and providing false or misleading information in connection with a registration or permit.

The Bill will support New Zealand's commitments under the Arms Trade Treaty, which New Zealand ratified in 2014, and which requires all States Parties to take measures to regulate brokering taking place within their jurisdiction for conventional arms.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	NO

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	YES
<p>The United Nations Arms Trade Treaty, to which New Zealand became a Party in 2014, requires each Party take measures, pursuant to its national laws, to regulate brokering taking place under its jurisdiction for conventional arms (Article 10).</p> <p>A copy of the Treaty is accessible at https://www.parliament.nz/en/pb/sc/business-before-committees/document/00DBSCH_ITR_56467_1/international-treaty-examination-of-the-arms-trade-treaty</p>	

2.2.1. If so, was a National Interest Analysis report prepared to inform a Parliamentary examination of the proposed New Zealand action in relation to the treaty?	YES
<p>Ministry of Foreign Affairs and Trade, National Interest Analysis – Arms Trade Treaty, which was tabled in the House of Representatives on 17/6/2014.</p> <p>This report can be found in Appendix B of the report of the Foreign Affairs, Defence and Trade Committee, accessible at https://www.parliament.nz/en/pb/sc/reports/document/50DBSCH_SCR56666_1/international-treaty-examination-of-the-arms-trade-treaty</p>	

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>Regulatory Impact Statement Regulation of Arms Brokering Activities, Ministry of Foreign Affairs and Trade, 14 May 2015.</p> <p>This Regulatory Impact Statement is accessible at—</p> <ul style="list-style-type: none"> • https://mfat.govt.nz/exportcontrols • http://www.treasury.govt.nz/publications/informationreleases/ris 	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
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The Regulatory Impact Statement above did not meet the threshold for receiving an independent opinion on the quality of the Regulatory Impact Statement from the RIA Team based in the Treasury.

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?

NO

While the Bill has been updated and finalised since the Regulatory Impact Statement was prepared, there have been no policy changes to the Bill which would result in a material change in the impact of the Bill.

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?

NO

2.5. For the policy to be given effect by this Bill, is there analysis available on:

(a) the size of the potential costs and benefits?

YES

(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?

NO

The Regulatory Impact Statement addressed the impacts of the proposed regulatory option to address brokering (pages 4 – 6) and the National Interest Analysis for the Arms Trade Treaty addressed the advantages and disadvantages and costs of becoming Party to the Treaty (pages 5 – 6, 10).

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:

(a) the level of effective compliance or non-compliance with applicable obligations or standards?

NO

(b) the nature and level of regulator effort put into encouraging or securing compliance?

YES

The Regulatory Impact Statement, above, outlines an implementation plan to ensure relevant New Zealand entities are made aware of the changes (page 11).

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?

Enactment of this Bill will further New Zealand's implementation of the United Nations Arms Trade Treaty (see 2.2 above). The Bill is consistent with New Zealand's obligations under this Treaty.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

The Ministry of Foreign Affairs and Trade analysed the Bill and did not identify any implications for the rights and interests of Māori protected by the Treaty of Waitangi.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

YES

Advice provided to the Attorney-General by the Ministry of Justice, or a section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. Such advice, or reports, will be accessible on the Ministry's website at <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/>

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	YES
<p>(a) The Bill contains criminal offences and civil penalties.</p> <p>The criminal offences are:</p> <ul style="list-style-type: none"> - Clause 10: carrying out a brokering activity without being registered as a broker or without a permit for the activity in any case that does not come within an exception described in the Bill, if the person knows or ought to know that they need to be registered and have a permit - Clause 12: carrying out any brokering activity knowingly or recklessly in breach of any conditions - Clause 13: breaching any conditions without reasonable excuse and other than in the course of carrying out a brokering activity - Clause 22: failing to keep or produce records or answer questions without reasonable excuse - Clause 36: in relation to an application for registration or a permit, supplying any information that the person knows or ought to know is materially false or misleading. <p>The penalties for these offences are:</p> <ul style="list-style-type: none"> - Clauses 10 and 12: In the case of an individual, a term of imprisonment not exceeding 5 years or a fine not exceeding \$100,000 (or both) and, in any other case, a fine not exceeding \$1 million. If a court is satisfied that the offence occurred in the course of producing a commercial gain, and if the amount of the gain can be readily ascertained, the maximum amount of the fine is 3 times the value of that commercial gain - Clauses 13, 22 and 36: in the case of an individual, a term of imprisonment not exceeding 6 months or a fine not exceeding \$10,000 (or both) and, in any other case, a fine not exceeding \$20,000. <p>Clauses 29 – 32 create civil penalties for people who breach or are likely to breach any of the prohibitions and requirements imposed by the Bill. The Attorney-General may issue a formal warning to a person to whom the regime applies, or accept an enforceable undertaking and then seek an order of the court if the undertaking is breached. Or the Attorney-General may seek an injunction restraining a person from breaching or failing to comply with the requirements of the brokering regime.</p> <p>(b) Clause 37 provides for a person who has applied for registration as a broker or been registered as a broker, or who has applied for a permit or been given a permit, to appeal to the District Court against certain decisions by the Secretary of Foreign Affairs and Trade.</p>	

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
<p>The Ministry of Justice was consulted between March and May 2017 on the Bill's offences and Penalties. The Ministry of Justice provided comment on the criminal and civil penalties, and the mens rea elements in the offences were revised to reflect their comments and drafting improvements made. Changes were also made to the civil penalties to reflect the Ministry of Justice's comments on the Autonomous Sanctions Bill, on which these provisions were modelled.</p>	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
<p>Clause 40 provides for the Secretary of Foreign Affairs and Trade to keep and maintain a register of brokers on the Internet.</p> <p>Clause 39 enables the Secretary to disclose any information held by the Secretary to an overseas authority for the purpose of assisting the authority to carry out its functions related to, or involving, the regulation or monitoring of brokering activity or the prevention, detection, investigation, prosecution, or punishment of offences that are, or if committed in New Zealand would be, offences under the Bill.</p>	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
<p>The Privacy Commissioner was consulted in May 2017 and provided comments on the public register provisions. In response to these comments, information required to be publicised on the public register was limited to only that considered necessary for its purpose (clause 17) and should any further personal information be required to be published by future regulations (clause 40), the Bill enables this to be withheld for privacy reasons.</p>	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>Interested non-governmental organisations and representatives of New Zealand's firearms community were briefed at the policy development stage in 2014 - 2015 and their feedback is reflected in the Regulatory Impact Statement.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
<p>The Legislation Design and Advisory Committee provided advice on the design of this Bill.</p>	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	NO

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>Clause 38 provides for regulation-making powers, for any of the following purposes:</p> <ul style="list-style-type: none"> (a) prescribing fees or charges for applications (b) prescribing particulars of brokers that must be entered on the public register (c) prescribing the records to be kept (d) prescribing matters to which the Secretary must have regard when considering whether to give a permit (e) providing for any other matters contemplated by this Act, necessary for its administration, or necessary for giving it full effect. 	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	YES
<p>Under clause 33, the Bill's offences apply extraterritorially. This is considered appropriate given the given the cross-border nature of brokering, and is modelled on section 7A of the Crimes Act 1961.</p>	