

## SECRET COMMISSIONS ACT 1910 (ACT)

Advice on NKBA members' potential liability under the Act.

### 1. Relevant provisions

This note focuses on section 8 of the Act<sup>1</sup>, which is the provision that will most likely affect NKBA members.

### 2. Effect of section 8

A breach of the section 8 of the Act would occur if a member advised a customer to enter into a contract with a third party supplier, and the member received (or agreed to receive) a payment (or other consideration) from that third party supplier, without the customer's consent or knowledge.

"Consideration" includes a discount, commission, rebate, bonus, deduction or percentage.

### 3. Application to members

It is likely that members risk breaching the Act in some of their day to day activities simply by advising a customer to use a third party supplier for goods and services and receiving some form of payment or other benefit from the supplier (e.g. a referral fee, commission or rebate) once the customer engages the supplier.

There are a number of ways to reduce the risk of falling foul of the Act:

- (a) Members can recommend more than one supplier to their customers – then it is the customer's choice who they engage, and there has been no "advice" given.
- (b) Members can engage the supplier directly, and supply to the customer – then, there is no agreement between the customer and the supplier that the member has advised the customer to enter into.
- (c) Members can disclose to the customer that the member receives a benefit from the supplier – then, there is no breach of the Act because the customer knows about the arrangement. In practice, the customer will often receive a better price by referring to the member in their dealings with the supplier, so the fact the member receives a benefit will be of no consequence to the customer.

### 4. Summary

It is important to recognise that the Act is part of NZ's anti-bribery and corruption laws. The Act cannot be enforced by a private individual – the consent of the Attorney General is required before a prosecution can be commenced. Therefore, some element of corruption or deception would likely need to be present before a member came under scrutiny.

The reality for most NKBA members, is that their arrangements with suppliers will be purely commercial in nature. Most customers will be aware of these arrangements.

Paragraph 3 above sets out some ways NKBA members can reduce the risk of inadvertently breaching the Act.

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<sup>1</sup> Section 8 provides:

#### 8 Receiving secret reward for procuring contracts an offence

- (1) Every person is guilty of an offence who advises any person to enter into a contract with a third person and receives or agrees to receive from that third person, without the knowledge and consent of the person so advised, any gift or consideration as an inducement or reward for the giving of that advice or the procuring of that contract, unless the person giving that advice himself acts as the agent of the third person in entering into the contract, or is to the knowledge of the person so advised the agent of that third person.
  - (2) For the purposes of this section a person shall be deemed to advise another person to enter into a contract if he makes to that other person any statement or suggestion with intent to induce him to enter into the contract.
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