

CONSUMER LAW REFORM

A DISCUSSION PAPER



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**Ministry of Consumer Affairs
PO Box 1473
Wellington
New Zealand**

List of Contents

LIST OF CONTENTS	2
FOREWORD	4
1. SEEKING YOUR VIEWS	5
2. INTRODUCTION	7
3. BRIEF DESCRIPTION OF EXISTING CONSUMER LAW	11
3.1 Fair Trading Act 1986.....	11
3.2 Consumer Guarantees Act 1993.....	12
3.3 Weights and Measures Act 1987	15
3.4 Auctioneers Act 1928	15
3.5 Door to Door Sales Act 1967	16
3.6 Layby Sales Act 1971	17
3.7 Unsolicited Goods and Services Act 1975	17
4. GOING FORWARD: THE ESSENTIAL ELEMENTS OF CONSUMER LAW	19
5. PRINCIPLES-BASED LAW	21
6. UNFAIR PRACTICES	27
6.1 Fair Trading Act Misleading and Deceptive Conduct, False Representations and Unfair Practices Provisions.....	27
6.2 Possible Additional Unfair Practices Provisions	30
6.2.1 Unfair Contract Terms	30
6.2.2 Claims which Cannot be Substantiated.....	35
7. SELLING AND DURESS	41
7.1 Door to Door Sales and Other Direct Selling	41
7.2 Unsolicited Goods and Services	50
7.3 Possible Additional Selling and Duress Provisions.....	54
7.3.1 Unconscionability.....	54
7.3.2 Alternative option – oppression	58
8. PRODUCT SAFETY	61
9. INFORMATION TO ASSIST CONSUMER DECISION-MAKING	67
10. TRADER OBLIGATIONS	71
10.1 Layby Sales	71
10.2 Weights and Measures	78
10.3 Carriage of Goods Act 1979.....	82
11. AUCTIONEERS	85
Occupational regulation under the Auctioneers Act	86
Rules for conducting auctions.....	92
12. CONSUMER GUARANTEES	94
12.1 Possible areas for amendment in the Consumer Guarantees Act.....	97
12.1.1 Auctions and the application of the Consumer Guarantees Act	97

12.1.2	Issue: Extended warranties	101
12.1.3	Issue: Bonds to assess faulty goods.....	105
12.1.4	Supplier is unresponsive or does not heed consumer requests.....	107
12.1.5	Rejection of goods under the Consumer Guarantees Act and collateral credit agreements.....	107
12.1.6	Application to electricity	109
13.	ENFORCEMENT	110
13.1	Possible additional enforcement provisions.....	111
13.1.1	Court enforceable undertakings.....	111
13.1.2	Banning orders	111
14.	WHAT THE REVIEW MIGHT DELIVER	113
15.	FULL LIST OF DISCUSSION DOCUMENT QUESTIONS.....	115

Foreword

Following my appointment as Minister of Consumer Affairs in November 2008, I formulated key priorities and goals for the Consumer Affairs Portfolio from 2009 through to the next election. I used the Government's strong commitment to regulatory responsibility as a guidepost, along with the belief that effective consumer laws help to create a competitive business environment in which consumers and businesses can engage with trust and confidence. As with other business regulation, consumer laws that fail to achieve their objective – or which are no longer relevant to the way the market operates – can be a drag on the innovative potential of business.

At my first planning session with Ministry of Consumer Affairs' officials I introduced the idea of "One Law-One Door". The "One Law" refers to the goal of a principles-based piece of consumer-supplier legislation. I envisage the "One Door" concept as a portal for consumers; one place to go to seek advice and assistance when consumer transactions don't go as planned. Achieving the goals of the "One Law" initiative will be a significant step forward for consumer law and regulatory reform in New Zealand. Providing effective consumer law will help to further foster a competitive business environment in which consumers can transact with confidence and honest businesses compete on a level playing field.

This discussion paper is the result of the "One Law" review.

Having strong and relevant consumer legislation is very important. Consumer legislation is an important contributor to consumer confidence and successful consumer participation in the market place. Consumers transacting with confidence contribute to a productive and innovative economy. For businesses, effective consumer laws help to create a competitive business environment where reputable suppliers are protected from the inappropriate market conduct of competitors.

The Ministry's review work has been greatly assisted by the Australian Productivity Commission's 2007-2008 review of Australia's Consumer Policy Framework and the work since then by the Commonwealth, States and Territories to put in place the Australian Consumer Law. Carrying out the review at the same time as the development of the Australian Consumer Law is also enabling real-time harmonisation as appropriate with Australia which supports the Government's Single Economic Market agenda.

This discussion document covers seven consumer laws that have not been reviewed for many years in some cases. Each law is examined individually and questions are included throughout the paper to assist your consideration of the issues. I invite and welcome comment from both consumers and industry on the issues raised in this document.



Hon Heather Roy
Minister of Consumer Affairs

1. Seeking Your Views

The Ministry of Consumer Affairs invites submissions on the proposals outlined in this discussion paper.

To assist your consideration of the issues covered in the discussion paper, a number of questions are included. These are throughout the document and listed in full on page 125. Please do not be constrained by these questions or feel that you need to answer any or all of the questions.

Parties who wish to make a submission are invited to respond by Friday 30 July 2010.

Submissions should be emailed in either Adobe PDF or Microsoft Word format to the Ministry of Consumer Affairs (consumerlawreform@mca.govt.nz), with "Submission on the Consumer Law Reform" as a subject heading. Alternatively, submitters may send hard copies of their submission to:

Consumer Policy
Ministry of Consumer Affairs
PO Box 1473, Wellington

Submitters should indicate any documents attached in support of their submission in a covering letter.

A forum the week of 9 August 2010 will also be available to hear representative oral submissions. Please indicate in your written submission if you would like to make a supporting oral submission. The Ministry of Consumer Affairs will contact you and advise if you have been selected to present an oral submission. The forum will be open to other interested parties to attend. Details of the time and place of the forum will be placed on the Ministry's website.

The Ministry of Consumer Affairs will acknowledge receipt of all submissions electronically. Please contact Anita Manga (anita.manga@mca.govt.nz or ph +64 4 462 4273) if you do not receive electronic acknowledgement of your submission within 5 business days.

Consideration of submissions

The Ministry of Consumer Affairs will consider all submissions. A summary of submissions will be prepared and made available. Taking into account the submissions received, the Ministry will report to the Minister of Consumer Affairs on recommended reform of consumer laws.

Official Information Act 1982

Please note that any submissions you make may be published and subject to a request for release under the Official Information Act 1982.

In providing your submission, please advise us if you have any objections to the release of all or part of your submission and the basis of your objection. When preparing and releasing any summary of submissions and when considering any Official Information Act requests, the Ministry will carefully review any representations you make in this regard.

Privacy Act 1993

Any personal information that you supply to the Ministry in the course of making a submission will be used only by the Ministry when considering matters covered by this discussion paper.

When preparing any summary of submissions on Ministry discussion papers, it is the Ministry's normal practice to set out the names of parties making submissions. Your name will be included in any such summary unless you inform the Ministry that you do not wish your name to be included. To indicate your wishes, or to view personal information held about you in relation to matters covered by this discussion paper, or to request correction of that information, please contact the Ministry of Consumer Affairs (consumerlawreform@mca.govt.nz).

Disclaimer

The opinions and proposals in this discussion document are those of the Ministry of Consumer Affairs and do not reflect government policy.

Readers are advised to seek specific legal advice from a qualified professional before undertaking any action in reliance on the contents of this discussion document. The contents of this paper must not be construed as legal advice. The Ministry does not accept any responsibility or liability whatsoever whether in contract, tort, equity or otherwise for any action taken as a result of reading, or reliance placed on the Ministry because of having read, any part, or all, of the information in this document, or for any error, inadequacy, deficiency, flaw or omission from this document.

2. Introduction

There are several consumer laws that deal with the purchase of goods and services. These laws, taken together, seek to promote better outcomes for consumers through:

- protection from misleading and deceptive conduct, unfair practices and unsafe or defective goods or services
- assistance in making better purchasing decisions by ensuring consumers receive appropriate product information, or in some cases by changing the terms and conditions on which goods and services are purchased (such as cooling-off periods)
- standardisation in weights and measures
- provision of remedies when the reasonable expectation of a consumer transaction is not met, and
- enforcement by the Commerce Commission of good market conduct.

Effective consumer laws help to create a competitive business environment in which consumers can transact with confidence and reputable suppliers are protected from inappropriate market conduct. The advantage for reputable suppliers is that they can compete on a level playing field. Confident and empowered consumers, in association with responsive suppliers that trade fairly, promote effective competition and overall benefits for consumers. Confident and empowered consumers have an important role in the development of dynamic and trusted markets.

The principal consumer laws dealing with the purchase of goods and services are:

- Fair Trading Act 1986
- Consumer Guarantees Act 1993
- Weights and Measures Act 1987.

There are also:

- Auctioneers Act 1928
- Door to Door Sales Act 1967
- Layby Sales Act 1971
- Unsolicited Goods and Services Act 1975.

As part of the government's commitment to regulatory responsibility, the Ministry of Consumer Affairs is undertaking a review of the consumer laws listed above with the view to achieving reform.¹

¹ There are also other industry-specific laws which have a consumer protection function, but which fall outside the scope of this review. These laws include the Real Estate Agents Act 2008, the Lawyers and Conveyancers Act 2006 and the Immigration Advisers Licensing Act 2007.

Why the review

Where consumer laws do not achieve their objective or are no longer relevant to the way the market operates, they can be a drag on the innovative potential of businesses. Consumer law that is potentially out of date and may no longer be relevant is also a compliance problem for businesses and consumers.

The Government Statement on Regulation: Better Regulation, Less Regulation released by the Minister of Finance and the Minister of Regulatory Responsibility in August 2009, states:

“Outdated, poorly conceived and poorly implemented regulation can significantly hinder individual freedom, innovation, and productivity. Reducing the burden imposed by such regulation will help unshackle our economy and give New Zealanders more ability to shape and improve their own lives.

New Zealand needs to offer a better policy environment than can be found elsewhere if we are to overcome the economic disadvantages of our small size and geographical isolation, and attract and retain increasingly mobile talent, skills, capital, technology and entrepreneurship.

This is why improving the quality of regulation is a priority for this government. We believe that better regulation, and less regulation, is essential to assist New Zealand to become more internationally competitive and a more attractive place to live and do business.”

It is questionable whether there need to be 7 specific consumer laws dealing with consumer transactions. Most of the consumer laws covered in the review are older than 20 years. Some of the laws are quite prescriptive. None have modern purpose statements signifying their intent or underlying principles. Whilst there have not been concerns raised that the laws are ineffective, most have not been reviewed recently, or previous reviews have not resulted in any changes because of other priorities.

There is not good public recognition of consumer legislation other than the Consumer Guarantees Act and the Fair Trading Act. A major survey of consumers’ awareness of their rights and consumer law², undertaken mid-2009, showed that less than 2 percent could name the Weights and Measures Act as consumer legislation they were aware of, and less than 1 percent could name the Layby Sales Act, the Unsolicited Goods and Services Act and the Sale of Goods Act. There was no recall of the other pieces of law.

The Government also has a commitment to achieving, where possible, a single economic market (SEM) with Australia. SEM is based on the objective that deeper economic linkages between New Zealand and Australia provide bigger markets in which to buy and sell goods and services, allow access to a larger and more varied pool of capital and labour, and open our economy to new ideas and technology. SEM aims to address behind-the-border impediments to trade. This includes identifying innovative actions that could reduce discrimination and costs arising from different, conflicting or duplicate regulatory requirements. The aim is to ensure that trans-Tasman markets for goods, services, labour and capital operate effectively and support economic growth in both countries.

The Fair Trading Act 1986 is very similar to the consumer provisions in Australia’s Trade Practices Act 1974.

Australia is currently undertaking a major reform of its consumer laws with the introduction of the Australian Consumer Law. The Australian Consumer Law will replace the consumer protection and

² National Consumer Survey 2009 – <http://www.consumeraffairs.govt.nz>.

fair trading provisions in the national Trade Practices Act and each State and Territory's fair trading laws with a single national consumer law, applied as the law of each Australian jurisdiction. As part of the reforms there will also be a new policy development and decision-making framework through the Ministerial Council on Consumer Affairs (MCCA), and a coordinated approach to enforcement, compliance and education by Australia's consumer agencies.³ As a member of MCCA, the New Zealand Government has been involved in the development of the Australian Consumer Law and is following the reform process closely.

The review of our consumer law at the same time as the Australian Consumer Law reforms is very timely and provides a real time opportunity to achieve harmonisation of approach where this is appropriate.

Objectives of the review

The objectives of the review are:

- To have in place principles-based consumer law that:
 - enables consumers to transact with confidence;
 - protects reputable suppliers and consumers from inappropriate market conduct;
 - is up to date and relevant now and into the future;
 - is easily accessible to those who are affected by it;
 - is in line with international best practice, as appropriate; and
 - is effective and enforceable;
- To achieve simplification and consolidation of the existing law; and
- To achieve harmonisation with the Australian Consumer Law, as appropriate, in accordance with the government's agenda of a single economic market with Australia (SEM).

What the review encompasses

In accordance with the Government Statement on Regulation: Better Regulation, Less Regulation, the 7 consumer laws noted above are being reviewed in order to identify any requirements that are unnecessary, ineffective or excessively costly.

Specifically, each of the consumer laws is being reviewed by looking at its history and original purpose, its ongoing relevance and, if still relevant, whether it is sufficiently up to date for consumer transactions of today and the overall effectiveness and enforceability of the law. The review of the overall effectiveness includes looking at any gaps in the law taking into account best practice international consumer law.

As part of the review of each consumer law, consideration is also being given to whether it could be incorporated into an enhanced Fair Trading Act or whether it should remain as standalone law.

³ More information about the reforms can be found at: <http://www.treasury.gov.au/consumerlaw>.

The review also is considering the Carriage of Goods Act 1979 with respect to its coverage of consumer transactions and the Sale of Goods Act 1908 with respect to its relationship to the Layby Sales Act and the Auctioneers Act. These laws are not being reviewed, however, in the same manner as the other 7 consumer laws.

3. Brief Description of Existing Consumer Law

3.1 Fair Trading Act 1986

The Fair Trading Act defines rules for a fair and well-functioning business environment and establishes consumer protections related to the pre-sale period (before a purchase is made) and at the point of sale. The Act requires that all trading activities are based on accurate and honest information. Although the Act does not oblige businesses to provide information to consumers in all circumstances, businesses are obliged to ensure that the information they do provide is accurate, and that important information is not withheld. This enables consumers to make informed choices about goods and services. As well, honest businesses are disadvantaged when consumers are misled into buying competitors' goods or services through inaccurate information or false representations about these goods or services.

The Act also allows for bans and recalls of unsafe products and the imposition of mandatory standards if necessary. It complements the Commerce Act 1986 which emphasises the competition aspects of a well-functioning market place. Combined, the Fair Trading Act and the Commerce Act promote dynamic markets – markets in which New Zealanders benefit from competitive prices, better quality and greater choice.

Part 1 of the Fair Trading Act establishes a regulatory framework which applies market controls with respect to the point of sale. It has the objective of protecting consumers and businesses from unfair business practices.

It covers prohibitions against:

- misleading and deceptive conduct generally (section 9)
- false or misleading representations (section 13)
- offering gifts and prizes (and not providing them) (section 17)
- bait advertising (section 19)
- referral selling (section 20)
- demanding or accepting payment without intending to supply as ordered (section 21)
- misleading representations about certain business activities (section 22)
- harassment and coercion (section 23)
- pyramid selling schemes (section 24), and
- importation of goods bearing false trade description (section 26).

Part 2 provides for the making of regulations to provide for consumer information. Under Parts 3 and 4, the Minister of Consumer Affairs can recommend mandatory standards for products or services, ban the sale of unsafe products or order a compulsory recall of an unsafe product. These measures are generally used only when attempts to have the product amended or withdrawn voluntarily fail.

Additionally, section 51 of the Fair Trading Act provides that for goods exported from New Zealand for supply in China under the Conformity Cooperation Agreement⁴, sections 10 (misleading conduct in relation to goods) and section 13 (false or misleading representations) apply. Any contravention of these sections is an offence and may authorise a warrant being issued in New Zealand to search a place in New Zealand if it is related to goods exported from New Zealand for supply in China.

Enforcement

The Commerce Commission is responsible for monitoring and enforcement of the Fair Trading Act. Businesses and consumers can also seek their own remedies under the Act when its provisions are breached.

The Ministry of Consumer Affairs Measurement and Product Safety Service also has a general product safety monitoring role, particularly for goods where the safety risk is new and therefore no product safety standards exist.

New Zealand Customs Service controls the importation of goods subject to an unsafe goods notice. These are regarded as prohibited imports.

3.2 Consumer Guarantees Act 1993

The Consumer Guarantees Act creates statutory guarantees that are automatically conferred each time a consumer purchases a good or a service from a supplier in trade. It provides for rights of redress against suppliers and manufacturers for any failure of those goods or services to comply with the guarantees which apply. Essentially, it covers consumer protection in the post-sale period (after a purchase is made). The right of redress against the supplier or manufacturer applies not only to the original consumer, but anyone (as long as that person meets the definition of consumer) who acquires the goods from or through the consumer.

Coverage of the Act

The Consumer Guarantees Act applies generally and sets out guarantees that goods and services must meet when sold by someone in trade - that is, a retailer or a person providing a service – to a consumer. A consumer is anyone who acquires goods or services ordinarily acquired for personal, domestic or household use, and not for resupply or use in production or manufacture by a business. The goods and services the Act covers include:

- goods of a type that people ordinarily buy for personal or household use, such as clothes, washing machines, cars
- services of a type that people ordinarily have carried out for a personal or household purpose, such as car repairs, haircuts, drycleaning, painting or work done by a tradesperson
- new and used goods.

⁴ Agreement between the Government of New Zealand and the Government of the People's Republic of China on Cooperation in the Field of Conformity Assessment in Relation to Electrical and Electronic Equipment and Components, which is Annex 14 of the Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China 2008.

From 8 July 2003, the Act was amended to clarify that it applies to electricity, gas, water and computer software after a High Court case held that utilities were neither goods nor services under the Act.⁵

The Act does not cover:

- goods supplied by auction or by competitive tender
- goods bought from a private seller
- goods of a type that people ordinarily buy for personal or household use, but which are bought by a business which has contracted out of the Act
- commercial goods (goods of a type that are ordinarily bought for use in offices, factories or farms which are likely covered by the Sale of Goods Act 1908)
- commercial services - services of a kind that are ordinarily supplied to offices, factories or farms, for example, top-dressing, commercial property leases, commercial building maintenance, livestock transportation.

Guarantees

The Act sets out guarantees for goods and services. Goods and services must meet these guarantees.

The statutory guarantees include guarantees as to:

- title and the right to sell goods free from any undisclosed security interest (section 5)
- acceptable quality (defined as fit for purpose, acceptable in appearance and finish, free from minor defects, safe and durable, to the standard a reasonable consumer would regard as acceptable having regard to the nature and price of the goods, any statements made on labels or packaging, any representation made by a supplier or manufacturer and any other relevant circumstances) (sections 6 and 7)
- fitness for particular purposes made known by the consumer or represented by the supplier (section 8)
- compliance with description (section 9)
- conformance with samples (section 10)
- reasonable price (where the price is not specified by the contract) (section 11)
- reasonable facilities for repairs and spare parts reasonably available (section 12)

⁵ *Electricity Supply Association of New Zealand Inc v Commerce Commission* (1998) 6 NZBLC 102,555.

Remedies

Repair, replace or refund

If goods do not comply with the guarantees provided under the Act, the consumer can require the supplier to remedy the failure. If the failure can be repaired, the supplier can repair the goods or replace the goods or refund money to the consumer. The consumer may require the supplier to remedy the failure within a reasonable time (section 18).

If the supplier refuses, neglects to do this or does not do so in a reasonable time, the consumer can have the failure remedied elsewhere and claim the cost from the supplier or reject the goods.

If the failure cannot be repaired or is of a substantial character, the consumer can reject the goods and the supplier must replace the goods with an identical or superior type, or refund the purchase price. The consumer may also keep the goods and claim compensation for the drop in value. The consumer can choose which of these remedies is most acceptable.

In the case of a failure that is of a substantial character and can be remedied, the consumer has two choices:

- to require the failure to be remedied; or
- to reject the goods.

Rejection of goods

Where consumers reject the goods, they have to notify the supplier that they reject the goods and give the reasons for the rejection. The consumer is also obliged to return the goods to the supplier unless the cost of doing so is substantial.

Consumers cannot reject the goods after they have been satisfactorily repaired.

A consumer loses the right to reject goods if the right is not exercised within a reasonable period of time.

Right of redress against the manufacturer

Part III sets out the rights of redress for a consumer against a manufacturer. These rights are not as extensive as those against the supplier and are mainly restricted to claiming damages for any reduction in the value of the goods below the purchase price. The consumer has rights when the goods fail to comply with the statutory guarantees such as acceptable quality, access to repairs and spare parts, description of the goods, and express guarantee of the manufacturer.

Consequential loss

In all cases where consumers have a right of redress under the Act, they also have the right to obtain damages for any loss or damage resulting from the failure which was reasonably foreseeable as being likely to result from the failure. Damages can be claimed whether or not the failure was remedied, and whether or not the failure was of a substantial character.

Enforcement

The Act is self enforcing. This means the onus is on consumers if they wish to seek redress.

3.3 Weights and Measures Act 1987

Correct weights and measures have been important to consumers and businesses throughout history, and they remain relevant in modern societies. The Weights and Measures Act protects New Zealand's system of metric weights and measures, and prescribes their use in the market place. It is aimed at ensuring that goods sold by weight, measure or number are traded fairly and in accordance with internationally recognised principles. The Act ensures fairness for consumers and business domestically and underpins the credibility of goods traded internationally. Consumers and businesses need to know they are getting what they pay for.

The Act provides the means by which consumers are assured of the correct quantity of goods sold by weight, measure or number. The Act includes provisions ensuring that goods are exchanged on the basis of recognised and accurate weights and measures essentially through reference to standards and their enforcement, requiring businesses to be aware of their obligations, and for accredited persons to oversee and maintain accuracy of weighing and measuring instruments and their use.

The Act also includes a consumer protection component which regulates against traders selling goods less than their stated weight, measure or number and against incorrectly stated weight, measure or number. However, the Act is largely about standards and their enforcement.

A significant part of administering and enforcing the Weights and Measures Act involves complying with international standards. This enables consumers and businesses worldwide to have greater confidence that the products they are purchasing meet the same measurement standards, whether they are locally produced, exported or imported. Alignment with international convention makes it easier for New Zealand to work with other jurisdictions on weights and measures matters.

Enforcement

This Act is enforced by the Ministry of Consumer Affairs. The enforcement work is undertaken by appointed inspectors; and verification and certification work is carried out by inspectors and third party verifiers known as accredited persons.

3.4 Auctioneers Act 1928

The Auctioneers Act has the objective of protecting consumers from financial loss caused by unreliable or incompetent auctioneers. Auctioneers are required to be licensed under the Act to undertake auctioneering services. Exceptions are that the Real Estate Agents Act 2008 allows individuals licensed under that Act to sell or offer to sell any land without having to also be licensed under the Auctioneers Act; and motor vehicle auctioneers can choose to be registered under the Motor Vehicle Sales Act 2003.

The Act specifies how a person becomes a licensed auctioneer. Entry to the occupation is dependent upon applicants being able to satisfy a District Court Judge that they are "fit and proper" and financially secure.

Section 43 of the Act provides for the making of regulations for licensing auctioneers. The Act also details offences and their resulting penalties.

The Auctioneers Act defines what an auction is for the purpose of the occupational regulation of auctioneers, but it does not include any other rules or protections for consumers buying goods by auction. Under section 2 of the Act, a sale by auction involves,

“the selling of property of any kind ... by outcry, by the auctioneer saying ‘I’ll take’ and commencing at a higher figure and going to a lower figure, by what is known as Dutch auction, knocking-down of hammer ... or any

*other mode whereby the highest, the lowest, or any bidder is the purchaser, or whereby the first person who claims the property submitted for sale at a certain price named by the person acting as auctioneer is the purchaser, or where there is a competition for the purchase of any property ... in any way commonly known and understood to be by way of auction ...”*⁶

To further clarify this definition, “outcry” is also defined in section 2 of the Act as “any request ... made ... by means of signs, speech, or otherwise in the presence of not less than 6 people by any person for the purpose of selling any property offered or available for sale ...”

Types of property commonly sold by auctions include general chattels, art, livestock, fresh produce, motor vehicles and real estate.

The actual rules for conducting auctions of goods are in the Sale of Goods Act 1908, and a similar section covering the sale by auction of land is found in the Property Law Act 2007. These provisions are based on the Sale of Goods Act 1893 from the United Kingdom, and similar provisions are still in force in the United Kingdom, Canada, and Australia. In New Zealand, these rules apply to the exclusion of the Consumer Guarantees Act, which specifically does not apply to goods supplied at auctions and competitive ... tenders under section 41(3).

Enforcement

The Act is enforced by the New Zealand Police, and it also allows for private or self-enforcement.

3.5 Door to Door Sales Act 1967

The Door to Door Sales Act regulates agreements for the sale of goods and services on credit entered into at places other than appropriate trade premises. The Act only covers sales initiated by the seller.

A credit agreement is defined under the Act as any credit sale agreement, hire purchase agreement or hiring agreement under which the vendor sells, lets, hires or bails the goods that are the subject of the agreement in the vendor’s ordinary course of business. Some exceptions apply.

The term “appropriate trade premises” is defined in the Act in relation to the supply of goods as those premises where “the vendor normally carries on a business” or where similar goods are “normally offered or exposed for sale in the course of a business carried on at those premises.” Similarly, in respect of services, the term “appropriate trade premises” is defined as “premises... at which the vendor or any bank, solicitor, or chartered accountant normally carries on business.”

Typically, the Door to Door Sales Act applies to sales in the home that result from uninvited traders calling with goods or services for sale.

The Act provides consumers faced with this type of selling method with legal protection in the form of a cooling-off period. The Act allows the consumer seven days after the making of an agreement to cancel the contract by notice in writing. The Act also provides that the seller must disclose to the consumer the rights of cancellation in a written statement and that the contract is unenforceable if the disclosure requirement is not met.

The Door to Door Sales Act was enacted to mitigate the detrimental effects of high pressure sales tactics to induce sales in captive environments where the customer cannot simply walk away. At the time the legislation was developed, the Act was drawn up largely in response to door to door sales of

⁶ Auctioneers Act 1928, section 2.

encyclopaedias; however, the same issues remain today with different products – particularly vacuum cleaners, house cladding, educational software, electricity and telecommunications services.

Enforcement

This Act is self-enforcing.

3.6 Layby Sales Act 1971

The Layby Sales Act sets out a clear set of principles governing goods put on layby. Layby means that a consumer pays instalments towards the cost of the good (and in this way gains title to the good) but does not take possession of the good until the full cost has been paid. Sellers do not necessarily have to physically have the good in their possession during the payment period, but are responsible for that good until it is passed to the consumer. The Act facilitates the “holding” of goods for consumers.

The Layby Sales Act is part of the Sale of Goods Act 1908, but amends this Act to reduce risks to consumers and sellers, under layby sales, from situations such as insolvency, non-payment and non-collection, where possession remains with the seller.

The Layby Sales Act only relates to consumer retail sales and does not apply to layby sales over \$7,500 or to a motor vehicle being sold by a registered motor vehicle trader.

Enforcement

This Act is self-enforcing.

3.7 Unsolicited Goods and Services Act 1975

The Unsolicited Goods and Services Act provides protection for people (consumers and businesses) who receive unsolicited goods or invoices for unordered goods or services.

The Act establishes that unsolicited goods sent to a person remain the property of the sender until the consumer accepts them, does something contrary to the sender’s ownership (i.e. disposes of them), or the sender recovers them. If the sender does not recover the goods within times specified in the Act, the goods become an unconditional gift to the consumer. These provisions limit the person receiving the goods’ liability for goods sent to them without prior request (i.e. goods which are “unsolicited”).

There is a prohibition on sending invoices to people for goods or services they have not ordered unless the sender has a reasonable belief that they are entitled to payment. This limits a sender’s ability to seek payment for unordered goods or services. The Act also prohibits senders from demanding or using threats to elicit payment for unsolicited goods unless they have reasonable cause to believe they have a right to payment, for example, senders cannot threaten or take legal action or debt collection processes for payment for unsolicited goods. The Act also enables certain services to be specified by regulations so prior written consent must be obtained by the service provider before the service can be charged for.

These provisions place the onus on the sender to establish their right to payment. The maximum fine for invoicing or demanding payment without an established right is \$1,000 and \$1,500 for threats to elicit payment. Penalties, up to \$300, can be imposed on persons ordering goods for others without their authority.

The Unsolicited Goods and Services Act also includes provisions that can be used to remove the ability for proceedings to be taken in a New Zealand Court to enforce payment for unsolicited goods or services provided overseas.

Enforcement

This Act is enforced by the Commerce Commission.

4. Going Forward: The Essential Elements of Consumer Law

The following table sets out at a high level the essential elements that consumer law must cover (indicated by the headings in bold in the table) and possible areas that come under each of the elements. The matters not covered in existing law are in a grey shade.

In summary, consumer law needs to be clear in terms of the outcomes or underlying principles it seeks to deliver. These may be set out in purpose statements or other statements of the objectives of the legislation.

At its core, consumer law concerns protection against:

- unfair commercial practices
- selling under duress
- unsafe products.

Consumer law also may establish protections through defining trader obligations for specific situations, such as supplying goods by weight or measure.

Consumer law also concerns the empowerment of consumers. In this regard, it should cover:

- information provision to assist consumer decision-making
- guarantees and associated enforcement provisions to enable redress when a transaction does not meet reasonable expectations.

Consumer law must also include appropriate enforcement and penalty provisions to ensure compliance.

The following sections of the report discuss those elements of consumer law that already exist and their ongoing relevance; as well as possible additional consumer law provisions. The discussion is arranged under the headings as set out in the table.

Essential elements and possible areas to be covered by consumer law

Principles/Purpose statement(s)					
Restrictions on unfair commercial practices	Selling and duress	Product safety	Information to assist consumer decision-making	Trader obligations	Consumer guarantees
<ul style="list-style-type: none"> • May not make misleading and deceptive or false representations • Unfair practices prohibited e.g. bait advertising, pyramid selling • Unfair contract terms may be voided • May not make claims which cannot be substantiated 	<ul style="list-style-type: none"> • Door to Door Sales • Direct Selling • Unsolicited Goods and Services • Unconscionable Conduct 	<ul style="list-style-type: none"> • Unsafe Goods Notices • Product Safety Regulations 	<ul style="list-style-type: none"> • Consumer Information Standards Regulations 	<ul style="list-style-type: none"> • Layby Sales • Weights and Measures • Carriage of Goods • Auctions 	<ul style="list-style-type: none"> • Consumer Guarantees Act
Enforcement tools				Enforcement approaches	
<ul style="list-style-type: none"> • Criminal and Civil Penalties • Court Enforceable Undertakings • Banning Orders • International Co-operation and Information Sharing 				<ul style="list-style-type: none"> • Commerce Commission • Self-enforcement • Measurement and Product Safety Service MCA 	

5. Principles-Based Law

Principles-based law refers to including relatively high-level objectives and principles in Acts of Parliament, without delving into over-prescriptive details.

The advantage of principles-based law is that its purpose and objectives are clear, and affected parties have the opportunity to determine how they will comply with the principles without necessarily having to follow detailed and intrusive rules. The intention is that principles-based law is outcomes focussed and easier to comply with for businesses in particular. The intended outcomes for consumers/citizens and businesses are clearer.

Modern New Zealand legislation tends to be principles-based, with carefully crafted “purpose” sections and rules that apply at a relatively general level. The function of purpose sections is to provide a guide to interpreting the law for its users, as well as for the courts when they are required to apply the law. Regulations and other delegated legislation which sit below the primary Act of Parliament are then used, as necessary, to set out more prescriptive and detailed rules.

None of the laws being considered in the review of consumer law have purpose sections that can be described as principles-based. For the most part this reflects the age of the legislation, with most being at least 20 years old.

The Fair Trading Act and the Consumer Guarantees Act include reasonably high-level rules rather than detailed requirements, but neither of them have modern purpose sections. Introducing purpose sections to these Acts is an option for modernising them, and moving them further in the direction of principles-based legislation. Amending existing consumer law to make it more principles-based would simplify and assist consolidation of existing consumer law.

The policy underpinning consumer law is essentially based on the concept that both consumers individually and the economy as a whole benefit from consumers making effective purchasing choices from a range of competing goods and services. In order to make effective choices, consumers need to have access to good and accurate information and to be able to make their decisions without undue or unfair pressure.

Consumer law is largely focussed on ensuring that these essential pre-conditions for good decision-making exist and that an environment exists in which consumers can transact with confidence. When products and services do not live up to the expectations created by the information provided by the supplier, consumers can hold these suppliers to account.

We have described laws creating rights for disappointed consumers to take action themselves as being “self-enforcing” in this discussion document. The remedies available to individuals or other private parties generally provide for breaches to be mitigated or stopped, or for damages or losses to be compensated. These types of remedies are available through the courts (including the Disputes Tribunal) in their civil jurisdiction.

In some cases, the government enforces the law on behalf of consumers (through the Commerce Commission and the Ministry of Consumer Affairs Measurement and Product Safety Service (MAPSS)). Public enforcement involves punitive sanctions (fines) where there is a perceived public harm or an offence rather than individual “private” harms. There is usually some moral wrongdoing underpinning offences enforceable by regulators under consumer laws, and enforcement is technically through the courts’ criminal jurisdiction.

The outcome sought from consumer law is confident consumers, such that:

- when a consumer purchases a product or service, his/her reasonable expectations are met; and
- consumers know there is access to redress if their reasonable expectations are not met; and
- consumers and suppliers have confidence in market rules.

Possible purpose statement for the Fair Trading Act

A possible purpose statement (the preferred option) for an enhanced Fair Trading Act, that encapsulates these policy principles and that would clearly state the principles of the legislation, is along the lines of:

“To promote consumer well being by fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly and in good faith.”⁷

This purpose statement points to a responsibility on both the supplier and consumer to undertake fair and honest transactions. It is very similar to the objective for consumer policy recommended by the Australian Productivity Commission in its 2007 review of Australian Consumer Law, which has been a key catalyst for the Australian Consumer Law reforms.

The Productivity Commission’s overarching objective, slightly modified, was adopted in 2008 by the Australian Ministerial Council on Consumer Affairs (MCCA), which includes the New Zealand Minister of Consumer Affairs. MCCA added reference in the primary objective to the empowerment and protection of consumers, and removed the reference to consumers and suppliers trading in good faith.

The consumer policy objective agreed by MCCA, and which was subsequently endorsed by the Coalition of Australian Governments (COAG) is:

“To improve consumer well being through consumer empowerment and protection fostering effective competition and enabling confident participation of consumers in markets in which consumers and suppliers trade fairly.”⁸

The Australian Consumer Law does not include the high-level policy objective from the Productivity Commission or MCCA, but the MCCA objective was included in the Intergovernmental Agreement which supports the Australian Consumer Law.

The MCCA policy objective is a possible alternative to the Productivity Commission policy objective as a basis for a purpose statement for the Fair Trading Act. The MCCA policy objective would have the possible advantage of closer alignment with Australia – although the Australian Consumer Law does not include this as a purpose statement. A possible disadvantage is that it emphasises consumer empowerment, protection and confident participation and gives less emphasis to the importance of good faith in the law.

⁷ Final drafting of any purpose statement will be undertaken by the Parliamentary Counsel Office. The suggested purpose statements in this discussion document are thus indicative only to allow for consultation and discussion regarding their general direction.

⁸ COAG decision of 2 October 2008 and reflected in the Intergovernmental Agreement for an Australian Consumer Law signed on 2 July 2009, reference http://www.coag.gov.au/coag_meeting_outcomes/2008-10-02/index.cfm#regulat and http://www.coag.gov.au/coag_meeting_outcomes/2009-07-02/index.cfm#regulatory.

The options discussed in this paper include enhancing the Fair Trading Act by incorporating various other Acts in it. The optional purpose statements for the Fair Trading Act could be included in the Fair Trading Act, whether or not parts covering the matters in other Acts, including the current Weights and Measures Act and Consumer Guarantees Act, are also added to the Fair Trading Act.

Possible purpose statement for the Weights and Measures Act

If the Weights and Measures Act remains separate from an enhanced Fair Trading Act, a possible purpose statement for the Weights and Measures Act could be along the lines of:

“To promote consumer and business confidence and effective market competition through ensuring goods are exchanged using accurate measurement, and regulating measuring instruments in use for trade.”

Wording along these lines makes clear the overall outcomes sought from the Weights and Measures Act, being consumer and business confidence and well-functioning markets. Essentially, the wording notes that the Weights and Measures Act is important business legislation intended to regulate market conduct and result in honest outcomes for consumers and businesses as regards weight and measure of goods.

The wording also covers the important regulatory functions of the Act.

This possible purpose statement relates well to the Act’s quite prescriptive provisions which concern achieving certainty for consumers and a level playing field for businesses.

Possible purpose statement for the Consumer Guarantees Act

If the Consumer Guarantees Act remains separate from an enhanced Fair Trading Act, a possible purpose statement could be along the lines of:

“To promote consumer well being in markets by:

- a) defining rights that give consumers confidence that their reasonable expectations about a good or service provided by a supplier or manufacturer will be met, including expectations about the good or service’s performance, quality, purpose, or safety; and*
- b) defining rights for consumers to seek redress from a supplier or manufacturer where those reasonable expectations have not been met.”*

This possible purpose statement has been worded to complement the wording of the possible Fair Trading Act purpose statements referred to above. The suggested options refer to promoting consumer well being in markets and consumer confidence. The wording draws attention to the Act providing rights to consumers with respect to goods and services purchased and to the obligations on suppliers and manufacturers to provide redress to consumers when these rights are not met. The rights concern the reasonable expectation that goods and services purchased will be safe, will meet performance and quality expectations and will meet the intended purpose the consumer has made known or the supplier has represented they are or will be fit for.

Additional objectives of consumer law

The Australian Productivity Commission also suggested six operational objectives for consumer policy in Australia:

“The consumer policy framework should efficiently and effectively aim to:

- *ensure that consumers are sufficiently well informed to benefit from and stimulate effective competition;*
- *ensure that goods and services are safe and fit for the purposes for which they were sold;*
- *prevent practices that are unfair;*
- *meet the needs of those consumers who are most vulnerable or are at the greatest disadvantage;*
- *provide accessible and timely redress where consumer detriment has occurred; and*
- *promote proportionate, risk-based enforcement.”*

One possible approach is to include all or some of these objectives in the Fair Trading Act, the Weights and Measures Act and the Consumer Guarantees Act, in addition to the purpose statements.

Good faith

As noted above, the Australian Productivity Commission included in its suggested overarching policy objective for consumer law the concept of the confident participation of consumers in markets in which both consumers and suppliers trade fairly *and in good faith*.

The reference to good faith was controversial, and in the end it was omitted from the policy objective adopted by the Ministerial Council for Consumer Affairs. The difficulty with the concept of good faith is that the courts in countries like the United Kingdom, Australia and New Zealand have struggled to attach a coherent or principled meaning to the words. The concept has long been applied in civil law jurisdictions, and it is included in the United States of America's Uniform Commercial Code, but it does not fit easily with the underlying philosophies of the common law. The principles of freedom of contract and "let the buyer beware" are foundation planks of the common law of contract, and the intervening principle of "good faith" is foreign to the common law.

While the common law courts have struggled with the definition of "good faith", or its meaning in particular circumstances, references to the good faith principle have become increasingly common in cases and academic writing. For example, modern Australian and New Zealand courts are generally reluctant to decide that an express agreement between parties to conduct themselves in good faith has no meaning at all, when that was less likely to have been so in earlier cases.

The controversial issue for contemporary cases (and academic consideration) is whether a general duty to act in good faith should be implied in commercial contracts generally, or in particular types of contracts, irrespective of what the contracts might say. The difficulty with this approach is that contract law is theoretically based on the agreements parties make between themselves, and implying terms which the parties have not in fact agreed to always strains the underlying model. The problem of the courts deciding on whether or not a general duty of good faith should be implied is exacerbated by the inability of the courts to agree on a consistent definition of what good faith actually means.

Imposing good faith obligations through legislation avoids the difficulty of the courts speculating on what the parties might have agreed to in their contracts, but the difficulty of determining what good faith means in any given situation remains. In general terms, good faith involves parties acting fairly and honestly towards each other. It may also involve behaving reasonably, meeting the other party's reasonable expectations, or acting in accordance with prevailing community standards. Acting in good faith may simply (if unhelpfully) involve not acting in bad faith.

Another definitional problem with "good faith" is that it tends to merge into other legal doctrines or principles, many of which are already referred to in the Fair Trading Act. For example, breaching the misleading and deceptive conduct, false representation and unfair practices prohibitions in Part 1 of the Fair Trading Act would also involve a breach of good faith. The same point would apply to unfair contract terms or unconscionability (or oppressiveness) provisions if they are added to the Fair Trading Act.

From a strict legal point of view, a separate legal obligation to act in good faith (whether implied in contracts through the common law or imposed by legislation) may add no substance to the law at all.

However, the issue of whether it would be useful to refer to mutual obligations of good faith between consumers and suppliers as a statement of principle in a new purpose section for the Fair Trading Act is a different question. The purpose section would provide statutory context and direction for the courts and other people reading the law; it would not create any new legal obligations. The fact that good faith sits easily alongside fairness as a principle which applies generally across the whole ambit of the Fair Trading Act is a strong argument for including it in any purpose statement.

Risks associated with principles-based law

There are risks with principles-based law. It may be seen as loose and ineffective if affected parties do not accept the principles and respond to the law by trying to minimise their compliance. It may also be more expensive in terms of compliance costs if businesses have to work out their own compliance programmes on a case-by-case basis, rather than simply following prescribed rules.

Tensions may arise between the principles or objectives and the specific provisions in the law when they are applied to particular circumstances. How the courts deal with the tensions which might arise may create uncertainty which is unexpected, even if a just or fair result is achieved.

Some lawyers in particular dislike law which includes high-level statements of purposes and principles and prefer detailed and prescriptive law where everyone knows exactly what the rules are because they are spelled out precisely. Australian law tends to follow a more prescriptive approach rather than being principles-based, so Australian Acts are often longer and more detailed than equivalent New Zealand Acts. Sometimes the prescriptiveness of more detailed law can become self-fulfilling because more distinctions and gaps appear as the law becomes more prescriptive, and new levels of detail are required to ensure the law anticipates those distinctions and gaps.

Questions

1. What are your views on including purpose statements in the Fair Trading Act, the Consumer Guarantees Act, and the Weights and Measures Act along the following lines:

- Fair Trading Act – *“To promote consumer well being by fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly and in good faith.”*
- Consumer Guarantees Act – *“To promote consumer well being in markets by:*
 - a) *defining rights that give consumers confidence that their reasonable expectations about a good or service provided by a supplier or manufacturer will be met, including expectations about the good or service’s performance, quality, purpose, or safety.*
 - b) *defining rights for consumers to seek redress from a supplier or manufacturer where those reasonable expectations have not been met.”*

- Weights and Measures Act – *“To promote consumer and business confidence and effective market competition through ensuring goods are exchanged using accurate measurement, and regulating measuring instruments in use for trade.”*

2. Are there other principles or objectives you think should be referred to in the consumer law(s)?

3. Should any purpose statement in the Fair Trading Act include a reference to consumers and suppliers trading in good faith, and for what reasons?

6. Unfair Practices

6.1 Fair Trading Act Misleading and Deceptive Conduct, False Representations and Unfair Practices Provisions

Introduction

An essential element of consumer law is protection of consumers and businesses from misleading and deceptive conduct, false representations and unfair business practices.

Misleading and deceptive conduct and false representations are regarded by society as unjust and unacceptable. Such conduct can lead to detriment for consumers and honest businesses, can distort markets, and lead to breaches of contract. This then has the impact of reducing confidence in the market and reducing competition, leading to associated negative economic impacts.

Consumers can be at a disadvantage due to a lack of adequate and accurate information about products and services they buy. This disadvantage decreases consumers' bargaining power, and can make access to redress or resolution of their complaints more difficult.

Part 1 of the Fair Trading Act 1986 provides prohibitions against:

- misleading and deceptive conduct in trade, generally and in relation to goods, services and employment
- false or misleading representations
- offering gifts and prizes (and not providing them)
- bait advertising
- referral selling
- demanding or accepting payment without intending to supply as ordered
- misleading representations about certain business activities
- harassment and coercion
- pyramid selling schemes, and
- importation of goods bearing false trade description.

These prohibitions are deliberately wide, applying to all industry sectors and types of activities. The provisions are written with the objective of promoting general standards of conduct, rather than prescribing mandatory trading conduct.

The broad prohibitions against misleading and deceptive conduct in trade, generally and in relation to goods, services and employment at sections 9 to 12 of the Act, are a form of principle-based legislation, and allow for a wide range of facts to be laid before the courts. Essentially, the provisions establish a norm of business conduct and are drafted to provide courts with significant latitude to consider the facts of the cases before them.

False representations and unfair practices are more specific practices that are determined to be unfair in all circumstances. Such specificity ensures that businesses and consumers are clear about what is prohibited. These practices have proven to cause detrimental effects on consumers and honest businesses, and attract both civil and criminal liability.

Similar broad prohibitions against misleading and deceptive conduct are found in the equivalent Australian law (Trade Practices Act 1974, the Australian Consumer Law and State and Territory Fair Trading Acts) and in equivalent laws in the United Kingdom and Canada. The United States of America (USA) and European Union countries have broad prohibitions on unfair business practices.

History of Fair Trading Act unfair practices provisions

The Fair Trading Act was developed as complementary legislation to the Commerce Act 1986. Both laws were developed at a time of deregulation and specifically the removal of economic regulation controls. The Commerce Act provides for general regulation of competition and the Fair Trading Act prescribes general prohibitions on unfair conduct and behaviour that both affect outcomes for consumers and fair competition in markets.

One objective of the Fair Trading Act noted in the Parliamentary debates preceding its passage was having laws in New Zealand comparable with those of our major trading partners, particularly Australia. The Fair Trading Act's provisions, in accord with this objective, are very similar to equivalent provisions in Australia's Trade Practices Act 1974.

Prior to the Fair Trading Act, misleading and deceptive conduct was controlled by common law and the Contractual Remedies Act 1979. The Fair Trading Act expanded the scope for the law to respond to misleading and deceptive conduct. Under the Contractual Remedies Act, the consumer must prove they were misled by misleading conduct or false representations. In comparison, proof of an intent to mislead, or negligence, is not required under the Fair Trading Act. The Fair Trading Act also allows enforcement by the Commerce Commission and by other businesses as well as consumers themselves.

Ongoing relevance of unfair practices provisions

The misleading and deceptive practices, false representations and unfair practices provisions of the Fair Trading Act are an important component of New Zealand's commercial legislation. Their relevance is quickly shown by a glance at the Commerce Commission's website. The Commission, which is responsible for the monitoring and enforcement of the Fair Trading Act, notes 11 cases involving the Fair Trading Act for the period 1 January to 30 April 2010; and nearly 30 cases for 2009. Many of these cases concern the misleading and deceptive practices, false representations or unfair practices provisions of the Fair Trading Act.

Section 9 of the Act (misleading and deceptive conduct generally) is frequently litigated in the courts.

In 2007-08, the Australian Productivity Commission undertook a major review of Australia's consumer policy framework⁹. Because of the similarity of New Zealand and Australian provisions related to unfair practices and conduct, as well as the similarity in the business environments of Australia and New Zealand, the Productivity Commission's findings provide helpful analysis. The Productivity Commission noted that measures against unfair conduct and practices are a key element of generic consumer law and found that existing consumer laws deal adequately with most instances of unfair practices and conduct. A gap was found in provisions relating to unfair contract terms and substantiation of claims. These are discussed below at section 6.2. A significant difference in Australian

⁹ Review of Australia's Consumer Policy Framework, Productivity Commission Inquiry Report, No. 45, 30 April 2008 – <http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport>.

consumer law compared to New Zealand's Fair Trading Act is also a prohibition of unconscionable conduct generally, and this is also discussed later in this discussion document (section 7.3).

The Productivity Commission compared the unfair practices and conduct provisions with the broad prohibition against unfairness which is used in the USA, and has been more recently included in the European Union's Unfair Commercial Practices Directive. A broad prohibition is suggested by some commentators as more future-proof as it avoids the need for prescription of specific types of unfairness.

The Productivity Commission noted that while they are conceptually attractive, the application of the USA provisions has periodically raised concerns due to changing interpretations of unfairness and the general statute is accompanied by various specific laws. Similarly in the European Union, the Unfair Commercial Practices Directive is supported by 31 specific prescribed practices.

The conclusion reached was that the differences between the general regime approach and the trade practices law in Australia are not as great as might be thought and that in practice a general fair practice provision may not be more adaptable in dealing with new problems.

Rather than examining this issue independently for the New Zealand context, the findings of the Productivity Commission have been accepted as just as relevant to New Zealand as Australia. Accordingly, including in the Fair Trading Act a broad prohibition on unfairness is not proposed.

In summary:

It is proposed the misleading and deceptive conduct, false representations and unfair business practices provisions of the Fair Trading Act are retained as an essential element of consumer law and that the Fair Trading Act continues as the cornerstone of consumer law. The Fair Trading Act is well-recognised law which is relevant in day to day business transactions and conduct. The National Consumer Survey 2009¹⁰ found that 20% of New Zealanders could name the Fair Trading Act.

A review of Australian and other international consumer law undertaken by the Ministry of Consumer Affairs in 2006¹¹ identified there were a number of possible enhancements that could be made to the Fair Trading Act to ensure it remains in line with best practice consumer law. Several of the enhancements relate to the enforcement provisions of the Act. These are discussed at Section 12, Enforcement.

Two potential additions to the unfair practices provisions of the Fair Trading Act were also identified: provisions relating to unfair contract terms and substantiation of claims. These are discussed below and, as noted, are both provisions the Australian Productivity Commission considered, and supported, in its 2007-08 Review of Australia's Consumer Policy Framework.

Unfair contract terms and substantiation provisions are included in the Australian Consumer Law. One objective of the Consumer Law Reform is to achieve harmonisation of approach, where this is appropriate, with the Australian Consumer Law. This objective accords with the Government's single economic market with Australia (SEM) agenda.

Another objective of the Consumer Law Reform is having in place principles-based legislation that is in line with international best practices and that delivers the outcome of confident consumers. Including unfair contract terms and substantiation provisions as part of the Fair Trading Act also would support this objective.

¹⁰ National Consumer Survey 2009 – <http://www.consumeraffairs.govt.nz>.

¹¹ Ministry of Consumer Affairs, *Review of the Redress and Enforcement Provisions of Consumer Protection Law: International Comparison Discussion Paper* (May 2006) – <http://www.consumeraffairs.govt.nz>.

6.2 Possible Additional Unfair Practices Provisions

6.2.1 Unfair Contract Terms

An unfair contract term is a term that causes a party to a contract (usually the consumer) to be at a disadvantage while the term is not reasonably necessary for the protection of the interests of the other party (usually a business). Typically, an unfair term is a pre-written term in a standard form contract.

A standard form contract is a contract created by the business in advance of an agreement being made, and it is not negotiated separately with each consumer. In comparison, a negotiated term is agreed upon by both the business and each individual consumer. The types of consumer contracts which are typically standard form contracts include rental car agreements, electricity and gas agreements, telephone line agreements, gym memberships and retirement home contracts.

Unfair contract terms have been identified in other jurisdictions as causing a significant imbalance in the parties' rights and obligations under contracts, to the detriment of consumers. A term that states that a business may change or alter other terms in a contract without consulting the consumer may be an example of an unfair contract term.

In the United Kingdom and Victoria, Australia, there have been in place for some time prohibitions related to unfair contract terms.¹² There is also the European Union directive 93/13/EEC 1993 on Unfair Terms in Consumer Contracts. This legislation was considered by the Australian Productivity Commission in its Review of Australia's Consumer Policy Framework¹³. The Productivity Commission recommended that provisions addressing unfair contract terms along the lines of the provisions of the Victorian Fair Trading Act should be incorporated in the new national Australian Consumer Law. This recommendation was then endorsed by MCCA (which includes Commonwealth, State, Territory and New Zealand Ministers responsible for consumer affairs). The Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010 passed in April 2010 includes new unfair contract terms provisions which come into effect on 1 July 2010¹⁴.

Given Australia's decision to include provisions dealing with unfair contract terms in the Australian Consumer Law, and laws in other international jurisdictions restricting unfair contract terms, it is appropriate to examine the possibility of including unfair contract terms provisions in the Fair Trading Act. The extent of concerns with unfair contract terms in practice in New Zealand is not known. Anecdotally, community agencies have advised the Ministry of Consumer Affairs of contracts that may include unfair terms. The Review of the Operation of the Credit Contracts and Consumer Finance Act 2003¹⁵ noted that some credit contracts may not meet the high test for oppression under the Credit Contracts and Consumer Finance Act, but may include unfair contract terms.

The Australian Productivity Commission's extensive examination of the possible inclusion of unfair contract terms provisions in the Australian Consumer Law was from the same position of not having a clear and obvious problem demanding a regulatory response. The similarity between the Australian and

¹² Unfair Terms in Consumer Contracts Regulations 1999, United Kingdom, and the Fair Trading Act 1999, Victoria.

¹³ Review of Australia's Consumer Policy Framework, Productivity Commission Inquiry Report, No. 45, 30 April 2008 – <http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport>.

¹⁴ The Australian Securities and Investments Commission Act 2001 also includes identical unfair contract terms provisions. New Zealand's Fair Trading Act applies to credit and other financial sector contracts and thus any consideration of unfair contract terms provisions will need to consider their applicability to financial services and products.

¹⁵ Ministry of Consumer Affairs, *Review of the Operation of the Credit Contracts and Consumer Finance Act 2003* (September 2009) – <http://www.consumeraffairs.govt.nz>.

New Zealand markets enables New Zealand policy makers to take advantage of the Australian Productivity Commission's analysis without having to repeat an identical analysis.

In summary, the Productivity Commission decided there are sound economic and ethical reasons for legislation dealing with unfair contract terms that cause consumer detriment. It noted that fairness is an ethical value in its own right, and it is a legitimate function of the law to protect consumers from being dealt with unfairly. There is also an economic value in consumers being able to trust suppliers they contract with, even if they use standard form contracts with fine print terms.

It noted there are also arguments that one-sided standard form contracts which consumers are obviously not intended to actually read are in fact efficient, and that suppliers will only rely on contract terms which might ostensibly be "unfair" in limited cases, especially where consumers might not be acting in good faith themselves. The argument is that consumers generally have nothing to fear from "unfair" contract terms because suppliers will generally treat their customers fairly in competitive markets, irrespective of the standard terms the consumers might notionally have agreed to.

The Productivity Commission concluded that there was persuasive evidence that notionally unfair contract terms are common in Australia, even though they are often dormant and not used by suppliers. The Commission accepted that the evidence of the detrimental use of unfair contract terms was of variable quality and often anecdotal, but that it was nevertheless significant. The United Kingdom experience also suggests there is a consumer benefit from their Unfair Terms in Consumer Contracts Regulations.

The Productivity Commission's approach was to weigh the generally persuasive but uncertain evidence of consumer benefit against the likely costs of regulating unfair contract terms. The Commission relied on business in Victoria, the United Kingdom and Europe not having identified major problems or costs associated with the introduction of unfair contract terms laws. The Commission also relied on the assumption that any new unfair contract terms laws would be targeted specifically at non-negotiated (i.e. standard form) consumer contracts, and that the terms of the new law would be clear.

Features of the Australian Consumer Law provisions on unfair contract terms

The unfair contract terms provisions put in place by Australia are now discussed. The underlying issue is whether similar provisions could work for New Zealand.

The Australian Consumer Law provides that unfair terms in consumer contracts are void. It defines a "consumer contract" as a standard-form contract for a supply of goods or services or a sale or grant of interest in land which is wholly or predominantly for personal, domestic or household use or consumption.

Consumer contract

As part of Australia's consideration prior to the finalising of its unfair contract term provisions, there was some consideration given to also covering business to business contracts but this did not proceed.

Restricting the unfair contract term provisions to consumer contracts for the supply of goods or services which are wholly or predominantly for personal, domestic or household use or consumption deliberately limits the provisions to the problem area the Productivity Commission noted there was some evidence to support.¹⁶ If New Zealand includes unfair contract term provisions in the Fair

¹⁶ The Productivity Commission, at page 152 of Volume 2 of its Inquiry Report No. 45, noted there is quantitative evidence from Victoria and various countries that somewhere between 5 to 15% of consumers might be detrimentally affected by unfair terms.

Trading Act, one question is whether this should be a general provision or similar to Australia where the provisions are limited to consumer contracts. The Australian consumer contract definition generally accords with the special protection given to business to consumer transactions under the Consumer Guarantees Act (and not business to business transactions).

Unfair

The Australian Consumer Law says a term is “unfair” when it:

- causes a significant imbalance in the parties' rights and obligations arising under the contract, and
- is not reasonably necessary to protect the legitimate interests of the supplier, and
- causes financial or non-financial detriment to a party.

The Australian Consumer Law also provides that a court must have regard to the transparency of the term and the contract as a whole in determining whether a term is “unfair”. A term is considered to be transparent if it is in plain language, legible, clear and available to be read.

The Australian Consumer Law also provides that terms which relate to the main subject matter and up-front price of the contract are not able to be challenged under these provisions. However, payments made under a contract which are contingent on the occurrence or non-occurrence of an event are examinable under the unfair contract terms provisions.

The reference in the first part of the Australian Consumer Law definition of “unfair” to a significant imbalance in the parties’ rights and obligations is conventional. The United Kingdom and Victorian legislation, and the Productivity Commission recommendation, also include a “good faith” element in the test, but this was rejected for the Australian Consumer Law definition because it was considered to introduce too much uncertainty and subjectivity.

The alternative to “good faith” used in the Australian Act is to refer to a term which is “not reasonably necessary in order to protect the legitimate interests” of the supplier. This is more specific than a general “good faith” requirement. The Act says a term of a consumer contract is presumed *not* to be reasonably necessary to protect the legitimate interests of the supplier, unless that party proves otherwise (section 3(4)). This creates the opportunity for suppliers to justify contract terms which may on their face seem to create an imbalance between the parties or otherwise be “unfair”, although the rebuttable presumption in section 3(4) will create an initial advantage for consumers when the test is applied.¹⁷

A non-exhaustive, indicative “grey-list” of 14 examples of types of terms that may be unfair is also included in the Australian Act. These examples are subject to the unfair contract terms test and provide statutory guidance on issues of concern. They do not deem or presume particular types of terms to be unfair.

The effect of these examples is to provide the courts with a clear indication of the kinds of circumstances in which a contract term will be found to be unfair, while retaining scope for flexibility and the exercise of discretion by the courts. This is consistent with a principles-based approach to making new law.

The 14 examples of terms of consumer contracts which may be unfair are all cases where there is an imbalance between the parties, or the supplier is able to act on a one-sided or unilateral basis. The

¹⁷ Trade Practices Amendment (Australian Consumer Law) Act (No.1) 2010 Schedule 2 Part 2, section 3(4).

examples are not conclusive because it is possible that the supplier could justify the terms under the second part of the definition of “unfair” as being reasonably necessary to protect its legitimate interests in its particular case.

The 14 examples in the Australian Act are contract terms that:

- a. permit one party to avoid or limit performance of the contract
- b. permit one party to terminate the contract
- c. penalise one party for a breach or termination of the contract
- d. permit one party to vary the terms of the contract
- e. permit one party to renew or not renew the contract
- f. permit one party to vary the upfront price payable under the contract without the right of another party to terminate the contract
- g. permit one party to unilaterally vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract
- h. permit one party unilaterally to determine whether the contract has been breached or to interpret its meaning
- i. limit one party’s vicarious liability for its agents
- j. permit one party to assign the contract to the detriment of another party without the other party’s consent
- k. limit one party’s right to sue another party
- l. limit the evidence one party can adduce in proceedings related to the contract
- m. impose the evidential burden on one party in proceedings relating to the contract, and
- n. are of a kind prescribed by the regulations.¹⁸

The examples are similar to the examples used in the Victorian legislation. They all refer to one-sided powers that might be exercisable under the contract, or one-sided protections that would limit the opportunity for the consumer to enforce a contract. The final “example” creates the opportunity for the government to fill any gaps by regulation, without needing to amend the Act.¹⁹

Standard form contract

Another feature of the principal provision dealing with unfair contract terms in the Australian Act is the definition of “standard form contract”. In principle, the reason for limiting the scope of the law dealing with unfair contract terms to standard form contracts is that standard form contracts tend to include unfair terms which consumers do not knowingly agree to. If consumers *do* knowingly agree to a term, then it will not be as likely to be unfair.

¹⁸ *Ibid*, section 4.

¹⁹ Using regulations to fill potential gaps in legislation may not be regarded as acceptable in New Zealand, although the fact that the “examples” are not legally binding may make the provision less objectionable in principle.

Under the Australian Act, if a consumer claims a contract is a standard form contract then it will be presumed to be so, unless the other party proves otherwise. The Act does not include a definition of a standard form contract as such, but the decision is for the court to make, and the Act includes the following factors which the court must take into account:

- a. whether one of the parties has all or most of the bargaining power relating to the transaction
- b. whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties
- c. whether another party was, in effect, required either to accept or reject the terms of the contract in the form that they were presented
- d. whether another party was given an effective opportunity to negotiate the terms of the contract
- e. whether the terms of the contract take into account the specific characteristics of another party or the particular transaction, and
- f. any other matter prescribed by the regulations.²⁰

The objective of targeting standard form contracts is to catch unfair contract terms which consumers do not knowingly agree to. There are some terms which consumers will have knowingly agreed to, even when a standard form contract is used. These terms include the main subject matter of the agreement (whatever is being bought and sold), and the price payable up-front by the consumer. The assumption is that consumers will always know what they are buying and how much they are paying (up-front at least), so these provisions are not eligible to be unfair contract terms under the Act. These provisions are also excluded from the factors the court must take into account in determining whether a contract is a standard form contract.

Including unfair contract terms provisions in the Fair Trading Act

Including unfair contract terms provisions in the Fair Trading Act along the lines of the Australian Consumer Law would mean the Fair Trading Act was in accord with international consumer law regulating unfair practices. It would also be consistent with harmonising consumer and business law as part of promotion of the SEM with Australia.

Protecting consumers from unfair contract terms is also consistent with the principles underpinning consumer law in New Zealand, which are referred to in the suggested purpose statement for the Fair Trading Act. The purpose statement refers to consumer well being, fostering effective competition, confident participation of consumers, and consumers and suppliers trading fairly and in good faith.

New Zealand is in a similar situation to Australia prior to it deciding to include unfair contract terms in its legislation. We do not have a clearly defined problem of unfair contract terms causing consumer detriment. The Australian Productivity Commission extensively examined possible regulation of unfair contract terms from the same situation in Australia and recommended including unfair contract terms provisions in Australia's consumer law. The Productivity Commission's analysis is relevant to New Zealand. The preferred option is to include unfair contract terms in the Fair Trading Act along the lines of the Australian unfair contract term provisions. The alternative option is the status quo and not to have regulation of unfair contract terms.

²⁰ Trade Practices Amendment (Australian Consumer Law) Act (No.1) 2010 Schedule 2 Part 2, section 7(2).

Questions

4. Do you support including unfair contract terms provisions in the Fair Trading Act along the lines of the Australian Consumer Law, and for what reasons?
5. Is it appropriate to include a "good faith" element in the definition of an unfair contract term (like the United Kingdom and Victorian legislation, and the Productivity Commission recommendation), or is the approach used in the Australian Consumer Law preferable?
6. Do you think the approach used in the Australian Consumer Law of providing examples of unfair contract terms would be appropriate for New Zealand law?

6.2.2 Claims which Cannot be Substantiated

Purchasing decisions by consumers have an important role in the development of dynamic and competitive markets, and consumers need to be able to trust the information they are given to make the best decisions. For credence goods – that is goods where it is too difficult for a consumer to determine whether a product is true to its claims – consumers rely on the information presented by suppliers. Suppliers making misleading, false or unsubstantiated claims compromise the effective operation of markets.

Misleading or deceptive conduct is prohibited under section 9 of the Fair Trading Act, and false or misleading representations are prohibited under section 13. The onus of proof for a breach of the prohibitions on misleading and deceptive conduct or false or misleading representations usually falls on the Commerce Commission in its enforcement capacity. Misleading or deceptive conduct under section 9 is a civil claim, so the burden of proof is “on the balance of probabilities”. Making a false or misleading representation is an offence, so the criminal burden of proof of “beyond reasonable doubt” applies.

There are no statutory powers in the Fair Trading Act to allow the Commerce Commission to require substantiation of claims or representations from suppliers. The burden of proving that an unsubstantiated claim is misleading or actually false (rather than just unsubstantiated) can be difficult and expensive for the Commerce Commission to meet, especially in criminal cases. These difficulties make it relatively rare for suppliers making unsubstantiated statements to be held to account.

There is a practice for some traders in the market to make unsubstantiated claims, or claims where there seems to be an inadequate understanding of any basis for the claim. For example, claims of eco-friendliness and sustainability is a growth area where there is significant potential to confuse and mislead consumers, but where there are few guidelines on what is meant by such definitions. Often consumers pay a premium for “organic” products, and it is not always clear what the claim means. Claims of miracle cures, product safety, comparative pricing and business opportunities are also made.

Recent examples of goods advertised as being “more” than they actually were that have led to successful prosecutions by the Commerce Commission include:

- Ready to drink Ribena – where GlaxoSmithKline advertised the product as containing Vitamin C when it did not; and
- Probitas – a fertiliser which claimed to activate the electrical and magnetic processes in the soil when it did not.

These examples are different from puffery advertising commonly associated with cosmetics – with claims such as “feel years younger”, “increase the shine and bounce in your hair” etc.

The Advertising Standards Authority (ASA) provides alternative remedies for complaints relating to claims made in advertisements and the ASA can request evidence to support a claim made in an advertisement. This process only covers advertising claims. It does not cover labelling or packaging claims, unless they can be seen in an advertisement. The ASA also does not have the full range of sanctions available under the Fair Trading Act.

As noted, the new Australian Consumer Law includes provisions allowing the regulator (the Australian Competition and Consumer Commission (ACCC)) to issue substantiation notices.²¹ The same approach has also been applied in the Australian Corporations Law, which gives the Australian Securities and Investments Commission power to also issue substantiation notices.²²

The inclusion of these provisions followed the Australian Productivity Commission's consideration of the full range of policy issues in relation to substantiation notices in its Review of Australia's Consumer Policy Framework, which concluded that substantiation notices should be included in the new Australian Consumer Law.²³

The Australian Consumer Law provides that when the ACCC becomes aware of a representation that may appear to contravene the Australian Consumer Law, it can require a person to provide information which could be capable of supporting the claim, or ask for particular documents that may be relevant to the claim.

The substantiation notice powers are described as a preliminary investigative tool to seek information about claims or representations that may assist a regulator in determining whether to take action for a suspected breach of consumer protection provisions of the Australian Consumer Law.²⁴ Substantiation notices do not require the person to prove that a representation is true or is not misleading.

The Ministry of Consumer Affairs' 2006 Review of the Redress and Enforcement Provisions of Consumer Law proposed including in the Fair Trading Act a similar provision to that now in the Australian Consumer Law empowering the Commerce Commission to issue "substantiation notices", requiring suppliers to substantiate the claims they make in relation to the products they supply.²⁵ The review of the Fair Trading Act identified that several other jurisdictions have substantiation requirements.²⁶

Nearly half of the submitters who responded to the 2006 Review supported the substantiation notices proposal. There was a strong view that the ability of traders to substantiate the claims they make is a basic tenet of consumer protection law.

Those submitters that did not support this proposal were concerned by the criminal sanctions in the Fair Trading Act. They considered that the proposal would require suppliers to prove they were innocent, which is a "reverse onus" that is contrary to their rights under the New Zealand Bill of Rights

²¹ Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010, Schedule 2 Part 3, section 87ZL.

²² Trade Practices Amendment (Australian Consumer Law) Act (No.1) 2010, Schedule 3 Part 4 (amending the Australian Securities and Investments Commission Act 2001).

²³ Review of Australia's Consumer Policy Framework, Productivity Commission Inquiry Report, No. 45, 30 April 2008, page 242 – <http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport>.

²⁴ The Australian Consumer Law, A Guide to Provisions, Commonwealth of Australia, April 2010 – http://www.treasury.gov.au/consumerlaw/content/downloads/Australian_Consumer_Law_A_Guide_to_Provisions_April_2010.pdf.

²⁵ Ministry of Consumer Affairs, *Review of the Redress and Enforcement Provisions of Consumer Protection Law: International Comparison Discussion Paper* (May 2006) – <http://www.consumeraffairs.govt.nz>.

²⁶ Most recently the UK has introduced The Consumer Protection from Unfair Trading Regulations 2008.

Act 1990. Submitters also stated that if suppliers were required to substantiate product characteristics then they will be reluctant to supply new products or to obtain products from new traders. Concerns were raised about the costs associated with proving claims and some submitters thought this proposal would mean the Commerce Commission would not be required to conduct thorough investigations.

Proposals to require suppliers to substantiate claims about their products or services are therefore controversial.

The Commerce Commission considers that giving it the ability to issue substantiation notices would strongly assist its enforcement of misleading claims and misrepresentation under the Fair Trading Act. The Commerce Commission already has the power to require the supply of information or documents when it is investigating a claim under section 47G of the Fair Trading Act. However the Commerce Commission has argued that this power is insufficient, because the High Court has interpreted the Commerce Commission's powers to require information or documents to be provided under the Commerce Act in a way which limits these powers.²⁷ The relevant provision in the Commerce Act is the same as section 47G of the Fair Trading Act, so the same limitation on the Commerce Commission's power applies.

Reducing compliance costs on businesses where possible is also a priority. Requiring supporting information for a product or service claim is likely to increase costs on businesses, although the cost burden will vary according to the claim.

Should substantiation provisions be included in the Fair Trading Act?

Including substantiation provisions in the Fair Trading Act along the lines of the Australian Consumer Law would be in accord with harmonising consumer and business law as part of the promotion of the SEM with Australia. One aspect of the SEM is the New Zealand and Australian regulatory authorities such as the Commerce Commission and the ACCC working more closely together and being able to share information and provide investigative assistance. Information sharing and investigative assistance would be enhanced with similar enforcement powers under the Fair Trading Act and the Australian Consumer Law.

There is, however, a problem for New Zealand with the reverse onus inherent in the substantiation notice process adopted by Australia which would likely be a prima facie breach of the New Zealand Bill of Rights Act. Rather than adding a substantiation notice process to the Fair Trading Act, another option would be to add a general prohibition on suppliers not to make unsubstantiated claims under Part 1 of the Fair Trading Act. A new section could be added to Part 1 along the following lines:

No person shall, in trade, make a material claim in relation to the supply or possible supply of goods or services as to the nature, characteristic, or suitability for a purpose of those goods or services, without having reasonable grounds to justify or substantiate the claim.

This would mean unsubstantiated claims could be investigated and prosecuted in their own right, instead of having a substantiation notice procedure as an investigatory tool which would effectively reverse the onus of proof.

Why a general prohibition?

A prohibition on unsubstantiated claims would improve the ability to quickly clarify and take enforcement action against unsubstantiated claims. It is likely to be used most often as a "wake-up

²⁷ *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1991] NZAR 155 discusses section 98 of the Commerce Act 1986.

call”, rather than as a full-blown prosecution, and would ideally lead to rapid changes to, or clarification of, claims to the consumer’s benefit, voluntarily or by court enforceable undertaking.

There is a fundamental premise that honest business should only make supported and justified claims. This enhances the confidence consumers have in the market. Loss of credibility by one business may affect the whole sector unfairly.

Supporting evidence

A claim must be suspected of being unable to be substantiated before the claim would be investigated.

Where a particular level of supporting evidence is claimed, then that level of substantiation must be shown. For example, if the claim is “clinical tests show”, the substantiation should be competent and reliable scientific evidence should be included.

For other non-scientific claims, such as price comparisons (“sale price”, “marked down”, “below cost”), the substantiation should be appropriate to the level of the claim, for example, by providing pre-sale price and cost price.

When no particular level of support is claimed, a “reasonable basis” could be obtained by analysing²⁸:

- the type of claim
- the type of product or service
- the benefits of a truthful claim
- the cost/difficulty of developing or obtaining support for the claim
- the consequences of a false claim, and
- the amount of substantiation experts in the field believe is reasonable.

Testimonials can be acceptable as supporting evidence for certain claims, but not for scientific claims.

Absolute claims, such as “XX-free” must be justified, but the interpretation of this definition can have some flexibility, such as “XX must not be detectable”. This is consistent with the Food Code for gluten-free and lactose-free claims.

Offences

It is important to note that only civil remedies are available for breaches of section 9 of the Fair Trading Act (misleading and deceptive conduct), while civil and criminal remedies apply to most of the other prohibitions in the Fair Trading Act. Therefore breaches of section 9 only need to be proved to the balance of probabilities, while breaches of sections 10-14 are required to be proved beyond reasonable doubt or on the balance of probabilities, depending on whether the claim is criminal (by the Commerce Commission) or civil (by a consumer or other business).

It would be appropriate for the prohibition on unsubstantiated claims to also be civil and criminal. This would allow the Commerce Commission and other parties, such as consumers and other businesses, to take action.

²⁸ Based on the Australian Federal Trade Commission approach.

The same offences would apply as for the misleading and deceptive conduct, and misrepresentation under the Fair Trading Act (sections 40-43). There is a possibility of an alternate/additional offence specifically for the prohibition of unsubstantiated claims, along the lines of that given in section 40A for section 24 (pyramid selling schemes).

The inability to provide supporting evidence for a claim could be a strict liability offence.

Costs and benefits

The previous work of the Ministry of Consumer Affairs on possible substantiation provisions in the Fair Trading Act²⁹ and the Australian Productivity Commission's thorough analysis of substantiation³⁰ have informed consideration of the above proposals and the following assessment of costs and benefits.

Benefits

The requirement for businesses to verify their claims is an important safeguard against misleading or deceptive conduct. This may motivate traders to consider the claims they make, and therefore change behaviours and potentially reduce the chances of misrepresentation and misleading and deceptive conduct.

Such a provision would protect vulnerable consumers, as many unsubstantiated claims take advantage of the vulnerability of certain groups. In the case of miracle cures, people with chronic or terminal illnesses are targeted.

If not being able to supply supporting information for a claim is a strict liability offence, then there is a potential to resolve the breach rapidly. There would not be the requirement for a prolonged investigation of the matter.

Consumers and other businesses would be able to take action on such a breach, not only the Commerce Commission. This would allow cases that would otherwise not meet the Commerce Commission's enforcement criteria to be taken.

The disadvantage for honest businesses would be reduced because their competitors could not make unsubstantiated claims. This is also part of the justification for prohibiting misleading and deceptive conduct. Additionally, unsupported claims by one business can negatively affect other businesses in the same sector. Conversely, supported claims can improve the credibility of an entire sector. Businesses which can provide supporting evidence to their claims can leverage off this to improve their credibility and reputation. This can lead to improved marketability of their goods and services.

Costs

It would be a compliance cost on businesses to require them to ensure they have supporting information for their products. This would vary with the nature of the claims they make. For example, a scientific claim would require more complex substantiation than a claim such as "hens being free-range". However, many businesses would rely on information from others, and this is a defence (to a certain extent) under the Fair Trading Act.

²⁹ Ministry of Consumer Affairs, *Review of the Redress and Enforcement Provisions of Consumer Protection Law: International Comparison Discussion Paper* (May 2006) – <http://www.consumeraffairs.govt.nz>.

³⁰ Review of Australia's Consumer Policy Framework, Productivity Commission Inquiry Report, No. 45, 30 April 2008 – <http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport>.

There may be uncertainty as to what would be reasonable or best endeavours to substantiate a claim. This was the main concern of the ACCC in their submission to the Australian Productivity Commission's review into the consumer policy framework.

There is a possibility that businesses may not put any claims on their products, therefore not informing consumers at all. This option has been open to products in the regulated medicine sector for many years, yet few traders choose to take this course. Claims are a useful marketing tool, and it is clear that traders regard the benefits of making claims outweigh the costs of having to prove those claims.

Questions

7. Should there be a general prohibition on unsubstantiated claims under the Fair Trading Act, and for what reasons?
8. Should any general prohibition on unsubstantiated claims (or any other preferred approach) be enforceable by the Commerce Commission and/or privately under the Fair Trading Act?

7. Selling and Duress

Certain types of trader conduct can put consumers under pressure to buy goods or services they do not really want, which is a form of duress. This section discusses existing consumer law protections regarding door to door sales and unsolicited goods and services, which are both types of selling that can put consumers under duress. There is existing legislation addressing both of these areas, but in both cases the legislation is old and out of date.

The existing law is compared with the Australian Consumer Law stage 2 proposals which have modern provisions on unsolicited sales practices including door to door selling, telephone sales and other forms of direct selling which do not take place in a retail context. These will replace door to door sales and unsolicited sales practices legislation in the Australian States and Territories. The Australian Consumer Law stage 2 proposals also include under unfair practices, modern provisions concerning unsolicited supply of goods and services.

This section also considers whether protections for consumers against unconscionable conduct or oppressive conduct should be included in an enhanced Fair Trading Act.

Australia has existing provisions in the Trade Practices Act prohibiting unconscionable conduct. In 2008 the Australian Commonwealth Government Senate Economics Committee undertook an examination of the unconscionable conduct provisions. In November 2009, the Australian Government responded to the Senate Economics Committee report and established an expert panel to consider options for amending the unconscionable conduct provisions. We have drawn on the findings of both of these processes as much as possible.

The work undertaken by Australia regarding unsolicited sales practices, unsolicited supply of goods and services and unconscionable conduct is timely. It has assisted the analysis which follows and also provides an opportunity to consider harmonisation of law in these areas.

7.1 Door to Door Sales and Other Direct Selling

Introduction

The Door to Door Sales Act 1967 applies to any credit sale agreement made other than at the “appropriate trade premises” of the vendor. “Appropriate trade premises” is defined as premises where the vendor normally carries on business, or where similar goods are normally offered for sale. Typically the Act applies to sales in the home that result from uninvited traders calling with goods or services for sale.

The Act provides consumers faced with this type of selling method with legal protection in the form of a 7 day cooling-off period after the making of an agreement during which the consumer may cancel the contract by notice in writing. The Act also provides that the seller must disclose to the consumer the rights of cancellation in a written statement and that the contract is unenforceable if the disclosure requirement is not met.

The Act is a legislative response to the perceived vulnerability of consumers purchasing goods and services in their own homes or otherwise away from the vendor’s “appropriate trade premises”. It is premised on the assumption that consumers are vulnerable to being pressured into buying goods or services when they have not chosen to conventionally shop at the seller’s usual trade premises. The vulnerability which may cause consumers to make poor purchasing decisions is due to,

- the seller making the initial approach (unexpectedly), often personally, either face to face or over the telephone

- the seller only offering a limited range of products, and
- salespeople making use of direct selling techniques and strategies which take psychological advantage of the selling environment (usually the consumer's home, workplace or other environment where the consumer cannot easily walk away without buying something first) to pressure the consumer.

In these circumstances, consumers might not be in the position to make the best choices, or to trade confidently with these suppliers.

Other businesses may also be disadvantaged if they do not have the opportunity to compete fairly with suppliers which might be inappropriately pressuring vulnerable consumers.

History of the Door to Door Sales Act

The Door to Door Sales Act is a limited response to redress the above issues. Most significantly, it only applies to the provision of goods on credit (including hire purchase and hiring).³¹ It does not apply to cash sales of goods because it was assumed when the Act was passed that consumers who were able to pay the full purchase price when the sale agreement was entered into did not need protection.

The Door to Door Sales Act was passed at a time when it was quite common for salesmen to go house to house selling such goods and services as encyclopaedias, photographs, vacuum cleaners, household linen, brushes, heating equipment and pest control. The Act was intended to protect consumers from the sales pressure applied by sellers knocking on their door in an attempt to sell their products.

In the second reading of the Bill, the Minister of Industries and Commerce stated that “The purpose of the Bill is to allow a purchaser who has signed an agreement involving a credit sale if on mature consideration and perhaps discussion with other members of the family, he or she...feels that it is not in her interests to go on with the transaction. It is aimed not at interfering with door to door selling as such, but only at undesirable practices and pressures that are sometimes applied in this type of transaction.”

Ongoing relevance of regulation of door to door sales and direct selling

The Door to Door Sales Act is 40 years old and was enacted before a number of modern sales technologies were envisaged, including telemarketing. There are a number of specific problems with the Act, in particular that it applies to credit arrangements but not sale of goods by cash or using a credit card. Aspects of the Act are also unclear including what is meant by appropriate trade premises.

There are three principal issues to consider regarding any ongoing regulation of door to door and direct selling:

- Is specific legislation necessary to protect purchasers from direct selling pressures and, if any, what transactions should it apply to?
- If legislation is appropriate, what protections should be provided, e.g. cooling-off period, disclosure?
- If legislation is appropriate, should it be in a separate Act or incorporated into an enhanced Fair Trading Act?

³¹ Services are deemed to be goods sold on credit – section 3A.

Is legislation necessary?

The National Consumer Survey 2009³² found 26% of New Zealanders purchased via door to door selling, telemarketing or other direct selling such as at a seminar, in the previous 2 years (31% under 30 years, 26% 30-64 years and 19% 65 years or over), indicating this is still a fairly popular form of selling. In recent years, door to door selling and telemarketing of telecommunications and electricity services has become popular.³³

It is a form of selling that still attracts some attention and criticism. Consumer NZ occasionally publishes articles in the Consumer magazine about rights under the Door to Door Sales Act and warnings to consumers about pressure selling door to door. There is anecdotal evidence of consumers having problems with direct selling which has been recorded by Consumer NZ, the Ministry of Consumer Affairs and the media. Recently, there were complaints about door-to-door selling of KiwiSaver at residential premises, which is prohibited by the Securities Act 1978, and about the undesirable practices used in selling the product at a university campus (direct selling of investment products at businesses or via the phone or email is not prohibited).

The National Consumer Survey found that 16% of people who purchased via door-to-door selling, telemarketing or other direct selling experienced a problem.

When there is existing legislation establishing protections against certain practices, it is difficult to get a clear view of the problem that would exist if these protections were not in place. The above suggests, however, that this is an area where regulation is still needed.

A similar conclusion has been reached in Australia as part of the development of the Australian Consumer Law. This law includes provisions on unsolicited selling which cover door to door and direct selling.

The Productivity Commission in its Review of Australia's Consumer Policy Framework³⁴ noted "a particular example of the role played by generic consumer law in protecting vulnerable and disadvantaged consumers is in the area of door-to-door selling (and cooling-off periods). Direct selling practices are sophisticated and widespread across a range of industries and products, including new growth markets such as pay television, telecommunications and retail energy supply. Some of the most vulnerable groups in the community (especially older women living alone, indigenous people and consumers with poor understanding of English continue to be subject to undesirable selling practices."

What transactions should the law apply to?

What types of direct selling?

Although the Door to Door Sales Act's title suggests it applies to "door to door" sales transactions, the mechanism used in the Act to define its scope refers to sales other than at the vendor's "appropriate trade premises", and this extends beyond door to door situations. The courts have held that the scope of the Act extends to telemarketing despite the argument from the vendor that its call centre was an "appropriate trade premises".³⁵ It is unlikely that telemarketing call centres were contemplated when

³² National Consumer Survey 2009 – <http://www.consumeraffairs.govt.nz>.

³³ Discussions between Ministry of Consumer Affairs and Australian government officials indicate they have observed a similar increase in popularity of door to door sales of utility services contracts.

³⁴ Review of Australia's Consumer Policy Framework, Productivity Commission Inquiry Report, no 45, 30 April 2008, page 297 – <http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport>.

³⁵ *Commerce Commission v Telecom Mobile Limited* [2004] 3NZLR 667 (High Court), [2005] NZCA 218 (Court of Appeal), [2006] 1 NZLR 190 (Supreme Court). In this case, the courts considered the application of the Door to Door Sales Act to mobile

the Door to Door Sales Act was passed in 1967. The fact that a case on the application of the Door to Door Sales Act to new technology, new selling techniques and relatively new legal concepts around contract formation and “shrink-wrapped” products went all the way to the Supreme Court indicates that the Act is out of date and could be clearer.

There are also other direct or distance selling techniques where it is uncertain whether the Door to Door Sales Act does or should cover the situation. For example, selling through party plans (i.e. potential customers are invited to a “party” at another customer’s home to view the products), seminar selling, direct response television advertising (0800/0900 dialling), trade fairs and one-off venues.

The “appropriate trade premises” test does not provide a sufficiently clear direction as to whether or not particular direct marketing techniques are covered by the Act. Assessing whether particular trade premises are “appropriate” or not is particularly problematic.

A better option may be to expressly refer to door to door sales, telemarketing and any other form of direct marketing which ought to be covered by the law because consumers are vulnerable to making poor purchasing decisions.

The Australian Consumer Law proposal does not refer to door to door sales at all, but instead refers to unsolicited consumer agreements made by dealers and consumers in each other’s presence other than at a place of business of the supplier, or over the telephone. Simply referring to a “place of business” avoids the requirement to determine whether trade premises are “appropriate” under the current New Zealand formulation.

Initial approach by the direct seller

The Door to Door Sales Act does not apply where the “first inquiry specifically relating to the sale and purchase” is initiated by the purchaser (section 11) because the purchaser has chosen to place him or herself in the potentially vulnerable purchasing position. Many direct selling techniques involve the purchaser choosing to go somewhere (e.g. a sales party, seminar, trade fair etc) or to voluntarily respond to some kind of advertisement (e.g. direct response marketing). The Door to Door Sales Act says any advertising by the seller should be ignored in determining whether the consumer has initiated the sale.

The distinction between direct marketers making the initial approach, either in person or by telephone, and consumers making the initial approach themselves seems to be broadly valid in terms of identifying situations where consumers might be vulnerable and in need of some legal protection.

However there may still be situations where consumers are coaxed into “inviting” direct marketers to demonstrate a product or service in the consumer’s home (by, for example, responding to an offer for a “free quote”). In some instances, a consumer may have entered a competition and provided contact details allowing a seller to follow up. It is unclear whether this would mean the sale contact was initiated by the purchaser.

The Australian Consumer Law seems to clarify these situations by providing that unsolicited selling is when “the consumer did not invite the dealer ... for the purposes of entering into negotiations relating to the supply of those goods or services (whether or not the consumer made such an invitation in relation to a different supply)” and “An invitation merely to quote a price for a supply is not taken, for the purposes of [previous quoted clause], to be an invitation to enter into negotiations for a supply.” It

telephone plans through the High Court, Court of Appeal and Supreme Court in the *Commerce Commission v Telecom Mobile* cases. The courts held that the Act did apply, but the cases involved complex issues about the status of the Telecom call centre as a trade premises, and the actual formation of the sales contract when the consumer unwrapped the new cell phone.

may be appropriate to include provisions similar to these in any new law to help deter some of the “enticement” practices.

What type of sales?

As noted, the Door to Door Sales Act only applies to “credit agreements”. For goods, this means the Act does not apply to purchases using cash or a credit card. Agreements to provide services are defined as credit agreements under section 3A of the Act.

If consumers are vulnerable to making poor purchasing decisions due to the direct selling techniques used by vendors, that vulnerability will exist irrespective of how the consumers might pay for their purchases. The distinction in protection needed between consumers using credit sales and other consumers who use cash, credit cards or bank overdrafts to pay for their purchases does not seem justified. Arguably a consumer who prepays for goods or services from a door to door salesperson or other direct marketer is more vulnerable than a consumer who defers payment of the purchase price.

The Australian Consumer Law proposals for regulating unsolicited selling make no reference to how goods or services are paid for.

If protections for door to door and direct sales are only needed for credit contracts, then it needs to be established whether protections beyond the Credit Contracts and Consumer Finance Act 2003 (CCCFA) are needed. The CCCFA includes mechanisms for disclosure and a cooling-off period during which the borrowing consumer can cancel the agreement. (The CCCFA, however, only provides for a three day cooling-off period and cancellation right, whereas a purchaser under the Door to Door Sales Act has a seven day cooling-off period and cancellation right.)

The scope of the contracts covered by the Door to Door Sales Act is wider than the scope of consumer credit contracts under the CCCFA. Under the CCCFA, there need to be interest charges, credit fees or a security interest for a contract to be a consumer credit contract. Consumer credit contracts under the CCCFA also exclude contracts for the sale of goods or services where the purchase price is agreed to be paid within two months. Under the Door to Door Sales Act a credit-sale agreement is simply one where the payment for goods and services is deferred (and where the purchase price exceeds \$40, or \$20 for books or goods which are hired), and there is no reference to interest or any other costs of credit being payable or to a time limit for paying the full price. Therefore some door to door sales agreements will be covered as credit sales under the Door to Door Sales Act when they are not consumer credit contracts under the CCCFA.

The disclosure requirements in the CCCFA provide for a wider range of credit information than the disclosure requirements under the Door to Door Sales Act because the CCCFA assumes there will be interest charges and other costs of credit, and it provides for those costs and charges to be disclosed. The Door to Door Sales Act does not provide for any costs of credit to be disclosed. If consumer protections for door to door and direct sales continue, these should be complementary to the wider application of the CCCFA as it is important that the fuller disclosure provisions of the CCCFA apply.

As well, if door to door or direct sales protections apply to a sale which is a consumer credit agreement under the CCCFA, then there needs to be avoidance of any unnecessary and potentially confusing duplication of requirements. The only value in the current duplication is that the purchaser has the additional benefit of the cooling-off period which is four days longer under the Door to Door Sales Act than the similar period under the CCCFA.

It may be appropriate to separate the credit aspect of door to door sales contracts from the Door to Door Sales Act and rely on the CCCFA to regulate consumer credit contracts. This would be consistent with the Australian Consumer Law proposals.

Purchase value threshold and other exclusions

The Door to Door Sales Act applies only to credit agreements for purchases of books over \$20 and of all other goods over \$40. These thresholds have applied since 1967. The purpose of a threshold is to minimise compliance and reversal costs for businesses dealing in low-value and/or low-profit goods. The Australian Consumer Law's proposed threshold for unsolicited sales agreements is \$100.

The Door to Door Sales Act also does not apply to employment or business agreements or agreements related to disposal of an estate or interest in land, a contract of insurance or purchase of shares in a building society. The Australian Consumer Law, rather than having exclusions, provides that the unsolicited selling provisions apply to consumer transactions (the goods or services were of a kind ordinarily acquired for personal, domestic or household use or consumption).

The Australian Consumer Law is suggested as an appropriate approach for New Zealand to consider. This definition of consumer is similar to that used in the Consumer Guarantees Act.

What protections are appropriate?

Cooling-off period

The only remedy provided for consumers in the Door to Door Sales Act to address pressure selling is the right to cancel a credit sale agreement within a seven day cooling-off period. The cooling-off period is linked to the vendor's statutory disclosure requirement. Door to door sales have several characteristics which mean consumers may benefit from a cooling-off period. A cooling-off period allows the consumer time to reconsider their decision and cancel the purchase if they no longer want to proceed. Consumers are likely to relatively quickly recognise that they have made a poor choice, if it resulted from a high-pressure sales situation and being caught unprepared and unable to simply walk away from the salesperson. The cooling-off period also provides the consumer with the benefit of redressing the lack of ability to shop around in that they can quickly check other available options.

The use of cooling-off periods is also likely to affect the trader's behaviour. If traders face the prospect of the sale being cancelled, they may be less likely to coerce a consumer into the transaction. Therefore cooling-off periods significantly reduce detriment to consumers who make ill-considered decisions without imposing substantial costs on traders or consumers. Generally they only cause minor delays on transactions.

As noted, the Door to Door Sales Act has a cooling-off period of seven days from the date of the agreement and the Australian Consumer Law has opted for 10 business days, also to start from the date of the sale agreement. Consumer NZ has suggested a 14 day cooling-off period.

Other protections

The proposed Australian Consumer Law goes further than a cooling-off period by prohibiting the supply of, requiring or accepting payment for, the goods or services in that 10 day period. This provision strengthens the cooling-off period provision in that the receipt of the goods does not add to the pressure or temptation. There is a downside, however, for consumers who want early delivery of their goods or services.

The proposed Australian Consumer Law also includes the following obligations on the vendor:

- clearly disclosing the seller's purpose and identity
- ceasing to negotiate on request
- providing written contracts which conspicuously display information about the cooling-off period
- regulating the hours when direct marketers may call on consumers, either personally or by telephone, and
- prohibiting the inclusion of provisions in an agreement to exclude, limit, modify or restrict a right to terminate the agreement, or to induce the consumer to waive any rights provided by the Act.

There are similar requirements in the Door to Door Sales Act to disclose to the consumer the seller's identity and contact details and information about the right to cancel the contract, and preventing contracting out of the provisions of the Act. There is no reason why these should not continue to apply to door to door sales, telemarketing and other direct selling. There have been no problems identified in New Zealand with door to door or telemarketing or direct selling suggesting the need for provisions to cease negotiating or to regulate the hours when direct marketers may call on consumers. This may be because of industry codes of conduct in place (discussed below). The regulation of hours when direct marketers can call has received a lot of attention in Australia's development of the Australian Consumer Law.

Industry self-regulation

There are two industry associations with voluntary codes of practice which supplement the provisions of the Door to Door Sales Act.

The New Zealand Marketing Association has developed (and recently reviewed) a Code of Practice for Direct Marketing in New Zealand which has five basic principles:

- Principle 1: Marketers will comply with the laws and bylaws of New Zealand and all appropriate industry Codes of Practice
- Principle 2: Offers will be clear and truthful and not present a product, service, or offer in a way that could mislead the consumer
- Principle 3: Orders for products or services will be handled in a responsible and prompt manner
- Principle 4: Marketers will carry out their business in a way that is socially responsible
- Principle 5: Marketers will uphold high standards of business practice to bring about the trust of consumers.

These principles each sit above a relatively detailed "compliance guide" which reflects best practice for the direct marketing industry. The code requires direct marketers to comply with all consumer legislation, including the Fair Trading Act and Consumer Guarantees Act, as well as the Privacy Act 1993. Other features in the code exceed the requirements of legislation, such as the general social responsibility requirements, and "do not call" lists and a seven day cooling-off period for telemarketing transactions (irrespective of whether they are credit sale agreements). The New Zealand Marketing Association also has a Telemarketing Code of Practice.

The Direct Selling Association of New Zealand (DSANZ) estimates its membership covers 90% of the direct selling industry. Its Code of Practice provides that:

- advertising and promotion is not misleading or deceptive
- sales conduct respects the rights and privileges of the individual customer in the privacy of his or her own home
- product demonstrations give full explanation and cease on request
- disclosure of the direct salesperson's full identity, address and reason for approaching the consumer
- a minimum 10 days cooling-off period
- terms of payment are advised at the time the product is ordered
- provision of comprehensive complaints and disputes procedures, and
- mechanisms exist to ensure that the Code is reviewed periodically.

Many of these objectives reiterate or extend existing consumer legislation. DSANZ's Code is based on the Direct Selling Industry's World Federation Code. The current version of the Code was adopted in May 2009.

Do we still need a separate Door to Door Sales Act?

As noted above, there is good justification for continuing to regulate for door to door or unsolicited selling to consumers. The law in this area, however, would significantly benefit from modernisation. There are a number of problems with the expression of the law in the Door to Door Sales Act. The Australian Consumer Law provides a useful model of a modern approach to regulating unsolicited selling.

The Australian Consumer Law includes the provisions regulating unsolicited selling alongside similar provisions to those in New Zealand's Fair Trading Act.

Taking a similar approach and including door to door or unsolicited selling provisions in the Fair Trading Act would have the advantage that consumer law is found in one statute and it would also provide for enforcement of the provisions by the Commerce Commission. This approach would meet the objectives of the Consumer Law Reform to achieve simplification and consolidation of the existing law. The need for standalone door to door and direct selling legislation is not evident.

In summary:

The Door to Door Sales Act was a limited response to pressure selling in the 1960s, and it now seems out of date. The fact that it only applies to credit sales, and that it sits alongside more modern and sophisticated consumer credit legislation, emphasises the inadequacy of the Act. The courts have also struggled with the "door-to-door" and appropriate trade premises aspects of the Act.

A more modern approach would be for the Act to apply to all direct selling other than at the usual place of business of the supplier, irrespective of when the consumer pays for the goods or services. One question is what threshold amount should apply. The amounts of \$20 for books and \$40 for other goods were set over 35 years ago. Australia has opted for a \$100 threshold amount applying to consumer goods and services.

A cooling-off period still seems to be an appropriate regulatory response to direct sales. There is a question as to whether the cooling of period should be seven days or 10 days or another timeframe.

There does not seem to be any good reason why the laws relating to door to door sales and direct marketing more generally should be in their own specialised legislation, rather than being in an enhanced Fair Trading Act.

In considering the objectives of the Consumer Law Reform, continued regulation of direct selling as part of an enhanced Fair Trading Act will meet the objectives that:

- the law will:
 - enable consumers to transact with confidence,
 - protect reputable suppliers and consumers from inappropriate market conduct,
 - be easily accessible to those affected by it, and
 - is enforceable;
- there will be simplification and consolidation of the existing law; and
- harmonisation with the Australian Consumer Law will be taken into account.

Questions

9. What direct selling (door to door sales, telemarketing, other defined direct selling), if any, should be regulated, and for what reasons?
10. Should direct selling law only apply to purchases above a particular value (for example, \$100)?
11. Do you support a cooling-off period of 7 days, 10 days or another timeframe?
12. Should the supply of the goods or services be prohibited during the cooling-off period, and for what reasons?
13. Should there be any regulation of the hours when direct marketers may call on consumers? Why, and if you think there should be regulated hours, what hours?
14. What are your views on moving regulation of direct selling to the Fair Trading Act?

7.2 Unsolicited Goods and Services

Introduction

The Unsolicited Goods and Services Act 1975 provides protections for people who have received goods or services they have not ordered or requested, i.e. unsolicited goods or services. The protections are available to all persons, not just consumers. Businesses receiving unsolicited goods or services are also protected under the Act.

The provision of goods and services in an unsolicited manner is not necessarily an issue. A problem arises, however, when the person receiving the goods does not want the goods or services and the sender or service provider demands payment.

With respect to goods, the sender relies on the consumer's inertia not to return the unwanted goods. This practice is called "inertia selling", and relies on the sender's assumption that the consumer has accepted the goods because the consumer has taken possession of them. The sender then relies on this assumption to demand payment for the goods, supported by the statutory rules for determining the presumed intention of buyers and sellers under section 20 of the Sale of Goods Act 1908.

This practice puts the consumer in a position of disadvantage because their right to choose and accept the goods is limited. It also means that the consumer has responsibility for goods that are, to all intents and purposes, forced on them.

The supply of unsolicited services has the same effect as unsolicited goods in that consumers do not have the ability to choose the service or consider the associated risks. For example, when an agreement has been made for a service, liability and risk can be established so it can be managed. Where the service is unsolicited the consumer's ability to protect their interests is reduced.

These practices put the consumer in a position of disadvantage because they deny the consumer the right to choose and accept the goods and services and any associated risks. On the other hand excluding the ability to provide goods and services on an unsolicited basis removes what can be a legitimate means of attracting business (i.e. a form of advertising) when done in an ethical and socially responsible way.

The Unsolicited Goods and Services Act balances these interests by establishing that any unsolicited goods remain the property of the sender until the person receiving them accepts them. If the sender does not recover the goods (and the consumer does not prevent the recovery) then within three months, or one month if the consumer notifies the sender that they do not want the goods, the goods become an unconditional gift to the consumer. Services are slightly different, but service providers are prohibited from invoicing unordered services unless they have reasonable cause to believe they have a right to payment.

History of the Unsolicited Goods and Services Act

The Unsolicited Goods and Services Act was based on similar legislation in Australia and the United Kingdom to address issues associated with unsolicited goods and services, particularly issues around unsolicited directory entries. The Act is essentially unchanged since it was passed in 1975.

There has been one successful case taken by the Commerce Commission under the Act (and also the Fair Trading Act 1986) in 1989 against Shore Productions Limited related to charging for advertising not agreed to.³⁶

Ongoing relevance

The underlying principles for regulating unsolicited goods and services are that:

- consumers and businesses should not have to accept, take responsibility for and pay for goods or services that they have not sought; and
- consumers and businesses should not be subjected to demands for payment for goods and services that they have not sought.

The ability for consumers to choose what goods and services they want and how and when they interact in the market is important because it affects competition and market diversity.

As noted with door to door sales, when there is existing legislation establishing protections against certain practices, it is difficult to get a clear view of the problem that would exist if these protections were not in place. Some idea can be obtained from sources such as Consumer NZ and the Commerce Commission.

The Consumer NZ website includes two 2009 examples of unsolicited goods received and consumers feeling pressured to accept and pay for the goods, showing that traders sending unsolicited goods is still practised and there is still a need to provide some level of consumer protection in this area.³⁷ These examples are intended to alert consumers about dealing with unsolicited goods. Consumer NZ advises that its files record many unsolicited goods and services enquiries. Over the years it has noted in its Consumer magazine ongoing examples of consumers being put under pressure related to unsolicited goods and services.

The Commerce Commission's record of complaints/enquiries received over the last three years indicates a number of businesses complaining about invoices for unsolicited advertising and also consumers complaining about unsolicited goods.

This data indicates that the potential exists for unfair practices, such as inertia selling and unsolicited advertising, to resurge and cause consumer detriment in the absence of legislative intervention, and that the underlying principles supporting protections against unsolicited goods and services are still relevant in today's legislation.

Whilst the need for regulation of unsolicited goods and services remains, there is a question as to whether the provisions of the Unsolicited Goods and Services Act are the appropriate approach and whether they are sufficiently clear in their current form.

The United Kingdom and Australia continue to regulate against unsolicited goods or services and it is useful to review how their legislation has been modernised and changed.

The United Kingdom's Consumer Protection (Distance Selling) Regulations 2000 regulate unsolicited goods and services. They make unsolicited goods an unconditional gift to the consumer (extinguishing rights of the sender in the goods). The regulations also contain penalty provisions for demanding or asserting a right to payment for unsolicited goods and also for making threats regarding payment. For

³⁶ *Commerce Commission v Shore Productions Ltd* (1989) 3 TCLR 482 (District Court).

³⁷ <http://www.consumer.org.nz/news/view/unsolicited.goods>.

services, the provider needs to establish a reasonable cause for demanding or threatening payment. These regulations are made under the European Communities Act and flow from the Directive on the protection of consumers in respect of distance contracts.³⁸

The United Kingdom's Unsolicited Goods and Services Act 1971 regulates directory entry services, requiring the supplier to document the consumer's agreement for the directory entry to establish their right to payment. The Act also enables consumers to recover any money paid for unsolicited directory entry services.

The new Australian Consumer Law proposes regulation of unsolicited supplies. This legislation covers unsolicited credit and debit cards,³⁹ unsolicited goods or services and unauthorised directory entries or advertisements.

The proposed regulation of unsolicited goods or services under the Australian Consumer Law aims to achieve the same objectives as the New Zealand Unsolicited Goods and Services Act, but in a modernised form. Essentially, this part of the Australian Consumer Law proposes that a person in trade or commerce cannot assert a right to payment from another person for unsolicited goods or unsolicited services unless the person has reasonable cause to believe there is a right to a payment; and the person bears the onus of proving that the person had reasonable cause to believe there was a right to payment. It also says the person receiving the goods or services is not liable for payment for the goods or services and is not liable for any loss or damage to the goods (other than wilful) or for loss or damage as a result of the supply of the services. It also sets out recovery periods for the trader to claim back the goods (3 months or 1 month if the person receiving the goods gives notice), after which the goods become the property of the person who received the goods.

The Australian Consumer Law provides a model that could potentially be adopted by New Zealand. This model provides for regulation of unsolicited goods or services under the general consumer law as a separate form of unfair practice. In a New Zealand context, this would mean including such regulation in the Fair Trading Act. This approach fits well with the Consumer Law Reform objective to simplify and consolidate consumer law. The Australian Consumer Law proposals also reflect the principles noted above supporting the need for regulation of unsolicited goods or services in a clear and concise fashion. Alignment with the Australian Consumer Law provisions also accords with the single economic market principles for harmonisation of business and consumer regulation where appropriate. This is the preferred option for future regulation of unsolicited goods and services.

Australia, like the United Kingdom, also has specific provisions for unauthorised directory entries or advertisements. Both the Australian and United Kingdom provisions for unsolicited directory entries require prior written approval from the consumer before the service can be charged for. Their legislation also enables money paid for unsolicited directory entries to be recovered. The New Zealand Unsolicited Goods and Services Act does not have a similar specific provision for directory services, but it provides generally that unordered services cannot be charged for unless the trader has reasonable cause to believe they have a right to payment. Specific regulations can be made under the New Zealand Act requiring prior written consent from consumers for specified unsolicited services, but no such regulations have been made.

In New Zealand, unsolicited directory entries appear to have been adequately managed through the generic provisions of the Unsolicited Goods and Services Act and the Fair Trading Act.⁴⁰ There is not

³⁸ Directive 1997/7/EC of the European Parliament and of the Council of 20 May 1997, consequently amended by Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.

³⁹ Not relevant to this discussion as New Zealand's regulation of credit and debit cards is covered under the Credit Contracts and Consumer Finance Act 2003.

a problem that requires specific legislation and, accordingly, it is not proposed that New Zealand follows the Australian and United Kingdom practice of separately prohibiting unauthorised directory entries.

An alternative option to using the Australian approach to regulating unsolicited goods and services would be to adopt the United Kingdom approach of considering unsolicited goods as an unconditional gift. The advantage of this approach is that the consumer has no liability if they dispose of or in some way damage the unsolicited goods received before the 3 month period the sender has to reclaim the goods. The consumer would be able to dispose of unsolicited goods as and when they see fit. The United Kingdom approach, however, does not apply to unsolicited goods sent for the purposes of the business of the receiver.

The United Kingdom approach makes it an offence to invoice for either unsolicited goods or unsolicited services.

Such an approach reduces the incentive on sellers to send unsolicited goods more than the current Unsolicited Goods and Services Act. However, it would not stop their provision as a means to attract business. This approach would also not exclude businesses from being able to request a voluntary payment for an unsolicited good or to seek the consumers' agreement to future goods.

In summary:

As noted, while there continues to be a need for some form of regulation regarding unsolicited goods and services, there is a question as to whether the provisions of the Unsolicited Goods and Services Act are the appropriate approach and whether they are sufficiently clear in their current form.

The new Australian Consumer Law provides a model to use for a more modern approach to regulating unsolicited goods and services. In a New Zealand context, this would mean including such regulation in an enhanced Fair Trading Act.

In considering the objectives of the Consumer Law Reform, continued regulation of unsolicited goods and services as part of an enhanced Fair Trading Act will meet the objectives that:

- the law will:
 - enable consumers to transact with confidence,
 - protect reputable suppliers and consumers from inappropriate market conduct,
 - be easily accessible to those affected by it,
 - is enforceable, and
 - is in line with international best practice;
- there will be simplification and consolidation of the existing law; and
- harmonisation with the Australian Consumer Law will be taken into account.

⁴⁰ Pro-forma billing, which is a type of fraud or scam where invoices are sent, without ever intending to provide a service, in the hope that the consumer will not question the invoice and pay it, is a breach of section 21 of the Fair Trading Act.

Questions

15. Do you support unsolicited goods and services provisions along the same lines as those in the proposed Australian Consumer Law, and for what reasons?
16. What are your views on moving regulation of unsolicited goods and services to the Fair Trading Act?

7.3 Possible Additional Selling and Duress Provisions

7.3.1 Unconscionability

Unconscionability is a long-standing doctrine established by the courts in their equitable jurisdiction to provide a just outcome where other legal concepts such as duress, fraud or mistake do not provide adequate relief. Unconscionability applies where the courts consider it is unfair or inequitable to allow a party to enforce its contractual rights. The word “unconscionable” includes the element of a party acting without a conscience, and it has the flavour of being immoral, unethical or unfair.

In practice the legal test for unconscionability is difficult to meet. Essentially a stronger party needs to be found to have taken advantage of a weaker party, to an extent which is “against good conscience”.

The most recent authoritative summary of the principles of unconscionability from the New Zealand courts was set out by Arnold J in *Gustav v Macfield* (Court of Appeal, subsequently endorsed by the Supreme Court).⁴¹ The statement is a sufficiently authoritative and comprehensive summary of the current law of unconscionability in New Zealand that it is worth setting out in full (even though Arnold J commented in the judgment that the summary of principles is not in fact exhaustive),

1. Equity will intervene to relieve a party from the rigours of the common law [*i.e. technically enforceable contracts*] in respect of an unconscionable bargain.
2. This equitable jurisdiction is not intended to relieve parties from “hard” bargains or to save the foolish from their foolishness. Rather, the jurisdiction operates to protect those who enter into bargains where they are under a significant disability or disadvantage from exploitation.
3. A qualifying disability or disadvantage does not arise simply from an inequality of bargaining power. Rather, it is a condition or characteristic which significantly diminishes a party’s ability to assess his or her best interests. It is an open-ended concept. Characteristics that are likely to constitute a qualifying disability or disadvantage are ignorance, lack of education, illness, age, mental or physical infirmity, stress or anxiety, but other characteristics may also qualify depending upon the circumstances of the case.
4. If one party is under a qualifying disability or disadvantage (the weaker party), the focus shifts to the conduct of the other party (the stronger party). The essential question is whether in the particular circumstances it is unconscionable to permit the stronger party to take the benefit of the bargain.

⁴¹ *Gustav & Co Ltd v Macfield Ltd* [2007] NZCA 205 (Court of Appeal), and [2008] 2NZLR 735 (Supreme Court).

5. Before a finding of unconscionability will be made, the stronger party must know of the weaker party's disability or disadvantage and must "take advantage" of that disability or disadvantage.
6. The requisite knowledge may be that of the principal or an agent, and may be actual or constructive [*i.e. deemed or assumed*]. Factors associated with the substance of the transaction (for example, a marked imbalance in consideration) or the way in which a transaction was concluded (for example, the failure of one party to receive independent advice in relation to a significant transaction) may lead to a finding that the stronger party had constructive knowledge. So, in the particular circumstances the stronger party may be put on enquiry, and in the absence of such enquiry, may be treated as if he or she knew of the disability or disadvantage.
7. "Taking advantage of" (or victimisation) in this context encompasses both the active extraction and the passive acceptance of a benefit. Accordingly, as Tipping J said in *Bowkett* at 457, an unconscionable victimisation will occur where there are:
8. '... circumstances which are either known or which ought to be known to the stronger party in which he has an obligation in equity to say to the weaker party: no, I cannot in all good conscience accept the benefit of this transaction in these circumstances either at all or unless you have full independent advice.'⁴²
9. If these conditions are met, the burden falls on the stronger party to show that the transaction was a fair and reasonable one and should therefore be upheld.

The application of these tests for unconscionability is always going to be very fact-specific, which is reflected in Arnold J's comment that the categories of disability or disadvantage are open-ended, and may include other circumstances which have not yet been encountered. The fact that stronger parties may be held to have acted unconscionably when they are not actually aware of the disability or disadvantage of the person they are dealing with shows that the courts will be flexible in the application of the doctrine. Having said that though, the courts are consistently clear that unconscionability is not about rescuing people from the hard or otherwise foolish bargains they might have entered into.

One of the features of the doctrine of unconscionability is that it only applies as a defence in court where the "stronger" party is seeking to enforce a contract. Unconscionability is "remedial", but there is no positive legal obligation under the case law on anyone not to act unconscionably.

Another limitation is that the unconscionability cases which come before the courts usually concern relatively high-value transactions. For example, the *Gustav* case concerned a property developer with terminal cancer entering into a contract to purchase land for \$12.5 million. The *Bowkett* case also had a commercial aspect, because an elderly couple mortgaged their property to secure the business debts of their son.

Unconscionability is less likely to apply in conventional consumer law situations. Part of the reason is that lower-value transactions are rarely litigated and unconscionability is a case law concept. The threshold tests for disadvantage or disability are also difficult to meet in relatively low-value consumer cases.

The Disputes Tribunal has jurisdiction under section 19 of the Disputes Tribunal Act 1988 to vary or set aside agreements which are (among other things) unconscionable. The previous Principal Referee of the Disputes Tribunal noted that in 5,000 cases, only two consumers were successful in establishing

⁴² *Bowkett v Action Finance Limited* [1992] 1 NZLR 449.

unconscionable conduct in the Disputes Tribunal.⁴³ Many of the Disputes Tribunal cases would have resulted in remedies for consumers under the Fair Trading Act, Consumer Guarantees Act, or common law-based contract law, but the low number of findings of unconscionability suggests the utility of the doctrine is limited for low-value disputes.

Another reason why the utility of the unconscionability doctrine is limited is that it only applies to the formation of contracts, and it does not apply to the conduct or decisions that a stronger party might make during the course of the contract. A stronger party might behave unfairly in dealing with a complaint, for example, but that will never strictly be unconscionable under the case law, because it does not relate to the formation of the contract. This distinction is often described as being the difference between “procedural unconscionability” and “substantive unconscionability”, and the courts have tended to focus on procedural unconscionability when they have considered the cases before them. Substantive unconscionability leads to a consideration of the overall fairness of the outcome of contracts, and the courts have been reluctant to make decisions on this basis.

Unconscionability and the Australian Trade Practices Act

Unconscionability sections have been added to the Australian Trade Practices Act over time. The intention has been to address some of the limitations of the unconscionability remedy under the case law by creating a positive legal obligation, and providing a statutory indication of the scope of unconscionability. There are three relevant provisions in the Trade Practices Act:

- Section 51AA prohibits conduct that is unconscionable within the meaning of the “unwritten law of the States and Territories”. This section was added in 1992.
- Section 51AB prohibits engaging in conduct in connection with the supply of goods or services to a person that is, in all the circumstances, unconscionable. This section was added in 1986.
- Section 51AC prohibits conduct that is, in all the circumstances, unconscionable in connection with the supply or acquisition of goods or services to or from a corporation. This section was added in 1998.

Section 51AA creates a positive legal obligation not to act unconscionably, and opens up the statutory remedies available for a breach of the Trade Practices Act, including pecuniary penalties.⁴⁴ The effect of section 51AA has been to address two of the fundamental weaknesses of the unconscionability doctrine (i.e. only remedial, and lacking a full range of remedies), while retaining the flexibility for the courts to develop the underlying concept. In practice section 51AA has done nothing to change or extend the meaning of unconscionability as a case law concept.

Section 51AB interestingly includes a list of the factors the courts may consider in determining whether particular conduct of a person supplying goods or services has been unconscionable. There has been a debate in Australia as to how far section 51AB was intended to extend the meaning of unconscionable conduct, assuming that it must extend the meaning of the case law concept, at least to some extent. Section 51AB is clearly grounded in the existing concept of unconscionability. In particular the list of factors included in section 51AB all relate to the formation of the contract, so section 51AB is limited to procedural unconscionability, and does not open up the wider scope of substantive unconscionability.

⁴³ Personal communication from Peter Spiller to Ministry of Consumer Affairs, October 2008.

⁴⁴ In New Zealand, the criminal remedies in cases brought by the Commerce Commission under the Fair Trading Act include fines and additional penalties to recover any illicit gains (sections 40 and 40A), but the financial remedies in civil cases are limited to loss or damage (section 43).

Arguably section 51AB does not add any more to the law than section 51AA, although usually case law-based unconscionability cases concern financial products (loans and guarantees in particular) or dealing with land. Applying unconscionability to the supply of goods and services may be an extension of the doctrine into a new area without materially changing the underlying definition of unconscionability. The reference to the courts making decisions in the cases that are “in all the circumstances unconscionable” reinforces that the application of the doctrine remains very fact-specific.

The later addition of section 51AC was intended to make it clear that the remedies for unconscionable conduct are available to companies (other than public listed companies). Section 51AC is specifically intended to apply in commercial contexts, and to protect businesses dealing with “stronger” suppliers or customers. Section 51AC uses the expression “business consumer” when it lists the factors the courts may consider, and describes the parties it is designed to protect. Business consumers might have had access to remedies under sections 51AA and 51AB in the appropriate circumstances, but section 51AC makes it crystal clear that they are intended to have access to unconscionability remedies which may not have been available under the case law. The factors listed for the courts to take into account when they are considering potentially unconscionable conduct towards business consumers are noticeably broader and have a more commercial emphasis than the factors listed under section 51AB.

The Australians have recently been considering whether the provisions dealing with unconscionability in the Trade Practices Act have been effective. Unconscionability is still a high threshold to achieve, especially in relation to the supply of goods and services. High-level cases clarifying the coverage of the statutory provisions and the extent to which they have expanded the case law principles have been relatively rare, especially in relation to section 51AC. The courts in Australia have generally been reluctant to take the opportunity to broaden the application of the doctrine of unconscionability, and they remain focussed on procedural unconscionability rather than venturing more widely into the conduct of parties under contracts and substantive unconscionability.

When the Senate Economics Committee considered the Australian Consumer Law in December 2008, it recommended that the provisions in the Trade Practices Act should be amended to make it clear that the “terms and progress” of contracts may be relevant to unconscionability, as well as the circumstances of the formation of the contract. The Commonwealth Government has accepted this recommendation, and section 51AA, AB and AC of the Trade Practices Act are being re-enacted and amended.⁴⁵ The new provisions will make it clearer that the legislation is intended to expand the case law doctrine of unconscionability.

Issues for New Zealand

Unconscionability remains largely a case law concept in New Zealand. There are no provisions in the Fair Trading Act which match those in the Trade Practices Act, despite the Fair Trading Act having largely been taken from the Trade Practices Act. The primary issue for New Zealand in this area is therefore whether there is any merit in including provisions prohibiting unconscionable conduct in the Fair Trading Act.

There are consumers who are vulnerable, and who may agree to contracts with stronger parties who take advantage of their vulnerability or disadvantage. Small businesses may also be dealt with unconscionably by more powerful suppliers or customers. The issue is whether amending the Fair Trading Act to prohibit and create remedies against unconscionable conduct would create new or better rights for vulnerable consumers and small businesses.

The fact that consumers and small businesses could initiate their own civil action with potential remedies against unconscionable traders, and that the Commerce Commission could enforce a

⁴⁵ Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010.

prohibition on unconscionable conduct with possible pecuniary penalties, would obviously create new legal rights and remedies. The actions might be available where there are no existing legal remedies.

An example the Ministry of Consumer Affairs is aware of concerned a consumer who was interested in buying a car. She browsed the internet and found a trader apparently in her home town. On contacting the trader, they told her they did not have a physical address in her town but could drive her to another town (2.5 hours away) where they had a car yard. She agreed to this and was duly driven to the car yard. After several hours of looking at cars, she indicated that none met her needs, and that she had to get home to pick up a child from childcare. The trader then pointed out the bus stop and told her to catch the bus home as she had wasted their time. The consumer did not have enough cash to purchase a bus ticket and would have been late to pick up her child, so she relented and signed a finance contract to purchase a car so that she could drive back to her home town.

It is interesting whether the consumer in this case would have been under a sufficient disadvantage or vulnerability to be protected by the doctrine of unconscionability. She does seem to have signed a contract for a car which she did not want, and the trader does seem to have acted “against good conscience”. Exploiting stress or anxiety is one of the characteristics of unconscionable conduct referred to in the *Gustav* case. Whether the trader had gone so far as to have been unconscionable according to the legal test would depend on how much the trader knew (or ought to have known) about the consumer’s situation, and whether or not the consumer might have had alternatives apart from buying the car. The example therefore illustrates the problem with unconscionability being uncertain, and fact-specific, even when a trader has obviously acted badly.

The inclusion of unconscionability in the Fair Trading Act would mean that the Commerce Commission would need to decide whether to pursue the complaints it receives and enforce the provisions in the courts.

It could also create additional civil law remedies for people who considered they have been dealt with unconscionably, and who have only previously been able to use the case law doctrine of unconscionability as a defence if they are sued.

The parties who are most likely to benefit from including unconscionability in the Fair Trading Act along the lines of the Australian provisions are small businesses which find themselves at a commercial disadvantage against larger suppliers or customers. Small businesses can be as vulnerable as other consumers, and they may be more prepared to pursue their legal rights than private individuals. The use of the Fair Trading Act by businesses to protect their commercial interests is already a feature of the law, so creating additional rights which small businesses will use is consistent with the general approach of the Fair Trading Act.

7.3.2 Alternative option – oppression

The definition of “oppressive” in the Credit Contracts and Consumer Finance Act 2003 (CCCFA) is one of the few provisions in New Zealand legislation which refers to unconscionability.⁴⁶ Section 118 of the CCCFA says,

s118 In this Act, oppressive means oppressive, harsh, unjustly burdensome, unconscionable, or in breach of reasonable standards of commercial practice.

⁴⁶ Other examples include the Disputes Tribunal Act 1988 (giving the Disputes Tribunal jurisdiction to make orders), Employment Relations Act 2000 (unconscionable terms of employment agreements), Minors’ Contracts Act 1969, Sale of Liquor Act 1962 (terms of tied houses), Crown acknowledgements and apologies in various Treaty Settlement legislation, and the current Unit Titles Bill.

These words were in the earlier Credit Contracts Act 1981. The Credit Contracts Act and the more recent CCCFA provide that if a court decides a credit contract is “oppressive”, the credit contract can be “reopened”, and the court may make any orders it thinks necessary to remedy the oppressiveness. The “reopening” remedy applies to all credit contracts; not just consumer credit contracts.

Although unconscionability is included as one of the grounds of oppression, oppression is a wider test than unconscionability because the definition of oppression also includes other criteria or tests. One difference is that oppression clearly covers conduct under a contract, while unconscionability is usually limited to the circumstances on entering into a contract.

New Zealand has a body of case law on what the test for oppressiveness is for the purposes of section 118 of the CCCFA. The courts have been reluctant to intervene in commercial transactions in particular,⁴⁷ but generally the concept of oppression is wider than the case law concept of unconscionability. The courts have decided that none of the elements of the definition of oppression are particularly meaningful in the abstract, and that the “reasonable standards of commercial practice” is the touchstone for the “harsh” and “unjustly burdensome” elements of the definition.⁴⁸ The courts will either apply their own view of what the reasonable standards of commercial practice are (which is not without its risks), or they will require evidence on which to base their decisions.⁴⁹

The doctrine of unconscionability, with its inherent uncertainties and limitations, is an important part of “oppression” under the CCCFA, but the wider definition of oppression broadens the test and creates the opportunity for remedies to be available in a wider range of circumstances.

The possibility therefore exists to insert a prohibition on oppressive conduct in the Fair Trading Act, rather than following the Australian example of referring to unconscionability. The Australian legislation has attempted over time to stretch the concept of unconscionability by a series of amendments. For example, the Trade Practices Act lists the factors the courts may consider in determining whether conduct has been unconscionable. However the Australian courts have so far tended to remain anchored to the conventional understanding of what might constitute unconscionability, and the efforts of the legislature to extend the meaning of unconscionability in Australia have only achieved limited success. The latest extension to include reference to the “terms and progress” of contracts may make a difference in extending the scope of unconscionability in Australia.

Adopting the wider definition of oppression, which includes unconscionability, may be a more effective and reliable basis for providing remedies for consumers and small businesses which are dealt with unjustly by suppliers or customers with the power to prevent them from acting in their own best interests.

Apart from the extension in scope, another significant difference between using oppression as a basis for remedies under the Fair Trading Act and the current use of the term under the CCCFA is that the remedies potentially available under the Fair Trading Act would be wider than those under the CCCFA. The only consequences of a finding that a credit contract is oppressive under the CCCFA are that the credit contract is unenforceable, and the court may make orders remedying the effect of the oppression. The amount of a loan, for example, is likely to remain owing.

Unconscionability has a higher threshold, and potentially more far reaching consequences. Unconscionable contracts are completely unenforceable in equity, so the courts would not make an

⁴⁷ *Prudential Building and Investment Society of Canterbury v Hankins* [1997] 1NZLR 114, at 123.

⁴⁸ *Greenback New Zealand Limited v Haas* [2000] 3NZLR 341 (Court of Appeal).

⁴⁹ *Greenback, and Raptorial Holdings Limited (in rec) v Elders Pastoral Holdings Limited* [2001] 1 NZLR 178 (Court of Appeal).

order remedying the objectionable effects of the unconscionability, while leaving the underlying transaction in place. The inclusion of oppression (or unconscionability) in the Fair Trading Act would also extend the availability of civil and pecuniary penalties where they are not currently available.

Questions

17. Is it appropriate to include a prohibition on unconscionable conduct in the Fair Trading Act, along the lines of the Australian Trade Practices Act and the proposed Australian Consumer Law?

18. Should any remedies for unconscionable conduct be restricted to consumers or also available to businesses, and for what reasons?

19. Would it be more effective to amend the Fair Trading Act by applying the broader concept of “oppression” from the Credit Contracts and Consumer Finance Act to the supply of goods and services generally, rather than amending the Fair Trading Act to extend the application of the case law concept of unconscionability?

8. Product Safety

Introduction

Consumers being confident that the goods and services they buy are safe is fundamental to their participation in markets. Suppliers of goods or services which are not safe and that cause harm or physical damage may not be trading fairly or in good faith. As well as potentially causing harm and distress to individuals, unsafe products can have an impact on costs to the health budget and to the Accident Compensation Corporation.

Product safety is addressed in the two main consumer laws: the Consumer Guarantees Act and the Fair Trading Act.

Consumer Guarantees Act 1993

Consumers' first line of defence when a product supplied is unsafe is under the Consumer Guarantees Act. The statutory guarantee that goods supplied in trade to consumers are of acceptable quality includes the requirement that the goods be as safe as a reasonable consumer fully acquainted with the state and condition of the goods would regard as acceptable, having regard to all the circumstances including the nature of the goods and any statements on their packaging or label, or representations by the supplier or manufacturer in relation to the goods (sections 6 and 7).

Where a consumer buys goods supplied in trade which are not acceptably safe in terms of the Consumer Guarantees Act, the consumer has remedies against the supplier and the manufacturer of the goods. The remedies available to consumers under the Act are to return the goods or have them repaired or replaced. Suppliers and manufacturers are also liable for any loss or damage to the consumer or any third person resulting from the failure of the goods where the loss or damage was reasonably foreseeable (sections 18(4) and 27(1)(b)). Suppliers and manufacturers are for practical purposes exempt from liability for physical injury to consumers and any third parties under the Accident Compensation scheme, but they are potentially liable for other damages.⁵⁰

Avoiding product liability is a stronger incentive in jurisdictions where suppliers and manufacturers are liable for personal injury than it is in New Zealand, but there is an inference that suppliers and manufacturers in New Zealand still have an incentive to avoid liability for other damages. Reputational damage in the market place from high profile cases where goods are found to be unsafe probably has a higher commercial impact than an award of damages by a Disputes Tribunal or other court.

Unlike the statutory guarantee that goods of an acceptable quality should be safe, the statutory guarantees in relation to services do not expressly refer to services being safe. The safety requirement is probably implicit in the guarantees that services are carried out with reasonable care and skill (section 28), and that the services are fit for particular purpose (section 29). If consumers suffer physical damage or loss as a result of services being provided which are not safe, then the services are unlikely to have been provided with reasonable care and skill, or to have been fit for purpose.

Breaches of the Consumer Guarantees Act are only actionable at the suit of consumers in the civil courts. Consumers are unlikely to be motivated to take on cases in relation to the lower-priced goods which are frequently the subject of product safety concerns. Breaches of the Consumer Guarantees Act are not offences enforceable by the Commerce Commission (or any other public agency).

⁵⁰ Injury Prevention, Rehabilitation and Compensation Act 2001.

Fair Trading Act 1986

The Fair Trading Act includes provisions dealing with product safety (Part III) and the safety of services (Part IV). The features of these provisions of the Fair Trading Act include:

- Regulations may be made establishing product or service safety standards for the purpose of preventing or reducing the risk of injury to any person (sections 29 and 35).
- Product safety standards may relate to:
 - The performance, composition, contents, manufacture, processing, design, construction, finish or packaging of goods;
 - The testing of the goods during or after manufacture or processing;
 - The form and content of markings, warnings, or instructions to accompany the goods.⁵¹
- Service safety standards may relate to:
 - The maintenance, repair, treatment, processing, installation, assembly, cleaning or alteration of goods;
 - The construction, maintenance, repair, cleaning or alteration of any building or other fixture on land;
 - The development of land;
 - The transportation of goods.⁵²
- An official standard (which means a standard determined by Standards New Zealand or similar) may be declared to be a product or service safety standard under the Fair Trading Act (sections 29(2) and 35(2)).

There are six current regulated product safety standards in New Zealand.⁵³ There are no regulations for service safety standards. Where a product or service safety standard is regulated, no person may supply, offer to supply or advertise for supply products or services unless the products or services comply with any applicable product or service safety standard.

Goods which are intended for use outside New Zealand do not need to comply with any product safety standards, but they must have a statement physically applied to the goods saying that the goods are for export only, or are intended to be used outside New Zealand.

⁵¹ Fair Trading Act, section 29.

⁵² Fair Trading Act, section 34.

⁵³ The six current product safety standards are:

- (1) Product Safety Standards (Baby Walkers) Regulations 2001;
- (2) Product Safety Standards (Children's Nightwear and Limited Daywear Having Reduced Fire Hazard) Regulations 2008;
- (3) Product Safety Standards (Children's Toys) Regulations 2005;
- (4) Product Safety Standards (Cigarette Lighters) Regulations 1998;
- (5) Product Safety Standards (Household Cots) Regulations 2005; and
- (6) Product Safety Standards (Pedal Bicycles) Regulations 2000.

Where it appears to the Minister that goods “will or may cause injury to any person”, the Minister may declare the goods to be unsafe by notice in the Gazette, and no person may supply, offer to supply or advertise the goods for sale while the notice is current. The notice applies up to 18 months in the first instance, and may then be extended to apply indefinitely (section 31).

Where goods have been supplied which do not comply with a product safety standard, or the goods are of a kind which will or may cause injury to a person, and the supplier has not taken satisfactory action to recall the goods itself, the Minister may require a compulsory recall.

The product safety standard regulations made under the Fair Trading Act are enforced by the Commerce Commission. New Zealand Customs Service is responsible for ensuring there is no importation of goods that do not comply with the product safety standard regulations. General product safety monitoring is undertaken by the Ministry of Consumer Affairs. The Ministry works with its Australian counterparts and other international consumer agencies as part of its product safety monitoring work.

Ongoing relevance of product safety law

The general approach to product safety law through the Consumer Guarantees Act and the Fair Trading Act allows for consumers to take self-enforcement action and for public enforcement and monitoring. This two pronged approach would appear to be very effective.

The product safety system in New Zealand is generally consistent with the Australian system under their Trade Practices Act (and the proposed Australian Consumer Law). This reflects the genesis of the Fair Trading Act.

The most fundamental issue which faces any product safety system is that regulations can only have a reactive role because the range of goods and services available to consumers is too great for a regulator to sensibly monitor or test for safety compliance. Any product safety regulation system is primarily reactive because in many instances it can only react to particular problems which arise. For most purposes, suppliers and consumers themselves have the primary responsibility for keeping consumers safe when they buy goods and services. New and emerging product safety risks and concerns challenge the reactive model. “Traditional” product safety risks have in the main centred on physical features (sharp edges, entrapment hazards etc) that are relative easy to identify.

Increasingly risks and issues are being raised around chemicals and new technologies where risks are virtually impossible to determine by any other means than laboratory testing. Consumers do not have ready recourse to such testing facilities and so rely on regulators to ensure safe products. Similarly many small businesses lack the capacity to test products, and/or do not consider testing for product safety before they supply goods, which means potentially unsafe goods get on to the market un-checked. Responsible businesses and manufacturers frequently ask the Ministry of Consumer Affairs for guidance as to how they can ensure that their products are safe. However, retailers of low value imported goods may be less inclined to demand evidence of safety testing for the products they sell. Mandatory standards can help all stakeholders by laying down clear criteria around product safety issues.

As noted, there are only six current product safety standards and no service safety standards under the Fair Trading Act. The product safety standards which have been made are all primarily concerned with protecting children from being injured by the products they use. The principle is that children are particularly vulnerable to risks like choking hazards, or from flammable nightwear. By way of comparison, Australia has 41 mandatory standards currently in place.

The Australian product safety system was extensively reviewed by the Australian Productivity Commission in 2005⁵⁴ and its findings have been used in decisions incorporated into the Australian Consumer Law process. The main driver of the review was the harmonisation of State and Commonwealth law and coordination of enforcement. The review also looked at Australia having a general product safety provision.

One issue which was considered by the Productivity Commission and in relation to the Australian Consumer Law was the extension of the system for safety standards to apply to services. Product safety laws in Victoria, Queensland and South Australia (which will be replaced by the new Australian Consumer Law) currently apply to services, and this is also the case in New Zealand, but the Trade Practices Act only applies to the safety of goods. The Australian proposal is to provide for safety standards for services, but to limit the services which may be subject to safety standards to those related to the supply of goods.

The examples usually cited in Australia as cases where service safety standards might apply are the unsafe installation of blind and curtain cords which create a strangulation hazard for children, the installation of highly flammable insulation in roof cavities, and the incorrect installation of heat lamps creating a fire hazard in ceilings. In New Zealand, other legislation covers specific service safety, e.g. the Building Act 2004 and Code, and the Electricity (Safety) Regulations 2010.

The scope of potential service safety standards in New Zealand includes services in relation to goods, as well as in relation to land, development of land and the transport of goods. Standards for solariums (sun beds) and hang-gliding have been contemplated in New Zealand. These industries are currently regulating themselves by complying with codes of practice or licensing operators. The voluntary development of industry codes and standards is encouraged where it can effectively deliver service safety and thus avoid the need for regulation.

The fact that no service safety standards have ever been made in New Zealand suggests any differences with Australia may be academic, but the potential scope of service safety standards is broader in New Zealand than will be the case under the Australian Consumer Law.

Possible enhancements to product safety laws

Power to ban or recall products which could reasonably foreseeably cause injury

Another issue identified in Australia which applies equally in New Zealand is that the test for product bans and recalls requires that the goods “will or may cause injury to any person”. This means the goods are required to be inherently defective or dangerous, even if they are used correctly. Some Australian jurisdictions have had a wider formulation allowing for products to be banned or recalled where it is “reasonably foreseeable” that they will or may cause injury.⁵⁵ It is sometimes “reasonably foreseeable” that products will be misused in a dangerous way, even if they are not inherently defective or unsafe if they are used normally or properly. Certain types of fireworks are a good example.

The Australian Productivity Commission recommended that the Australian Consumer Law should harmonise the approach in the different Australian jurisdictions, and include the power to ban or recall products which could reasonably foreseeably cause injury. The recommended provision has the advantage that “reasonable foreseeability” is part of the legal test for negligence, and it makes sense that the regulators should have the ability to ban a product that it would be negligent to supply.

⁵⁴ Review of the Australian Consumer Product Safety System, Productivity Commission Research report, 16 January 2006 – http://www.pc.gov.au/data/assets/pdf_file/0008/9998/productsafety.pdf.

⁵⁵ The relevant jurisdictions are Victoria, New South Wales and Western Australia.

A similar amendment could be made to the New Zealand Fair Trading Act, which would have the benefit of removing any potential doubt and make it clear that goods which might be safe when they are used properly might be banned or recalled if it is reasonably foreseeable that they will cause injury through being misused.

Regulators' powers

Other elements in the Australian Consumer Law concerning product safety which are different to New Zealand's product safety provisions relate to the powers of regulators. For example, the regulator could be empowered to undertake a product recall itself where the supplier fails to respond to a compulsory recall (or the supplier cannot be found or has gone out of existence). There will also be mandatory notification of voluntary recalls and incidents where products are associated with serious injury or death.

In New Zealand, the current recall process requires a significant amount of administration by the Ministry of Consumer Affairs as there is currently no requirement for suppliers to advise the Ministry of a proposed recall of a consumer product associated with serious injury or death. An exception is goods which are covered by other legislation such as electrical products and motor vehicles. Frequently the Ministry is contacted by the media asking about a recalled product and its relevance to New Zealand. In most instances, due to the monitoring networks in place, the Ministry is already aware of the recall and has taken steps to contact suppliers.

There is a compulsory requirement in many countries including Australia and the United States to advise the authorities of an unsafe product and a safety recall notice. In the event that prior notice is given, it is possible to ensure that the process is carried out effectively, with the published notice carrying appropriate details and contact information, placed correctly within the market, and that monitoring processes are in place.

Consideration could be given to requiring notification of voluntary recalls of products that have been involved in serious injury or death. Such a restriction is suggested as the regulator does not have the capacity to handle the volume of recalls that result from the occurrence of minor injuries.

Product safety regulators in Australia and other jurisdictions also have other powers not currently available in New Zealand. These include the power to enter trade premises to undertake regulatory activity, the ability to suspend unsafe products, the power to examine documentation and records associated with unsafe products, and the power to seek the disposal of unsafe and/or destruction of unsafe goods following legal proceedings.

The Fair Trading Act includes search powers where there are reasonable grounds to believe a search is necessary to investigate a contravention of the Act and a search warrant is obtained (section 47). However this power does not extend to a general inspection, or the investigation of potentially unsafe goods which are not subject to a safety standard or ban. At present if a business declines to allow Ministry or Commerce Commission officials on to their premises, nothing further can be done. It could make it extremely difficult, if not impossible, for appropriate action to be taken.

In terms of granting these types of powers, appropriate checks and balances are provided for in the Search and Surveillance Powers Bill 2008 which is currently before Parliament. It is probably most appropriate that changes to the legislation in this area are considered as part of that Bill which is amending the Fair Trading Act.

Government Product Safety Policy Statements

In 2007, there was a concern raised about possible unacceptable levels of formaldehyde in clothing. The Ministry of Consumer Affairs developed a Government Product Safety Policy Statement on acceptable levels of formaldehyde in clothing and other textiles.

A government product safety policy statement was identified as a non-regulatory approach which, while not having the same legal status as regulations, would still carry considerable weight. The concept of a government product safety policy statement was modelled on the government policy statements used in the energy sector to provide guidance to the gas and electricity industries on acceptable outcomes sought by government which if not achieved in a voluntary manner would have to be regulated.

As noted, under the Consumer Guarantees Act it is the responsibility of retailers, importers and manufacturers to only supply products that are of acceptable quality and fit for the purpose for which they are supplied, including that they are safe. A government product safety policy statement of acceptable limits of formaldehyde was identified as providing clear guidance to retailers, importers and manufacturers without the need for regulations.

A suggestion is that the Fair Trading Act specifically provide for the Minister of Consumer Affairs to issue government product safety policy statements, with a requirement for consultation with parties who may be affected prior to any statement being finalised. If there is a formal reference in the Fair Trading Act to issuing government product safety policy statements, this will extend the product safety regulatory options. It will also give the issue of any such statements a more formal status than at present.

In summary:

Consumers having confidence that the goods and services they buy are safe is fundamental to their participation in markets. Accordingly, product safety provisions are essential in consumer law. The existing provisions in the Consumer Guarantees Act and the Fair Trading Act are fairly comprehensive and seem to be effective.

Some improvements to enhance the product safety provisions in the Fair Trading Act have been identified and feedback on these is invited.

Questions

20. A range of provisions exist under the Consumer Guarantees Act and the Fair Trading Act in relation to consumer product safety. Do you think these provisions are sufficient, and if not, what changes do you suggest?

21. What are your views on New Zealand adopting a "reasonably foreseeable" test of product safety regulation along the lines being considered for the Australian Consumer Law?

22. What are your views on the regulator being able to initiate a product recall itself where a supplier fails to undertake a compulsory recall?

23. What are your views on mandatory notification to the regulator of voluntary recalls and incidents where products are associated with serious injury or death?

24. What are your views on the Fair Trading Act including provisions for the Minister to issue Government product safety policy statements?

9. Information to Assist Consumer Decision-Making

In 2003, a review was undertaken of the role of the Ministry of Consumer Affairs in a dynamic, modern economy.⁵⁶ Called “Creating Confident Consumers”, the review concluded that the outcome of confident consumers occurs when consumers’ reasonable expectations are met when purchasing a product or service and if they are not met, consumers have access to redress. Information barriers were identified as the major reason for the gap between what consumers expect and what they get from a transaction. The review determined that an information-based framework was the most appropriate approach to consumer law.

The information-based framework says well informed consumers are generally in the best position to form their own preferences and decide whether or not to enter into a transaction; and that consumer policy should be aimed at reducing the gap between consumers’ expectations and reality within such a framework, by ensuring that:

- consumers can get the information they need to make decisions;
- consumers understand and value accurately that information (so they are more likely to seek it out);
- consumers are not exposed to hidden risks and hazards; and
- consumers have access to redress in the event of failed transactions.

The existing consumer law, supported by industry self-regulation, fits the information-based framework. The Fair Trading Act is designed to ensure that consumers are not misled about what to expect from a transaction. It also provides specifically for regulations for product safety standards and consumer information standards. The Weights and Measures Act is designed to ensure that consumers get the quantity of goods they expect. The Consumer Guarantees Act provides for access to redress in the event of failed transactions.

Disclosure

Regulations to require businesses to disclose particular information are often used to enable consumers to get the information they need to make decisions. Compulsory disclosure requirements have the objectives of promoting transparency and accountability and reducing information search costs where the product, service or the relevant consumer information is complex, or the consumer information is difficult to gather. Compulsory disclosure is required for a wide range of products, from medicines and food to investment (e.g. the Securities Act 1978) and borrowing products (e.g. the Credit Contracts and Consumer Finance Act 2003).

Disclosure takes a variety of forms. For example, the regulated disclosure for financial products includes information on the performance of the investment, details of key personnel and conflicts of interest. The regulated disclosure for credit contracts includes information on the costs of borrowing, interest, repayment timing and fees associated with the borrowing.

Labelling, notices and warnings may be appropriate when only a small amount of simple information is required to inform consumers. For example, mandatory warning labels on poisonous products are a low-cost way of providing important information to consumers. Consumers can then choose to seek a

⁵⁶ Creating Confident Consumers: The Role of the Ministry of Consumer Affairs in a dynamic modern economy (May 2003) – <http://www.consumeraffairs.govt.nz>.

substitute, investigate the details of the risk, or make the purchase and use the product with care, based on the precautions most reasonable people take with “poisons”. Regulations prescribing the provision of information on medicines and food are made under the Medicines Act 1981 and the Food Act 1981.

Mandatory labelling is used to provide information that can be very difficult for consumers to otherwise find and the government considers having weighed the costs and benefits that there is justification to require such labelling. Included in this category is mandatory care labelling for clothing and furnishings, labelling of petrol octane rating at petrol pumps, energy efficiency and water efficiency labelling of some products and consumer information notices for used motor vehicles.

Consumer information standards under the Fair Trading Act

The Fair Trading Act provides for the making of regulations to prescribe the content, form or manner in which information about a particular good or service is required to be disclosed in a consumer information standard (section 27).

Consumer information standards may include information relating to the kind, grade, quality, origin, performance, care, composition, contents, design, construction, use, price, finish, packaging, promotion or supply of goods or services (section 27(1)(a)).

Regulations under the Fair Trading Act currently provide for consumer information standards on the following:

- country of origin labelling for clothing and footwear
- fibre content labelling on most textile goods, including clothing
- care labelling of clothing, furnishings, textiles
- used motor vehicles, and
- water efficiency of certain water using products.

The Fair Trading Act consumer information standard regulation making provisions are deliberately wide. This means that general information provision for consumers, when regulation can be justified, can be mandated through these regulation-making powers rather than requiring specific legislation.

Possible enhancements to Fair Trading Act information provisions

Extension of scope of consumer information standards regulations

In the development of the Consumer Information Standards (Water Efficiency) Regulations 2010 a problem arose with respect to including in the regulations specific requirements related to testing of the water-using products covered by the regulations. While the regulation-making powers at section 27 in the Fair Trading Act provide for certain types of information and the form and manner of the information to be disclosed, they do not allow for the testing requirements to be directly specified. Establishing the testing requirements can only be done by declaring an official standard (or part(s) of an official standard) as a consumer information standard and modifying it as necessary. For the supplier to meet the standard, there is a presumption that the testing requirements in the standard will be met. A further problem is when an appropriate official standard does not exist or is not fully suitable.

The product safety standard regulation-making powers at section 29 provide for regulations to be made relating to the testing of the goods during or after manufacture and processing. It is proposed that the

consumer information standard regulation-making powers should include a similar provision in order to clearly enable testing requirements to be specified in the regulations.

Information on traders soliciting on behalf of charities

The Commerce Select Committee is considering the Fair Trading (Soliciting on Behalf of Charities) Amendment Bill, which is a Members Bill sponsored by Amy Adams MP. The Bill is directed at charities that use third party collectors for fundraising by donations. It aims to provide increased transparency and public accountability for professional third party collectors who are in the business of collecting funds on behalf of registered charities. The General Policy Statement for the Bill notes that public accountability is an important part of the credibility that enables people to donate with confidence. In particular, the Bill aims to address concerns over disproportionate fees taken by third party collectors of funds solicited for charities.

The Bill proposes an amendment to the Fair Trading Act to address this issue for several reasons, including: non-disclosure of the proportion of the donation going to the third parties' costs is considered misleading to people who donate; and the Act applies to traders, as for the purposes of soliciting money, third party fundraisers are considered to be acting "in trade".

The Commerce Committee has asked that as part of the Consumer Law Reform review consideration is given to the matters addressed in the Bill. This will allow for a full regulatory analysis to be undertaken of the problem the Bill is seeking to address.

As noted, the Fair Trading Act is concerned with accurate information and provides specifically for regulations on disclosure of particular information. Two possible options for addressing the problem the Bill seeks to address have been identified (there may also be others). One is to include in the Fair Trading Act specific disclosure requirements regarding charities. While this is a possible approach, a downside is that it does not fit with the more generic principles-type approach of the current Act.

The other option might be a consumer information standard under the Fair Trading Act. Consumer information standards regulations can provide for disclosure of information relating to certain features, including the promotion or supply of the goods or services. They also can require the form and manner in which that information must be disclosed on or in relation to, or in connection with the supply or resupply, or possible supply or resupply, or promotion of the supply of the goods or services.

The review will take into consideration the submissions received by the Commerce Committee. Any additional comments are welcomed, in particular on the form for addressing the problem underlying the Fair Trading (Soliciting on Behalf of Charities) Amendment Bill.

In summary:

The Fair Trading Act, the Weights and Measures Act and the Consumer Guarantees Act all include provisions which enable information provision to consumers which is accurate and will assist consumer decision-making. These laws are complemented by other legislation which also provides for the disclosure of information to consumers; and also industry self-regulation which promotes disclosure of information and avenues to seek redress when transactions do not meet expectations.

One area which has had public discussion over several years concerns disclosure of information with respect to charities. There are still concerns that disclosure in this area is not adequate.

Questions

25. The Fair Trading Act provides for consumer information regulations. Do you think these provisions are sufficient, and if not, what changes do you suggest?
26. What are your views about adding testing requirements to the consumer information regulation-making powers?
27. What are your views on including specific disclosure requirements in the Fair Trading Act concerning third party collectors fundraising for charities?

10. Trader Obligations

Introduction

This section of the Discussion Paper considers consumer law that specifies obligations on businesses in defined trading circumstances. Current law sets out specific trader obligations regarding layby sales, sales by auction and sales by weight and measure (respectively in the Layby Sales Act 1971, the Auctioneers Act 1928 and the Weights and Measures Act 1987).

In all cases, the objectives of the law are to create a business environment in which consumers can transact with confidence and reputable suppliers are protected from inappropriate market conduct.

10.1 Layby Sales

A layby sale takes place when a consumer pays instalments towards the cost of a good but does not take possession of the good until the full cost has been paid. Layby (or lay-by, or lay-away in the United States) sales date back many years.

The Layby Sales Act 1971 applies to sales of goods in this manner up to \$7,500, excluding motor vehicles.

For consumers, layby sales are a means of managing payments for goods that may not be affordable in a single transaction. They are a fairly popular sales form for young people and women. The National Consumer Survey 2009⁵⁷ indicated that 17% of total consumers and 22% of female consumers used layby sales in the previous two years. By age breakdown, 25% of under 30 year olds used layby sales (and just 6% of the 65 years and older group).

The inherent risks to the parties to layby sale agreements are as follows:

To the seller:

- that a consumer may not return to make a final payment and meanwhile the goods have depreciated.

To the consumer:

- the supplier may not own the goods that are being put aside;
- the supplier may sell the goods to someone else;
- goods may be lost or damaged before the consumer takes possession;
- the supplier may refuse to pay back instalments if the consumer no longer wants the goods; and
- the supplier may become insolvent.

The Layby Sales Act aims to reduce these risks by:

- clarifying that the risk in the goods remains with the seller until the buyer has possession of the goods (section 6);

⁵⁷ National Consumer Survey 2009 – <http://www.consumeraffairs.govt.nz>.

- giving the buyer the right to request a statement of the purchase price, the estimated costs if the buyer cancels the sale, the amount outstanding and other details (section 7);
- providing specific rules in the event that the buyer wishes to cancel the layby sale, including rights for the buyer to recover the instalments paid, less the seller's "selling costs" (sections 8 and 9);
- allowing the seller to cover any depreciation in the value of the goods by retaining any reduction in the retail value of the goods (section 9);
- giving the buyer the right to complete the transaction if the seller becomes insolvent (as long as the goods are available) (section 10); and
- giving the buyer a preferential claim to get back the instalments paid if the seller is insolvent and the layby sale is unable to be completed (section 11).

History of the Layby Sales Act

The Layby Sales Act is technically part of the Sale of Goods Act 1908, and was developed before the Fair Trading Act 1986 and the Consumer Guarantees Act 1993.

Before the Layby Sales Act was passed in 1971, layby sales existed as a special type of contract, but they were not governed by any specific rules.

While the majority of businesses handled layby sales in a fair and equitable manner, two issues arose in the 1960s that led to the practice being reviewed. The first was a number of complaints that some traders were refusing to refund money when a consumer cancelled a layby. These traders regarded deposits and instalments they had received on cancelled layby sales as a windfall, and consumers were left out of pocket.

The second issue was the insolvency of several businesses, mostly linen stockists, leading to significant losses for their consumers, the majority of whom were young women (who not only lost their goods, but also their money given to the seller). The young women were only unsecured creditors of the insolvent sellers with a low likelihood of recovering their money. Many of the items they had put on layby were not physically present in the shops, and even if the goods had been found, title under the terms of the agreement would not have passed unless all instalments had been paid.

The Layby Sales Act was passed in recognition that, while this form of trading is a valid and acceptable practice, it was open to exploitation by dishonest traders. An advantage of the Layby Sales Act is that although it is technically part of the Sale of Goods Act, sellers cannot contract out of the consumer protection provisions.

Ongoing relevance

As noted, the National Consumer Survey 2009⁵⁸ found that layby sales are still a fairly popular form of transaction. This was an interesting result as the expectation had been that with the wide availability of other credit options layby sales may not have been very prevalent. In comparison with credit, however, layby sales do not attract interest charges (but you do not get the goods immediately).

The risks addressed by the Layby Sales Act are still relevant today. Businesses may still be tempted to treat the instalments received on cancelled layby sales as a "windfall", and there continue to be instances of retailers becoming insolvent.

⁵⁸ *Ibid.*

Some online businesses are also offering layby, with scheduled deductions from a nominated bank account before the item is shipped to the customer. This is a relatively new application of the layby sale form of trading.

The National Consumer Survey 2009 showed there appear to be few problems with layby sales (only 2% of consumers reported problems). Because of the low numbers of people who had problems the following is indicative only: Of those who had problems (23), most people went back to the seller if they had a problem and most (81%) were satisfied with the redress they got from the seller.

If sellers regard layby sales as too onerous, or if they prefer other options for credit sales which do not involve the seller retaining possession of the goods, then sellers are free to do business on that basis. To that extent, compliance with the Layby Sales Act can be seen as voluntary on the part of sellers, and the practice remains relatively common.

In summary, the information which is available suggests the Layby Sales Act continues to fulfil a useful function, and that it would be a retrograde step to repeal it without putting replacement provisions in place. Layby sales law, however, does not need to stand alone or continue to be read as part of the Sale of Goods Act. It would be appropriate to consolidate it into other existing consumer law in accordance with the consumer law objective.

The provisions of the Fair Trading Act and the Consumer Guarantees Act also have general application to layby sales. Considering these as possible options, it would be most logical to include modernised layby sales provisions in a revised Fair Trading Act because the Layby Sales Act includes rules that apply to layby sales rather than “guarantees”. The Consumer Guarantees Act would continue to apply generally to layby sales if layby sales provisions were consolidated in the Fair Trading Act.

Option going forward: Incorporating layby sales provisions into the Fair Trading Act

Scope of layby sales legislation

If the layby sales provisions are included in a revised Fair Trading Act, there is an issue as to whether all the current elements of the Layby Sales Act should be retained.

Australia has recently considered layby sales law as part of its major Australian Consumer Law reforms. The proposals related to layby sales regulation in the Australian Consumer Law centre around requiring layby sales agreements to be in writing and transparent (they must be expressed in reasonably plain language, legible and clearly presented), and limiting the right of suppliers to retain a “termination charge” which must be agreed, and must be no more than the supplier’s reasonable costs. The new Australian proposal considerably simplifies the provisions dealing with layby sales which are currently found in state-level legislation in New South Wales, Victoria and the Australian Capital Territory, and says nothing about risk in the goods, the provision of statements to the buyer, or the insolvency of the seller. The State provisions are very similar to the New Zealand Layby Sales Act which provides for:

- risk remaining with the seller until the buyer has possession;
- the buyer can request a statement from the seller;
- rights on cancellation, including the seller keeping the selling costs and any depreciation in the retail value of the goods; and
- buyers’ rights on insolvency of the seller.

The simplified Australian Consumer Law proposal for layby sales regulation is not in itself a compelling reason for New Zealand to follow suit, but it is a good reason for the policy underlying the elements of

the New Zealand legislation to be scrutinised and tested. The following discusses whether the above elements would need to be included in layby sales provisions covered in a revised Fair Trading Act.

Risk in the goods

Section 6 of the Layby Sales Act provides that the risk in goods purchased by layby sale remains with the seller until the buyer gets possession of the goods. The problem section 6 originally addressed was based on an inference from the Sale of Goods Act that title (and risk) in goods may pass before the goods are paid for or the buyer receives possession.

Section 6 modifies this possible inference and says risk stays with the seller. This seems to be fair, because the buyer has no control over the goods in the possession of the seller, and the seller is best placed to insure the goods and otherwise take care of them.

It is questionable whether section 6 is necessary in the current legislation. Under the Sale of Goods Act sellers can contract out of title passing to the buyer until full payment for the goods occurs and sellers are likely to always retain title in goods on layby until they are paid for in full. The proposed Australian Consumer Law does not include an equivalent provision to section 6. If layby sales provisions are included in an enhanced Fair Trading Act, then retailers would not be able to contract out of the provisions and thus an equivalent of section 6 would be unnecessary.

Statements

The Layby Sales Act requires sellers to provide statements on request by layby buyers specifying the purchase price, the amount owing and the estimated costs if the agreement is cancelled (section 7, Layby Sales Act). This requirement clearly increases transparency and provides buyers with full information about the cost to them if they decide to cancel a layby sale.

The Act also specifies a 25 cent cost for the seller issuing a statement (section 7(1)) and a \$10 limit for layby sales where a statement can be requested (section 7(5)). These are very detailed provisions that are outdated.

There is an obvious compliance cost for sellers preparing statements which include information such as the current retail value of the goods and an estimate of the selling costs. The complexity of the information required for the statement is linked to the complexity of the calculation of the amount outstanding under a cancelled layby sale under section 8 of the Act.

Records of the initial price of the good and payments made by the consumer are good practice for any retailer, and are likely to be kept regardless of the legislation. It seems likely that the requirement to calculate the estimated cost if the agreement is cancelled is not being followed by sellers or buyers due to the effort required and ignorance of the requirement. The ongoing need for equivalent provisions to section 7 to be carried forward to a revised Fair Trading Act is not established. There is no point in retaining a provision which is not given effect in practice.

Buyer cancellation

The buyer has an unconstrained right to cancel a layby sale under section 8 of the Layby Sales Act, but the seller has the statutory right to compensation under section 9. The rules in section 9 are relatively complex, and they allow the seller to retain the costs of sale and any reduction in the retail value of the goods from the instalments paid by the buyer. A seller can adjust the retail value of the goods under a cancelled layby sale if the sale is cancelled more than one month after it is entered into, but the seller cannot make that adjustment if the layby sale is cancelled after less than one month or if the sale is not of specific goods (section 9(4)). The buyer is entitled to recover the amount of the instalments paid over and above the costs of sale of the seller and any adjustment to the retail value of the goods. The

buyer might be required to pay more than the instalments they have already paid, but not if they have only paid one instalment by way of a deposit.

These rules are an example of prescriptive, rather than principles-based, legislation. A more principles-based approach would be to simply say the buyer is entitled to receive back any instalments paid on a cancellation, less the reasonable selling costs and losses incurred by the seller. The seller would then have to demonstrate that any reduction in the retail value of the goods is a cost to the seller, without the legislation necessarily spelling this out. Principles-based regulation may or may not specify whether a buyer might be liable for more than the amount of the instalments paid, depending on whether or not that possibility is either likely or important.

The proposed Australian Consumer Law approach is to have principles-based legislation which does not contain rules which are as detailed as those under the New Zealand Layby Sales Act, although the Australian proposal is to provide that buyers may be liable for more than the amount of the instalments they have paid if the seller's costs in relation to the agreement exceed the amount of the instalments the buyer has paid.

A complex calculation of the seller's costs under section 9 was determined to be unnecessary by the High Court in *Wood v Universal Fur Co Ltd* [1985] 1 NZLR 640 which states that the method of calculation is irrelevant as long as it is reasonable. The solution provided for in the Australian Consumer Law is elegant and achieves the same outcome. It provides that a "termination charge" can only be applied if the agreement includes that such a charge will apply when a consumer cancels the layby agreement (and the supplier has not breached the agreement), and the charge is not more than the supplier's reasonable costs in relation to the agreement.

Layby sales provisions in the revised Fair Trading Act need to retain the equivalent of section 8 to provide for the unrestricted ability of a consumer to cancel the layby agreement. Regarding compensation to the retailer for a cancelled layby sale, rather than providing very prescriptive law equivalent to section 9, the preferred option is a more principles-based provision regarding a "termination charge" if a consumer cancels the agreement, along the lines of the Australian provision.

Seller cancellation

The current Layby Sales Act does not expressly provide for sellers to cancel the contract, leaving it up to general contract law, including the Sale of Goods Act. There seems to be no reason why the cancellation rights of sellers should not be included in the new legislation to provide greater clarity for both sellers and consumers. One option is to list the circumstances where a seller may cancel, such as breach of the agreement by the consumer, insolvency, or unavailability of the goods specified in the agreement. In this case, all instalments paid by the consumer should be reimbursed. This reflects the proposed Australian Consumer Law approach.

Insolvency

The layby buyer's first right on the receivership or liquidation of the seller is to complete the transaction, even if the goods have not been specifically 'ascertained' as would normally be required under the Sale of Goods Act (section 10, Layby Sales Act). This is designed to avoid the situation where layby purchasers become unsecured creditors for the amount of the instalments they have paid, in which case they are likely to lose their money without receiving the goods.

The practical reality is likely to be that the goods will be subject to a prior charge to the seller's secured creditors, and the goods may not be at the seller's premises anyway. The Layby Sales Act recognises this in part by providing a first-in-time rule if there are insufficient goods to meet layby claims, and providing for competing claimants to draw lots where they entered into layby sales contracts on the

same day (section 10(2)). Buyers who have not made an instalment for 3 months and non-arms length buyers are excluded from the right to complete the transaction under section 10(3).

If a buyer is unable to complete a layby sale on the receivership or liquidation of the seller, the buyer has a claim for the amount owed by the seller as a “preferred creditor” (section 11). The claim ranks behind secured creditors and some other preferred creditors (Inland Revenue Department in relation to PAYE deductions and GST and employees’ holiday pay), but ahead of ordinary unsecured trade creditors. This may provide some confidence to consumers that they have a better chance than unsecured creditors of getting their money back on the insolvency of the seller, but the likelihood of their receiving their instalments back in full on the insolvency of the seller probably remains remote.

There is therefore an option to remove the “preferred creditor” status of layby purchasers. In the case of insolvency, layby creditors would become unsecured creditors. This would more accurately reflect the reality of their situation, and does not misleadingly imply rights and remedies that are unlikely to benefit layby purchasers.

Other issues with the Layby Sales Act

Definition of deposit

One issue that has arisen is whether a deposit paid for goods ordered by a consumer (for example, a kitchen bench) is an “instalment” under a layby sale. There is a problem that transactions might technically be layby sales when the parties had not necessarily intended them to be. When the buyer pays a deposit and the balance of the purchase price is paid in one further instalment, the transaction is technically a layby sale under the Act, even though the seller and the buyer may not be intending to enter into a layby sale.

The problem arises if the consumer cancels the contract. If the money paid is a “deposit”, then the supplier would not need to refund the deposit to the consumer. If the money paid is an instalment, then the Layby Sales Act provisions could apply. Retailers argue that paying a deposit is a separate contract to the contract of sale for goods and that the deposit should not be refundable as for a layby sale.

On the other hand is the view that the “deposit” is a part-payment towards the final price rather than an at-risk deposit to secure the goods.

An option to prevent these transactions being caught as layby sales, when they are probably not intended to be, would be to amend the definition of “layby sale” to provide that a sale by instalments with less than three instalments (including the deposit) is *not* a layby sale (unless specified in the agreement). This is the approach being recommended in the proposed Australian Consumer Law. It also provides the opportunity to clarify that any deposit paid is taken to be an instalment.

Selling costs

There have been concerns over the definition of “selling costs” which may be retained by a seller on the cancellation of a layby sale. The Layby Sales Act has no definition of “selling costs” and it appears to be ambiguous. It could refer to the costs incurred by the supplier for the layby element of the sale, i.e. costs of recording and taking payments. Alternatively, it could include *all* costs involved in selling the item, such as the salesperson’s salary and advertising costs.

In *Wood v Universal Fur* the High Court held that the fact that the term “selling costs” is followed by the words “in respect of the layby sale” is simply to identify the sale to which the subsection applies, not to restrict the recovery of costs to those involving the layby elements of that sale. In effect the High Court authorised sellers to retain *all* their costs of sale when the buyer cancels a layby sale. There has been comment that this wide interpretation may result in double compensation for the seller if the item is

resold to another customer, as the general selling cost is already built in to the price of the good. Selling costs for both the layby elements and the general selling costs are recoverable from the layby customer, and when the goods are sold a second time, the seller recovers the general selling costs a second time.

The Ministry of Consumer Affairs view is that the policy behind retaining “selling costs” was not to provide the broad catch-all for costs as interpreted by the High Court. Rather compensation should be to allow the retailer to recover the basic costs associated with the layby transaction and therefore not to be out of pocket or disadvantaged. Selling costs should not allow for double recovery of general selling costs. This accords with the general principle set out in the proposed Australian Consumer Law regarding retaining “termination costs”.

Enforcement and redress

The Layby Sales Act creates legal rights which are enforceable by sellers and buyers who enter into (or cancel) layby sales, but the Layby Sales Act does not include any general enforcement provisions. It is not an offence, for example, for a seller to over-recover the reasonable costs of sale on a cancellation of a layby sale.

If the Layby Sales Act is repealed and replacement provisions are consolidated in the revised Fair Trading Act then the enforcement provisions of the Fair Trading Act could apply.

Consumers can enforce the provisions of the Fair Trading Act on a civil basis, and if the Layby Sales Act was incorporated, it would be within the jurisdiction of the Disputes Tribunal as layby sales are limited to those goods under the value of \$7,500. As the National Consumer Survey indicates that very few problems occur with layby sales, this option would be advantageous to those who wish to take a complaint and receive a cheap, speedy resolution.

Given the impetus for the Layby Sales Act was a run of insolvencies and traders taking advantage of consumers by retaining their instalments, an option is to also allow the Commerce Commission to take action if they believe inappropriate conduct is happening on a widespread scale.

In summary:

The Australian Consumer Law provides a model that could potentially be adopted by New Zealand for layby sales. This model provides for regulation of layby sales using a principles-based approach under the general consumer law as a form of consumer transactions. In a New Zealand context, this would mean including such regulation in the Fair Trading Act. This approach fits well with the consumer law reform objective to simplify and consolidate consumer law and to have law that is principles-based. Alignment with the Australian Consumer Law provisions also accords with the single economic market principles for harmonisation of business and consumer regulation where appropriate. This is the preferred option for future regulation of layby sales.

Questions

28. Do we need detailed provisions regulating layby sales or would a more principles-based approach be better?
29. Should the definition of a layby sale be amended so any transaction with less than three instalments (i.e. a deposit and later payment in full) is not a layby sale under the Act, and for what reasons?
30. Is it appropriate that sellers can recover all their costs on the cancellation of a layby sale or should the seller's costs be limited to specific costs associated with the layby transaction?
31. What are your views on moving regulation of layby sales to the Fair Trading Act?

10.2 Weights and Measures

Introduction

Correct weights and measures have been important to consumers and businesses throughout history. They have formed the basis for fair trading, and taxation, for centuries. The oldest known weights are nearly 10,000 years old. The first recorded trade weighing was carried out in the Indus civilisation in about 3,000BC. Modern concepts of standards in weights and measures can be traced back to around 960AD when King Edgar the Peaceful of England decreed that all measures must agree with standards kept in London and Winchester. The need for consistency from both consumers and traders led to the first imperial Weights and Measures Act coming into force in 1826.

The New Zealand Weights and Measures Act 1987 defines New Zealand's system of metric weights and measures, and prescribes their use in the market place.

History

The current Weights and Measures Act replaced the Weights and Measures Act 1925. In the speech introducing the Weights and Measures Bill to Parliament on 10 July 1986, the then Minister of Labour noted that the Act's principal purpose was to recognise the primacy of metric rather than imperial measure; and to consolidate the nine amendments to the 1925 Act. The Act was considered well overdue for review and consolidation and had also had two sets of supporting regulations since its publication in 1925.

The Act provides the means by which consumers and businesses are assured of the correct quantity of goods sold by weight, measure or number. It covers the technical aspects and standards relating to the measurement systems and equipment used when goods are sold. This is important for consumers and businesses domestically and underpins the credibility of goods traded internationally.

The Act is aimed at ensuring that goods sold by weight, measure or number are traded fairly and in accordance with internationally recognised weighing and measuring principles and infrastructure.

The Act also sets out specific trader obligations for the protection of consumers, and for fair competition with other businesses. It defines what a trader must ensure has been done when goods are sold by weight, measure or number. The Weights and Measures Act references international standards which form the basis of specific trader obligations. By its very nature, the Act is a prescriptive piece of legislation. Worldwide weights and measures law is standalone legislation, and it tends to be prescriptive.

The Act includes a consumer protection component by regulating against traders selling goods less than their stated weight, measure or number and against incorrectly stated weight, measure or number.⁵⁹ However, the Weights and Measures Act is largely about trade measurement infrastructure consisting of the provision of physical standards, measurement practice and enforcement. Consumers do not need to be aware of the exact details of the Act itself, as long as the end result is that they receive correct measure, therefore providing confidence to all parties.

The Weights and Measures Act tends to be given operational effect through the Weights and Measures Regulations 1999, and these regulations were reviewed and amended in 2009.

New Zealand's Weights and Measures Act is regarded as world leading. Many of the elements of the Act which were considered to have been over prescriptive have been updated – for example certain

⁵⁹ Weights and Measures Act 1987, Part 3.

products such as milk and cheese are no longer required to be sold in predefined measures. The New Zealand Act has fewer prescriptive details than its Australian or United Kingdom counterparts.

Ongoing relevance

The risks addressed by the Weights and Measures Act are just as relevant today as they have been in the past. Correct weights and measures are an important component of a well functioning market place.

Consumers need assurance that the goods they are purchasing are of accurate weight or measure so that they know they are getting what they pay for and can transact with confidence. This applies to large purchases such as firewood, concrete or garden landscaping material, as well as everyday products such as milk, meat and petrol.

Businesses also need to be know they are dealing with accurate weights or measures so they can be assured they are competing on a level playing field and have the ability to trade internationally without encountering restrictions due to differing international standards. Accurate measurements contribute to business efficiency and production of goods that can be sold competitively and fairly. Poor measurement can lead to inefficiencies and incorrect costs for both consumers and businesses.

The Weights and Measures Act is not designed for consumers to seek their own redress, but it is intended to provide consumers with the confidence that their goods are of accurate weight or measure without concerning themselves with the details of technical requirements and standards. The National Consumer Survey in 2009 found that 11% of New Zealanders had bought something where they thought the weight or measure was different than expected. Of these individuals 40% returned the product to the seller and 53% indicated they did nothing. Of those who went back to the seller over 80% were satisfied with the redress they received.

A significant part of administering and enforcing the Weights and Measures Act involves complying with international standards. New Zealand has a commitment to implement the Organisation of Legal Metrology's (OIML) International Recommendations to the greatest possible extent in its domestic legislation.⁶⁰ The OIML's mission is to harmonise legal metrology internationally. Most countries are members of OIML and have harmonised standalone weights and measures laws. Alignment with international convention makes it easier for New Zealand to work with other jurisdictions on weights and measures matters. This enables consumers and businesses worldwide to have greater confidence that the products they are purchasing meet the same measurement standards, whether they are locally produced, exported or imported.

Possible areas for amendment in the Weights and Measures Act

The Weights and Measures Act remains substantially sound. A small minor change that could improve the operation of the Act has been identified and this is discussed below. The Consumer Law Reform review provides an opportunity for comment on the workability of any other aspects of the Act and these are invited.

Mandatory reverification

All weighing and measuring equipment must be checked and verified by an Inspector or Accredited Person before it can be used in trade.

⁶⁰ Organizacion Internacional de Metrologia Legal (OIML) – International Organisation of Legal Metrology.

Currently weighing and measuring equipment is only required to be verified initially and provided that the equipment is stamped with the mark of verification and seals remain in tact, then the equipment is not required to undergo any further testing.

Traders can choose to voluntarily have their equipment tested and be issued with a "certificate of accuracy", which lasts for 12 months. However it is left up to individual traders to decide if they want their equipment tested and certified.

A certificate of accuracy offers a trader some degree of confidence that their measuring equipment is fair and accurate.

The certificate also gives the trader some legal backing in that they are doing their best to ensure that their measurement equipment is fair and accurate.

Surveillance has found that in certain areas of trade there have been high non-compliance rates revealed involving false or unjust weighing and measuring equipment. For example, recent testing of weighbridges has shown a rate of non-compliance as high as 70%. A potential way to solve this would be through introducing mandatory verification periods in these areas.

The Australian system now requires that all weighing and measuring equipment used in trade be verified on a regular basis. The New Zealand system could adopt similar provisions through either requiring mandatory reverification or mandatory certificates of accuracy. It is possible to require mandatory reverification in those areas that show the highest rates of non-compliance, however this may signal that other areas of trade measurement are of lesser importance.

Possible inclusion of the Weights and Measures Act in an Enhanced Fair Trading Act

One of the objectives of the Consumer Law Reform review is to achieve simplification and consolidation of the existing law. Accordingly, consideration has been given to including weights and measures provisions in an enhanced Fair Trading Act.

Having accurate systems for weights and measures is a requirement for "fair trade", so it could be logical to incorporate the Weights and Measures Act in an enhanced Fair Trading Act.

There is an obvious risk though that the Weights and Measures Act would lose its identity, and it may be harder for businesses and other users to find if it is incorporated in more generic legislation. Being able to locate the law is a key element of its transparency, which is an essential feature of good law. One of the other objectives of the review is having in place law that is readily accessible to those who are affected by it.

There is a trade-off between having a lesser number of statutes and ease of businesses wanting to find relevant law. Weights and measures law internationally tends to stand alone. In Australia, there is the National Measurement Act 1960. This is not being included in the Australian Consumer Law. Taking into consideration another of the review objectives, harmonisation with Australia as appropriate, there is a case for continuing a standalone Weights and Measures Act in New Zealand.

Unlike the other legislation it is suggested could be included in an enhanced Fair Trading Act, the Weights and Measures Act does not readily fit within the principles-based framework of the Fair Trading Act. As noted, the Weights and Measures Act is, and needs to be, fairly prescriptive legislation. Businesses and Accredited Persons rely heavily on the legislation for direction and also guidance through the linkages through OIML and Asia Pacific Legal Metrology Forum (APLMF) "Uniform Best International Practice". The Act is primarily based on technical requirements that require a wide range of specific technical knowledge and expertise. The Act also has a whole physical infrastructure sitting behind it that is required to support trade transactions and to enable enforcement.

Enforcement

The Weights and Measures Act is currently enforced by the Ministry of Consumer Affairs, which employs weights and measures inspectors. If the Weights and Measures Act was incorporated in the Fair Trading Act, there would be a case for involving the Commerce Commission in the enforcement of the weights and measures provisions.

This could be an advantage. During enforcement activities Ministry of Consumer Affairs inspectors have sometimes noted other discrepancies outside of the scope of the Weights and Measures Act that they are unable to enforce at the time. For example, while checking a firewood measure, inspectors have noted debris other than firewood within the measuring device. While still conforming to the Weights and Measures Act, this is a likely breach of the Fair Trading Act. Under the current arrangement, the inspector is unable to do anything more than inform the Commerce Commission of the breach. If the Weights and Measures Act were incorporated into an enhanced Fair Trading Act it might be more practical for a Commerce Commission officer to pursue any breach of the Fair Trading Act simultaneously while enforcing the weights and measures section.

There may also be disadvantages. If the Commerce Commission was responsible for enforcement of weights and measures legislation it is possible that given the higher level cases the Commission deals with, the weights and measures legislation may not receive the same priority it has within the Ministry of Consumer Affairs, leading to less of the specific enforcement activity. Also, given that the Ministry of Consumer Affairs is responsible for considering updates to the Act with respect to OIML International Recommendations, there might be an undesirable disconnect between those enforcing the legislation and those who maintain it. Aspects of legal metrology are highly technical including verification of physical standards, type approving and verification of measuring instruments, conducting statistical-based sampling programmes for pre-packaged goods and technical-based auditing of Accredited Persons. These responsibilities would not fit easily within the Commerce Commission's current operational model.

It does not necessarily follow that including the Weights and Measures Act in an enhanced Fair Trading Act would mean the enforcement responsibility would shift to the Commerce Commission. The enforcement of the weights and measures sections could equally remain the responsibility of the Ministry of Consumer Affairs.

In summary:

Weights and measures laws are essential to a well-functioning market place. The fundamentals of the current law go back in history many, many years.

The current law is substantially sound. A small change has been identified that could assist its workability. Other suggestions of possible change are welcome.

Consideration has been given to including weights and measures provisions in an enhanced Fair Trading Act. On balance there would seem to be good reasons for maintaining a standalone Weights and Measures Act.

Questions

32. What are your views on the Weights and Measures Act remaining standalone or moving to the Fair Trading Act?

33. Are there any other areas within the Weights and Measures Act that you think could be improved? Please provide details and supporting explanation.

10.3 Carriage of Goods Act 1979

The Consumer Law Reform has also considered the Carriage of Goods Act and how it relates to consumers. As discussed below, the Carriage of Goods Act sets out a number of trader obligations. The Act is primarily commercial legislation. Rather than complementing other consumer law, it effectively overrides the Consumer Guarantees Act. The implications of this for consumers are discussed. Comments are sought on whether there need to be additional consumer protections with respect to carriage of goods.

There has not been a full review undertaken of the Carriage of Goods Act, only how it affects consumers.

History

The Carriage of Goods Act applies to the carriage of goods by any means within New Zealand. The historic position with the carriage of goods was that the carrier was effectively the insurer of the goods being carried. Over time, carriers attempted to limit their liability by contract. Legislation in the United Kingdom and New Zealand since the nineteenth century has regulated the liability of carriers; restricting the ability of carriers to contract out of their liability, while also capping the amount of their liability.

The Carriage of Goods Act is consistent with this general approach. The default position is that carriers are liable for the loss or damage to goods while they are being carried regardless of causation in most cases, but the amount of the liability is limited to \$1,500 for each unit of goods which is lost or damaged. The risk of any loss over that amount falls on the owner of the goods.

The Act provides various options for adjusting the risk between the carrier and the owner of the goods being carried, including shifting the risk to the owner. The protection for the owners of goods under the Act is that the terms on which the owner is responsible for any loss or damage must be set out in a written contract signed by the owner.

Carriage of Goods Act and the Consumer Guarantees Act

Section 6 of the Carriage of Goods Act excludes any liability of a carrier for the loss or damage of goods carried other than in accordance with the terms of a contract of carriage, or under the Act. The Carriage of Goods Act is primarily business legislation, and optimising the freedom of the parties to determine their own risk and insurance arrangements and pricing seems to be appropriate for commercial relationships. The Sale of Goods Act, which includes warranties on the sale of goods which may be contracted out of, operates under the same policy setting.

The principles of the Consumer Guarantees Act are different. The express guarantees and the rights and remedies attached to them under the Consumer Guarantees Act are for the benefit of consumers and cannot be contracted out of. They are in addition to any other rights or remedies under other legislation or general rules of law (section 4).

The effect of section 6 of the Carriage of Goods Act is to exclude the carriage of goods from the services covered by the Consumer Guarantees Act, so the carriage of goods is treated separately from any other services which are provided to consumers. The guarantees in the Consumer Guarantees Act which apply to services generally, but which do not apply to the carriage of goods, include the guarantees that services will be carried out with reasonable care and skill (section 28), that the services will be reasonably fit for their particular purpose (section 29), and will be completed within a reasonable time (section 30).

If the Consumer Guarantees Act applied to the carriage of goods, the service guarantees would be minimum obligations, and carriers could not contract out of these guarantees to consumers. However carriers do have the right under the Carriage of Goods Act to contract out of any responsibility or liability, as long as their customers agree.⁶¹

One of the differences between the Consumer Guarantees Act and the Carriage of Goods Act is that a consumer making a claim under one of the service guarantees in the Consumer Guarantees Act needs to be able to demonstrate that the supplier did not exercise reasonable care and skill, or did not provide services which were reasonably fit for a particular purpose. The liability of carriers under the Carriage of Goods Act is easier to establish because the starting point is that the carrier is responsible for the goods while they are being carried. Carriers can rely on defences such as inherent defects in the goods, or damage occurring through no fault of the carrier, but the owner of the goods does not have to prove that the carrier acted unreasonably in the particular case.

The fact that carriers' liabilities are relatively strict under the Carriage of Goods Act is the reason for setting the default limit for the liability at \$1,500 for each unit of goods carried, and for permitting carriers to contract out of their statutory liabilities. The obligations of carriers under the Carriage of Goods Act might seem to be more generous to their customers than the service guarantees under the Consumer Guarantees Act, but the crucial difference is that the Carriage of Goods Act rights will invariably be contracted away, and the Consumer Guarantees Act guarantees cannot be.

The \$1,500 liability cap is also arbitrary (and possibly out of date since it was last reset in 1986), and bears no relation to the value of the goods which may have been lost or damaged. The full value of goods lost or damaged, and consequential losses, due to a breach of the statutory guarantees under the Consumer Guarantees Act would be recoverable by a consumer under that Act.

Even if no other change is made to the Carriage of Goods Act, there is clearly a case for inflation-adjusting the \$1,500 liability cap, and perhaps providing for it to be adjusted in the future in line with inflation through regulations.

Contractual issue

The person who has the contract with a carrier will generally be the person who sent (or "consigned") the goods being carried. This raises issues as the receiver (or "consignee") of the goods does not have a contract with the carrier. Any remedy for non-delivered or damaged goods requires the sender to take action under the contract.

On receipt of a delivered good, the receiver may discover that the item has been damaged in some fashion. The good may need to be repaired or replaced. In such instances the receiver may seek redress from the carrier. The difficulty the receiver faces is that the contract for the carriage of the goods in question is between the carrier and the owner of the goods being carried. The end receiver has few rights because he or she was not a party to the contract of carriage.

The sender itself may have a difficulty establishing a contractual link with the party who actually caused goods to be damaged or lost, because it is common for the party which contracts to carry goods to in fact subcontract the actual carrier service to another carrier. The sender itself will only have a remedy against the "contract carrier", and may have no remedy against the actual carrier.⁶²

⁶¹ The customer of a carrier will often be the supplier of goods being shipped, rather than the receiver of the goods (who will often be a consumer). The supplier can therefore effectively contract away its own customer's rights against the carrier.

⁶² This is mitigated in the Carriage of Goods Act by providing the contracting party does have rights against the actual carrier if the contract carrier is insolvent, or cannot be found (section 11).

These are the types of issues addressed in the Carriage of Goods Act. Section 20 allows the consignee to have rights against the carrier (as if they were the sender and the property in the goods has passed to the consignee). The problem with section 20 is that it is able to be contracted out of under section 7 of the Carriage of Goods Act. When section 20 is contracted out of, the consignee or receiver of the goods has no redress against the carrier. Presumably many contracts take advantage of this opportunity provided for carriers to limit their responsibilities under the Act.

The receiver is able to complain to the person who sent the goods who may then choose to take up the matter with the carrier. This works well when the sender is a commercial entity. It is in their interest to have happy customers so they will ensure their product ends up safely with the receiver, so commercial entities will probably take up the issue of non-delivery or damage with the carrier on behalf of their customers.

This situation is not so easy where a consumer to consumer carriage of goods occurs. For example, if a person has sold an item via an auction website and then sends it to a consumer who they do not know, there is no incentive or onus for the seller to seek redress with the carrier. Family members sending packages to each other are more likely to take the issue up with the carrier, but this is a relatively limited example.

The Consumer Guarantees Act is significant in relation to this issue because the definition of a “supplier” of services in section 2 of that Act includes suppliers of services to an individual consumer or group of consumers “whether or not the consumer is a party, or the group of consumers are parties, to a contract with the person”.

This means that if the Consumer Guarantees Act applied to the carriage of goods, carriers would be suppliers of a service to consumers receiving goods from carriers, even if the consumers are not parties to the contract of carriage. The Consumer Guarantees Act would therefore overcome the problem section 20 of the Carriage of Goods Act is designed to address and, unlike section 20, the Consumer Guarantees Act cannot be contracted out of.

Covering carriers providing services to consumers under the Consumer Guarantees Act would be a significant change to longstanding practices in the carrier industry, because it would potentially rebalance the risk of goods being lost or damaged in transit in favour of consumers. The definition of who is a consumer under the Consumer Guarantees Act would be important to the carrier industry (and consumers), especially if the definition is extended to include small businesses.

Questions

34. Is it appropriate for consumers to have rights under the Consumer Guarantees Act in relation to carrier services?

11. Auctioneers

Introduction

The Auctioneers Act 1928 is included in the suite of consumer law being reviewed in this Discussion Paper. The Act provides for the occupational regulation of a person selling property by auction (an auctioneer). An auctioneers licence is required to authorise the holder to carry on business as an auctioneer (section 24), and it is an offence for any person to conduct any sale by auction (section 32), or to hold themselves out to be an auctioneer without a licence (section 33).

A sale by auction is defined under section 2 of the Act as:

“the selling of property of any kind ... by outcry, by the auctioneer saying ‘I’ll take’ and commencing at a higher figure and going to a lower figure, by what is known as Dutch auction, knocking-down of hammer, candle, lot, parcel, instrument, machine, or any other mode whereby the highest, the lowest, or any bidder is the purchaser, or whereby the first person who claims the property submitted for sale at a certain price named by the person acting as auctioneer is the purchaser, or where there is a competition for the purchase of any property or any interest therein in any way commonly known and understood to be by way of auction; and shall be deemed to include the selling of any property by outcry in any public place, as the same is defined in the Summary Offences Act 1981, or in any room, or mart, or place to which the public are admitted or have access, whether or not the sale of the goods has been advertised to take place.”

The reference to “outcry” in the beginning of the definition applies to the various different auction methods referred to in the definition. The methods include the very specific (e.g. Dutch auctions), and the very general (e.g. a competition for the purchase of any property ... in a way commonly known and understood to be by way of auction).

The concept of “outcry” is important because it applies to all the auction methods referred to in the definition. To further clarify the definition of sale by auction, “outcry” is also defined in section 2 of the Act as “any request, inducement, puff, device, or incitement made or used by means of signs, speech, or otherwise in the presence of not less than 6 people by any person for the purpose of selling any property offered or available for sale, whether such property is or is not the same as that shown or referred to by him when making or using such request, inducement, puff, device, or incitement.” The fact that not less than 6 people must be present means auctions cannot take place in private. The Auctioneers Act definition of auction only applies to auctions where it is possible for the bidders to be physically present with the auctioneer (and other witnesses).

One of the issues with the prohibition on anyone who is not a licensed auctioneer conducting a sale by auction is that community and charity fundraising auctions are technically caught under the Auctioneers Act, and it is not unusual for auctions of low value or donated goods for fundraising purposes to be conducted by people who are not licensed auctioneers. This aspect of the Act is clearly not enforced in practice, and there is a question as to whether the requirement for community and charity fundraising auctions to be carried out by licensed auctioneers is necessary or appropriate.

There are separate rules that may apply to auctioneers auctioning land and motor vehicles. The Real Estate Agents Act 2008 allows individuals licensed under that Act to sell or offer to sell any land without having to be licensed under the Auctioneers Act. Licensed auctioneers may also sell or offer to sell land by auction without being licensed under the Real Estate Agents Act.⁶³ The interface between the Real Estate Agents Act and any changes that might be made to the Auctioneers Act would need to

⁶³ We understand the New Zealand Real Estate Institute requires its members who auction land to be licensed auctioneers.

be carefully worked through. Motor vehicle auctioneers can also choose to be registered under the Motor Vehicle Sales Act 2003.

The actual rules for conducting auctions of goods are in section 59 of the Sale of Goods Act 1908, and a similar section covering the sale by auction of land is found in the Property Law Act 2007. These rules concern the sale of property by lots, the completion of auctions and the withdrawal of bids, vendor bidding and reserves. The Consumer Guarantees Act specifically does not apply to the supply of goods by auction or competitive tender under section 41(3).

The implications of the meaning of the term “sale by auction” in relation to the Consumer Guarantees Act and online auctions are discussed below in the Consumer Guarantees Act section at 12.1.1.

History of the Auctioneers Act

The Hansard debates prior to the passage of the Auctioneers Act indicate that auctioneers were to be licensed in order to more accurately and strictly define who was to be entrusted with the right of selling goods by auction, especially in light of an auctioneer’s role involving the handling of other people’s property and money.⁶⁴ The Hansard debate noted that auctioneers have the potential to cause significant financial harm to consumers if they conduct themselves inappropriately when they deal with other people’s property and money.

The second reason given in the debates refers to the class of auctioneers known as “itinerant auctioneers” who set up auctions one day and leave the next. This was deemed to be an “undesirable form of trading” because it was difficult to obtain redress against itinerant auctioneers.⁶⁵

Requiring auctioneers to be licensed was intended to ensure that only those of fit and proper character would be eligible to obtain an auctioneer’s licence. As consumers⁶⁶ generally deal with an auctioneer infrequently, they may not be able to effectively judge the character or competence of an auctioneer. Licensing fit and proper persons as auctioneers could therefore protect consumers from reckless or incompetent auctioneers, by preventing people who are not fit and proper from obtaining a licence.

Occupational regulation under the Auctioneers Act

The Auctioneers Act provides for the District Court to determine whether a person applying to be a licensed auctioneer is a “fit and proper person”, who can be trusted to deal with people’s property and money. This is a “negative licensing” system, because people who are not fit and proper persons are prevented from being licensed auctioneers, and can therefore not conduct any sale by auction.

The District Court makes the decision on whether an applicant is a fit and proper person based on:

- an affidavit or statutory declaration regarding the financial position of the applicant (the applicant cannot be bankrupt)
- two character testimonials which are dated no later than 6 months before the application, and contain the names and addresses of the referees

⁶⁴ Hansard, Volume 217, 26 July 1928.

⁶⁵ *Ibid.*

⁶⁶ Particularly as sellers, because it is sellers who are particularly exposed to auctioneers holding their property and sale proceeds.

- the proposed form of the advertisements – two advertisements for the local newspaper with the largest coverage, to be advertised between 7-10 days apart, and
- a police report which states the application is not opposed by the Police.

The requirement for the police report presumably helps decrease the likelihood that an auctioneer would knowingly auction stolen goods, although the Act does not stipulate the basis for the Police to form a view on whether someone is a fit and proper person. The applicant is also required to lodge a \$1,000 fidelity bond with an insurance company or other financial institution.

The fee for becoming a licensed auctioneer is \$300, and local authorities in the area where the auctioneer conducts business receive 90% of the fee (\$270). Only \$30 of the fee is applied as a partial contribution towards the cost of administering the Act. It is understood that the basis for assigning 90% of the fee to local government is to defray the additional costs to local government due to the number of auctions being held. For example, when the Act was passed, the majority of auctions held were for livestock. Local authorities had costs related to cleaning the mess from the streets following outdoor livestock auctions. Additionally, funding was considered to be necessary for building and maintaining roads, as the number of auctions attracted increased road use.

Ongoing relevance

Aspects of the regulatory system which apply to the occupational regulation of auctioneers seem to be either unusual or clearly archaic (e.g. councils receiving funding for removing effluent from streets and the requirement for a \$1,000 fidelity bond).

There are three questions that need to be addressed:

- Whether the occupational regulation of auctioneers is either necessary or appropriate in its current form
- Whether the legal rules that apply to auction sales are appropriate, and
- Whether the scope of the definition of “auction” is appropriate for the purpose of the occupational regulation of auctioneers, or for the rules that apply to sales by auction?

Is occupational regulation of auctioneers necessary?

Occupational regulation can take many forms, and can either be carried out by the government, or by an occupational group or industry. The purpose of occupational regulation is to protect the public from the occupation being carried out incompetently, recklessly or dishonestly.

There are some assumptions behind occupational regulation. These are that:

- intervention by the government in occupations should generally only occur when there is a problem or potential problem that is unlikely to be solved in any other way, or where the alternatives will be inefficient or ineffective
- the amount of intervention should be the minimum required to solve the problem, and
- the benefits of intervening must exceed the costs.

Government intervention in an occupation is not always necessary. With respect to auctioneers, the primary issue is whether there is a possibility that incompetent or dishonest service by auctioneers could result in significant harm to the consumer and/or a third party and what is the nature of the risk

of significant harm. Given that intervention in occupations incurs compliance costs, it is important to only intervene where the potential harm would be significant.

The actions of auctioneers that have the potential to cause harm, be it significant or otherwise, are:

- the manipulation of the auction process by the auctioneer
- the auctioneer making false or misleading representations about the property being sold
- the auctioneer selling items for much lower prices than could have been obtained
- collusion between the bidders, or between the auctioneer and a bidder
- the auctioneer failing to carry out their services to the seller with reasonable care and skill (services such as inspection and cataloguing items for auction, and arrangement of advertising and other marketing for the event)
- the auctioneer failing to account to the seller for the proceeds of sale, and
- the auctioneer selling stolen goods.

Of these risks, the most significant are likely to be where the auctioneer fails to account to the seller for proceeds of sale, or sells stolen goods.

As noted, the Auctioneers Act places the discretion about whether a person is fit and proper to deal with people's property and money with the District Court. The District Court is involved in the regulation of some occupations, but it is more usual for a specific licensing authority or registrar to carry out this function.⁶⁷

The justification for placing occupational regulation of auctioneers with the District Court was originally that District (or Magistrates) Courts would have local knowledge about people applying to be licensed auctioneers, so local police and court staff between them could effectively operate the negative licensing system. This justification is no longer valid. The District Court can only consider the papers presented to it when it makes its decision on whether an applicant is a fit and proper person to be a licensed auctioneer and this is not an efficient use of District Court resources.

Another unusual aspect of the occupational regulation of auctioneers is that there is no centralised "register" of licensed auctioneers maintained by the licensing authority. Each District Court maintains its own register of auctioneers which may be searched by members of the public, but there is no official national register of auctioneers registered under the Auctioneers Act. The only form of national "register" of auctioneers is held and maintained by the Auctioneers Association of New Zealand. An agreement exists between the Auctioneers Association and the Ministry of Justice whereby within one month of issue of an auctioneer's licence, a copy is sent to the Association so they can update their central register. The licensed auctioneers on the register maintained by the Auctioneers Association are not necessarily members of the Association.

⁶⁷ Apart from auctioneers, the other occupational licensing groups currently administered by the District Court are: prostitution business owners, private investigators, security guards and sharebrokers.

If it is considered that the risks of incompetent or dishonest auctioneers are sufficient to justify their continued occupational regulation, there are four possible options:

- licensing by a specialist licensing authority along modern lines requiring the meeting of defined competency standards
- a negative licensing regime such as that for motor vehicle traders under the Motor Vehicle Sales Act 2003
- including licensing of auctioneers alongside secondhand dealers and pawnbrokers under the Secondhand Dealers and Pawnbrokers Act 2004 (which is a specific form of a modern negative licensing system), and
- an industry-led licensing approach with an approved industry body.

Another option is to effectively remove the external regulation of the auction industry, and to rely on the industry to set its own standards for conduct and ethics. If this option is adopted, the Auctioneers Act in its current form would be repealed, although some form of legal underpinning could still be required to support industry self-regulation.

Licensing of auctioneers by a specialist licensing authority

Specialist licensing authorities exist for a number of occupations. There are licensing authorities that set competency standards that must be met for registration and to obtain a practising licence. These licensing authorities also have a disciplinary role and competency and conduct breaches can lead to the revocation of a licence. Positive licensing of this nature occurs across a range of disciplines, for example, electrical workers, teachers, and dentists. In many cases, the professions are in the health sector or cover other occupations where the work of the tradesperson or professional could damage life or property if not undertaken competently.

Authorisation (a form of licensing) of financial advisors and Qualifying Financial Entities (QFEs) by the Securities Commission is an example of a positive licensing system which could have some relevance to possible positive licensing of auctioneers. Authorised financial advisors and QFEs need to comply with a code of conduct and meet minimum competency and training requirements.

The existing Auctioneers Act provides a form of negative licensing system, but there are more modern and effective models available. For example, motor vehicle traders licensing under the Motor Vehicle Sales Act (MVSA) may have some relevance to auctioneers. Under the MVSA, a person may obtain a licence provided they have not breached certain conducts, for example, been convicted of a crime of dishonesty in the preceding 5 years. Negative licensing requirements are more lighthanded than positive licensing and do not require applicants to meet competency requirements or to comply with codes of conduct.

Secondhand dealers and pawnbrokers are also covered by a negative licensing regime. As well as having to satisfy certain conduct tests, a police check is required. The Secondhand Dealers and Pawnbrokers Act 2004 is focused on the risk of people dealing with stolen goods, and in particular it imposes particular recordkeeping requirements to assist with the traceability of goods which are bought and sold. This Act provides for secondhand dealers and pawnbrokers to be licensed by a Licensing Authority, but it does not deal with more general occupational regulation issues apart from those aimed at avoiding the sale of stolen goods.

Negative licensing can be expected to cost less than positive licensing because there are no competency or training requirements for a negative licensing system, although the trade-off is that a negative licensing system (even following a modern model) provides minimum protection to the public.

In all cases, specialised licensing authorities maintain a register of licensees which is accessible to the public.

Application to auctioneers

As noted, a requirement to hold an occupational licence should be justified by a problem or potential problem that is either unlikely to be solved in any other way, or where the alternative is inefficient or ineffective. Referring to the earlier discussion on the original justification for licensing auctioneers, there were two primary concerns: those relating to entrusting auctioneers with other people's property and money; and itinerant auctioneers.

Itinerant auctioneers who are considered to be undesirable because they set up auctions one day and leave the next are no longer an issue.

Regarding the need to licence auctioneers because they are entrusted with other people's property and money, this essentially concerns whether there is a possibility that incompetent or dishonest service by auctioneers could result in significant harm to the consumer and/or a third party. The risk primarily lies with the owner of the goods being sold, because the auctioneer is the seller's agent. It is the seller's property and money which the auctioneer holds, and the seller is the client of the auctioneer.

There have not been many cases in the New Zealand courts where auctioneers have been held to account for breaches of the Auctioneers Act, including for breaches of their duty to account for the proceeds of sale. However there is clearly the potential for auctioneers to harm their own clients who are selling property and third parties. It is an open question as to whether this risk is substantial, but it seems likely that some form of oversight of auctioneers is needed.

The checks and balances in the current negative licensing system are a fairly weak fit and proper person test. The Auctioneers Association of New Zealand Code of Ethics that applies for some auctioneers adds slightly to the current negative licensing regime, but not much.

Having a full positive licensing system, as noted, needs considerable justification and it is not clear that such justification can be established for auctioneers. A full positive licensing system will likely also impose considerably more cost on auctioneers than the present licensing system.

It is useful to consider how Australia regulates in this area. Whilst some States and Territories such as Queensland, Northern Territory and Western Australia have auctioneer licensing, others including Victoria and New South Wales no longer have general licensing of auctioneers (although there is specific licensing of auctioneers regarding real estate and motor vehicles). From discussions with Australian officials, it is understood that auctioneers' licensing in Victoria and other parts of Australia was no longer considered necessary as auctioneers were in established and reputable businesses and issues suggesting the need to licence auctioneers entrusted with other people's property and money were not evident. Self-regulation appeared to be the most appropriate and efficient response.

The United Kingdom also ended licensing of auctioneers some years ago. It does, however, have the Auctions (Bidding Agreements) Act 1969 which sets out specific rules related to anyone conducting an auction. These are discussed below in the context of the rules for conducting auctions.

Industry-led models

Currently, in New Zealand, auctioneers are able to voluntarily become members of the Auctioneers Association of New Zealand. Those auctioneers that choose to become members of the Association subscribe to a standard of ethical behaviour, which is found in the Association's Code of Ethics.⁶⁸ The

⁶⁸ <http://www.auctioneers.org.nz/membership.asp>.

Code of Ethics emphasises integrity by auctioneers among themselves and in relation to their clients and the public.

Approximately 150 of the 500 auctioneers who are licensed in New Zealand are members of the Auctioneers Association. To be accepted as a member of the Association, the individual must be either a licensed auctioneer, a person approved by the court to conduct sales by auction on behalf of an individual or company, or a chattels valuer (who is not a licensed auctioneer). Membership fees are a \$300 annual fee, plus a one-off cost of \$112.50 for access to the Auctioneers Association's interactive website.

If licensing of auctioneers is no longer required by government regulation, anyone could conduct an auction without any formal checks or balances. This may not be an issue if the Auctioneers Association had comprehensive coverage of auctioneers. Given the risks associated with the business of auctioneers, and that the Auctioneers Association covers only about 30% of auctioneers, there is some risk in not having any licensing of auctioneers.

The Auctioneers Association could consider the possibility of establishing itself as an industry self-regulatory body in place of government regulation. Membership of the Association could become akin to membership of similar established industry self-regulatory bodies such as the Registered Master Builders Federation (RMBF) or the Institute of Professional Engineers (IPENZ). Membership of the RMBF is voluntary. It conveys that the builder is a qualified and experienced tradesman, as well as having the experience and management skills to undertake the building work required. Becoming a member of the RMBF requires builders to meet a range of requirements around qualifications, period of service, financial stability of the business, and references. These requirements are similar to that of a licensing regime, but are industry managed.

An alternative industry-led approach requiring that auctioneers must belong to an approved industry body similar to chartered professional engineers might be a more appropriate option. Only chartered professional engineers registered with the IPENZ under the Chartered Professional Engineers Act 2002 are able to hold themselves out as being chartered professional engineers. For auctioneers, the approach could be that only auctioneers who are members of an approved industry body could undertake auctions exempted from the Consumer Guarantees Act.

Under Part 3 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008, there is a process set out for how to approve dispute resolution service providers. A similar process for approving auctioneers' industry bodies could be established. Approval criteria could include that there are membership rules concerning the proper conduct of auctions, the holding of money earned from the sale of goods at auction in a separate trust account, fit and proper person criteria (perhaps similar to the criteria for negative licensing of financial service providers, secondhand dealers or pawnbrokers, or motor vehicle traders) and breaches of rules and codes of conduct.

Because of the small number of auctioneers in New Zealand, another consideration for approval of an auctioneers' industry body could be that it has a representative number of members or there is adequate coverage under other approved industry bodies.

An industry-led approach would need a legal basis, which could be included in a new Auctioneers Act, or in an enhanced Fair Trading Act. If included in the Fair Trading Act, a benefit could be additional enforcement by the Commerce Commission to support the approved industry body (or bodies). In particular, enforcement might be needed if someone holds themselves out to be an auctioneer when they are not a member of an approved body.

The industry-led approach would also need to require that an approved industry body maintain a publicly available register of members. The register could include member contact details and other useful information. A more formal register of this nature could be helpful to consumers and would

provide more information about auctioneers than is currently available. A public register of licence holders would also require a specific provision in legislation.

Auctioneers themselves would be expected to meet the costs of the approved industry body (or bodies) if regulation of the industry was to be industry-led. Any positive or negative licensing approach would also be required to be funded through licence fees. The self-regulating option with no external regulation would also need to be funded by the industry itself.

The views of auctioneers on whether they consider an industry-led approach would work for their industry are particularly sought, together with whether there are particular competencies or standards of conduct that should be required by the approved industry body if there was an industry-led licensing system. Other stakeholders will also have views on these issues. If industry-led regulation or self-regulation is not supported, any information to support the alternative approach of requiring more formal positive or negative licensing is also sought.

Rules for conducting auctions

The Auctioneers Act is silent on how auctions are to be run. The Auctioneers Act deals primarily with the licensing of auctioneers, and the various offences which exist in relation to auctioneers and auctions. In prescribing these things, a “sale by auction” is defined; however this is for the purposes of defining the coverage of the occupational regulation of auctioneers, rather than for the purposes of regulating the actual conduct of auctions.

As noted above, section 59 of the Sale of Goods Act (and the equivalent provision in relation to the sale of land, which is section 42 of the Property Law Act 2007) addresses some aspects of the actual conduct of auctions. The Sale of Goods Act provides for:

- each lot at an auction to be subject to a separate contract of sale
- the sale to be complete on the “fall of the hammer” or other customary manner, and bidders may retract their bids up to the sale being complete
- the seller can only bid where the right to bid is reserved by the seller
- the fact that there is a reserve or “upset” price must be notified.

Section 59 therefore covers the most likely abuses of the auction process. The provisions are designed to protect the sellers whose goods are being auctioned, and the purchaser. The section covers the completion of the sale and the bidders’ opportunity to withdraw their bids, and the requirement for the seller to disclose the fact that there is a reserve price, or that the seller may bid itself. The seller may also be vulnerable to bids being withdrawn after the sale is complete, or to manipulation of reserve prices.

The statutory implied warranties in the Sale of Goods Act apply to the sale of goods by auction. These include the warranties as to fitness for purpose and merchantable quality in section 16 of the Sale of Goods Act. The broadly similar guarantees under the Consumer Guarantees Act do not apply to goods sold by auction because section 41(3) of the Act excludes the supply of goods by auction or competitive tender from coverage.

The main practical difference is that suppliers cannot contract out of the statutory guarantees on sales to consumers under the Consumer Guarantees Act, while they can contract out of the implied warranties in the Sale of Goods Act. Consumers buying goods at auction typically buy the goods on the basis of the goods being sold with no representations and warranties. Accordingly, they are usually taking a greater risk on the suitability or quality of the goods being purchased than if they were buying

the goods directly from a supplier in trade. The onus is on the buyer to carefully inspect the goods being bid for, and theoretically the greater risk will be reflected in the auction price.

Even though auctions (and competitive tenders) are excluded from coverage under the Consumer Guarantees Act, they are still covered under the general unfair trading provisions in the Fair Trading Act. Any abuses of the auction process which are not already covered by section 59 of the Sale of Goods Act are likely to be a breach of the Fair Trading Act.

Any disputes between sellers, buyers or auctioneers following a sale by auction are also subject to the civil jurisdiction of the courts, and the standard doctrines of agency and contract law.

The specific rules in the United Kingdom Auctions (Bidding Agreements) Act 1969 (referred to above) that relate to the abuse of auction processes include:

- a dealer who agrees to give a gift or other consideration as an inducement for someone to abstain from bidding at a sale by auction, and a person who accepts such a gift or consideration, are punishable on summary conviction
- if someone is convicted under the above provision, the court may order that the person (or their representative) is not allowed, without the court's permission, for a period of either one or three years, to enter premises where goods for sale by auction are displayed, or to attend or participate in any way in a sale by auction
- the seller may avoid a contract where goods are purchased at auction by a person who entered into an agreement with others that they would abstain from bidding for the goods, and the purchaser or one of the other parties is a dealer, and
- where the purchaser has obtained possession of the goods under a contract that is avoided under the above provision and restitution is not made, the people who were party to the agreement to abstain from bidding are jointly and severally liable to make good the loss (if any) sustained by the seller.

Inducing potential bidders to abstain from bidding may be fraudulent, but it would probably not be caught as an unfair practice under the Fair Trading Act. We are not aware of any particular need for rules along the lines of those in the United Kingdom, but they are an option for New Zealand.

Questions

35. Which do you consider the most appropriate approach to licensing auctioneers, and why – positive licensing, negative licensing or an industry-led approach?

36. Are there any particular competencies or standards of conduct that should be required of auctioneers by an approved industry body under an industry-led approach or positive licensing?

37. Are the legal rules which apply to auctions (primarily under the Sale of Goods Act) appropriate, or should they be updated?

12. Consumer Guarantees

Introduction

Effective consumer laws help to create an environment in which consumers can transact with confidence. Transacting with confidence includes that consumers' reasonable expectations of transactions will be met and when a transaction goes wrong that consumers have ready access to appropriate redress.

The main consumer law dealing with redress is the Consumer Guarantees Act. The Act applies generally to all consumer transactions with suppliers in trade and sets out guarantees that goods and services must meet. A “consumer” under the Act is anyone who acquires goods or services ordinarily acquired for personal, domestic or household use or consumption, and not for resupply or use in production or manufacture by a business.⁶⁹

The broad approach under the Act has proved to be an effective means of providing consumers with confidence in the multitude of consumer transactions that occur.

The Act is self-enforcing. This means consumers must seek redress from a supplier or manufacturer directly to resolve their disputes. Where agreement cannot be reached between a consumer and supplier or manufacturer, the Disputes Tribunal may hear a claim from a consumer under the Act or if the dispute is about a motor vehicle, it may be taken to the Motor Vehicle Disputes Tribunal. A claim under the Act includes any time the supplier may have misled the consumer as to their rights under the Act.

As well, disputes about rights under the Consumer Guarantees Act may be taken to a trade association to which the supplier belongs, or any specific complaints body that might exist (for example, the Electricity and Gas Complaints Commission or the Banking Ombudsman). Consumers can also take matters to the District Court but because of the costs involved it is unusual for consumers to do this.

If a supplier attempts to contract out of the obligations imposed by the Act, they may be committing an offence under section 13(i) of the Fair Trading Act. For example, it is unlawful to have a sign in a shop that states that refunds are not available. An offending supplier can be prosecuted by the Commerce Commission under the Fair Trading Act.

History of the Consumer Guarantees Act

The Consumer Guarantees Act introduced into New Zealand a new regime of rights and remedies for consumers with respect to transactions involving the provision of goods and services to consumers. Prior to the Consumer Guarantees Act any rights of domestic consumers concerning the sale of goods came under the Sale of Goods Act and common law rules for services were contained in case law.

In the introductory speech made in Parliament on the Consumer Guarantees Bill, the then Minister of Consumer Affairs noted that the current law of implied conditions as to merchantable quality in the Sale of Goods Act was badly out of date, was drafted with commercial transactions in mind and was not understood and was inappropriate for modern consumer transactions. She noted also the common law rules for services were contained in case law which was inaccessible to both suppliers and consumers. The purpose of the new consumer guarantees law was clearly stated as promoting a fair and

⁶⁹ Businesses can be deemed “consumers” under the Consumer Guarantees Act when they buy goods or services “ordinarily acquired for personal, domestic or household use”, although suppliers can contract out of the guarantees in favour of business customers (section 43(2)). Suppliers cannot contract out of the guarantees to non-business consumers.

efficient market place, to enhance the ability of consumers to participate effectively in the market place and to promote fair and effective competition in the market place.

The Consumer Guarantees Act was passed as complementary legislation to the Fair Trading Act. The Fair Trading Act was described as providing for pre-sale representations and the Consumer Guarantees Act would provide for post-sale redress.

Ongoing relevance of the Consumer Guarantees Act

There is fairly good understanding of the Consumer Guarantees Act by consumers and suppliers. Many retailers display in their stores a sign produced by the Ministry of Consumer Affairs (and designed in association with the New Zealand Retailers Association and the Commerce Commission) about Consumer Guarantees Act rights and obligations.

The Ministry of Consumer Affairs provides training to Citizens Advice Bureaux, Community Law Centres and budget advice centres on the Consumer Guarantees Act. The Ministry also produces pamphlets for consumers and Word of Advice articles for publication in community newspapers on the Act. Consumer NZ regularly advises consumers about their rights under the Act as do consumer awareness television programmes such as Fair Go and Target. The Disputes Tribunal does not keep statistics of the cases it hears but advice from the Principal Referee and Community Law Centres and Consumer NZ reports indicate that cases involving the Consumer Guarantees Act are regularly taken to the Disputes Tribunal.

Many New Zealanders are very confident in enforcing their rights under the Consumer Guarantees Act. The National Consumer Survey 2009⁷⁰ found that when asked to name any of the legislation that sets out the rights of consumers, nearly 50% responded by naming the Consumer Guarantees Act. This is a very high recognition for a piece of legislation. Not only can it be named but the National Consumer Survey 2009 and the preceding National Consumer Survey 2005⁷¹ specifically tested consumers understanding of the Act. In response to a question regarding an item bought at sale price then found to be faulty, in 2009 84% of consumers correctly answered that the shopkeeper has to replace, refund or repair the item, and in 2005, 83% answered correctly. In response to a question about whether you have to pay for extra work done by a car mechanic who did not first obtain your agreement, in 2009 77% answered correctly that you did not have to pay (80% in 2005).

Less well understood was that if you buy goods and change your mind you do not have a right to return the goods with 45% answering this correctly in 2009 and 40% in 2005. The surveys also both show there is poor understanding of the warranties provisions in the Act with only 22% in 2009 (18% in 2005) of consumers correctly responding that if a fridge breaks down a month after a manufacturer's warranty has run out, the retailer still has to repair the fridge free of charge.

Since the Consumer Guarantees Act came into effect in 1994, there have been considerable telecommunications technological advances, for example, mobile phones and the internet, which have allowed for new means of transactions. The Consumer Guarantees Act was developed at a time when sales were conducted face to face or by some form of mail order. The advent of sales methods now commonly used such as email arrangements, website interfaces which allow for online "shopping baskets" and confirmation of bids and sales by mobile phone were not contemplated.

⁷⁰ National Consumer Survey 2009 – <http://www.consumeraffairs.govt.nz>.

⁷¹ National Consumer Survey on Awareness and Experience of Consumer Legislation – <http://www.consumeraffairs.govt.nz>.

Consumers are also advertised to quite differently than they were 15 years ago, and they can also pay for goods and services differently (including by instant funds transfers by banking facility and credit card).

Whilst the Act has proven remarkably robust as a consequence of strong underpinning principles, there are some areas of strain. One area of uncertainty is purchase by internet bidding or online auction (as conducted by Trade Me and similar providers) and whether the Consumer Guarantees Act should apply to such sales. A second area of concern is the sale of extended warranties, especially when such warranties provide no additional protections to consumers than the Consumer Guarantees Act.

Possible changes to the law to address these concerns are discussed below.

The overall robustness of the principles and underlying policy of the Consumer Guarantees Act is also demonstrated by Australia deciding to include in the Australian Consumer Law stage 2 proposals consumer guarantees provisions modelled on the Consumer Guarantees Act. This is an example of Australia looking to amend its law to harmonise with very effective consumer law in New Zealand. Its inclusion of consumer guarantees provisions in the Australian Consumer Law is supported by a detailed Regulatory Impact Assessment that recognises the success of New Zealand's Consumer Guarantee Act. In particular the success is evident by New Zealand consumers' awareness of their rights to have faulty goods repaired, replaced or a refund provided compared to very low knowledge of implied statutory warranties by Australian consumers.⁷²

Consumer guarantees in standalone law or as part of the Fair Trading Act

It would be possible to include as a separate part of the Fair Trading Act provisions on consumer guarantees rather than having a separate Consumer Guarantees Act. This would be consistent with the Australian Consumer Law stage 2 proposals that provide for broadly equivalent provisions to the Consumer Guarantees Act in the new national consumer law. The Fair Trading Act, however, provides for public enforcement of its provisions by the Commerce Commission whereas the Consumer Guarantees Act establishes rights for consumers to take self-enforcement action. Including in the Fair Trading Act self-enforcing consumer guarantee provisions may introduce an unnecessary complexity.

The Consumer Guarantees Act has always been a complement to the Fair Trading Act. The Fair Trading Act provides for pre-sale and point of sale representations. The Consumer Guarantees Act concerns post-sale redress if a transaction does not meet reasonable expectations. The different enforcement approaches of the Fair Trading Act and the Consumer Guarantees Act alongside the very good recognition and understanding of the Consumer Guarantees Act supports the continuation of the Consumer Guarantees Act as standalone legislation and is the preferred option.

In summary:

The Consumer Guarantees Act is an important part of New Zealand's consumer law providing consumers with tools to take enforcement action when a transaction does not meet expectations and promoting consumer confidence. It is very well recognised law and there is a fairly good understanding of its provisions.

The strong recognition of the Act and its provisions and its "brand awareness" are supportive of the Act continuing as standalone legislation. As well, the Fair Trading Act provides for public enforcement of its provisions by the Commerce Commission whereas the Consumer Guarantees Act establishes

⁷² The Australian Consumer Law, A national consumer guarantees law, Regulation Impact Statement, December 2009, OBPR Reference No. 10953, 30 November 2009

rights for consumers to take self-enforcement action.

The Consumer Guarantees Act is a type of principles-based law, although, as discussed at section 5 of this paper, it does not include a purpose statement. As a general observation, it is law that meets many of the objectives of this Consumer Law Review, although given technological changes that have changed the face of sales transactions, it is appropriate to consider some amendments to the Act to ensure it remains relevant and effective now and into the future.

Given the Australian Consumer Law stage 2 proposals to include consumer guarantees provisions modelled on the Consumer Guarantees Act, the Act also meets the objective of this Consumer Law Reform to achieve harmonisation with Australian law, as appropriate.

12.1 Possible areas for amendment in the Consumer Guarantees Act

12.1.1 Auctions and the application of the Consumer Guarantees Act

Under section 41(3) of the Consumer Guarantees Act, an item sold at auction or by competitive tender is exempted from the guarantees of acceptable quality, fitness for purpose, and the other guarantees under the Act.

Auctions are exempted because they are conducted on a buyer beware basis and on the understanding that there are no rights of redress after completion of the sale. A traditional auction is a method for determining the value of a commodity that has an undetermined or variable price, although in some cases, there is a minimum or reserve price; if the bidding does not reach the reserve, there is no sale.

Traditional auctions are run by an auctioneer with bidders attending in person or bidding by telephone. The auctioneer is inviting bids for property as the agent for the seller. The terms and conditions proposed by the auctioneer form the basis of the contract of sale. Common examples of auctions in New Zealand include auctions of real estate, motor vehicles, livestock, art, china and house lots of goods. The value of property sold by auction ranges from relatively small amounts to millions of dollars, and they include business to business transactions, as well as business to consumer and consumer to consumer transactions.

A traditional auction does not involve any negotiation between the buyer and seller. The onus is on the buyer to inspect the item prior to the auction to ascertain whether the item meets their needs.

This means of sale has a long history. It can be a useful way to shift goods in an efficient manner. The price can also be lower than the normal market rate for sales not by auction because the bidders are aware of the risks. Some secondhand products are not able to be sold with any guarantee as to their working order and how long they may last. By providing that auctions are not subject to future claims, vendors are able to confidently sell goods at lower prices than might otherwise be the case, safe in the knowledge that down the track there are no comebacks on the sold goods.

The Consumer Guarantees Act does not define auctions. As noted, sales by auction are defined, however, under section 2 of the Auctioneers Act as:

“the selling of property of any kind ... by outcry, by the auctioneer saying ‘I’ll take’ and commencing at a higher figure and going to a lower figure, by what is known as Dutch auction, knocking-down of hammer, candle, lot, parcel, instrument, machine, or any other mode whereby the highest, the lowest, or any bidder is the purchaser, or whereby the first person who claims the property submitted for sale at a certain price named by the person acting as auctioneer is the purchaser, or where there is a competition for the purchase of any property or any interest therein in any way commonly known and understood to be by way of auction; and shall be deemed to include the selling of any

property by outcry in any public place, as the same is defined in the Summary Offences Act 1981, or in any room, or mart, or place to which the public are admitted or have access, whether or not the sale of the goods has been advertised to take place.”

“Outcry” is also defined in section 2 of the Act as “any request ... made ... by means of signs, speech, or otherwise in the presence of not less than 6 people by any person for the purpose of selling any property offered or available for sale ...”.

Competitive tenders are also exempted from coverage under the Consumer Guarantees Act, but the Act does not define a competitive tender. There are no definitions of competitive tender in other legislation.

Online market places

Generally, an auction is the process of buying and selling things by offering them up for bid, taking bids, and then selling the item to the highest bidder. Modern auctions can be conducted with telephone and online participants as well as bidders who are physically present at the site of the auction.

In recent years the sale of goods and services through online market places such as Trade Me has become increasingly popular. Over 15,000 New Zealand businesses sell on Trade Me, and there are 2.5 million members in New Zealand. Over a million online trades are completed each month. There are also about 20 other online auction and market place providers operating in New Zealand.

There is a problem of clarity concerning whether the auction and competitive tender exception in the Consumer Guarantees Act is intended to cover internet bidding and online auctions as conducted by Trade Me and similar providers.

There are two common types of trading that typically occur in online market places. The first is where the seller offers goods for sale at a specified price, followed by subsequent acceptance by the buyer of that offer. Many New Zealanders refer to this as a “Buy Now/Confirm Purchase” transaction. The second form of transaction in online market places is what is commonly known as an “online auction” (referred to in this discussion as Trade Me style auctions, so named after the popular website). Businesses and consumers use online market places and Trade Me style auction sites to sell both secondhand goods and brand new articles.

There is debate as to whether online Trade Me style auctions are true auctions of the type intended to be exempted from the Consumer Guarantees Act because they do not meet the definition of auction in the Auctioneers Act. For instance people are not actually physically present for the online auction which is a key component of the “outcry” which is required under the definition of an auction in the Auctioneers Act. As noted, however, the Consumer Guarantees Act does not define auction by reference to the Auctioneers Act, so whether Trade Me style auctions are “auctions” for the purposes of the Consumer Guarantees Act is a grey area, open to interpretation.

The Trade Me style auction is also potentially covered by the exemption of competitive tenders under the Consumer Guarantees Act. It can be argued that an online Trade Me style auction meets the definition of a competitive tender, even if the transaction is not strictly an “auction” in terms of the Auctioneers Act.

There is an inconsistency in consumers using an online market place having the benefit of the guarantees in the Consumer Guarantees Act if they make the final purchase by way of the Buy Now/Confirm Purchase button.⁷³ A good may be offered for sale on the online market place by Trade

⁷³ And if they are buying goods or services for personal use, and they are buying from someone who is a trader (not a casual private seller).

Me style auction (and therefore the Consumer Guarantees Act does not apply on the basis that the good is being sold by auction or competitive tender) but if there are no bids and the same good is then offered and sold under the Buy Now/Confirm Purchase transaction method, the protections under the Consumer Guarantees Act then apply for the same good.

For consumers and suppliers, the fact that the Consumer Guarantees Act may or may not apply depending on the transaction method used to obtain the good is confusing, illogical and arbitrary.

The Trade Me style auction may be being used as an additional channel to market by traders who may or may not have a bricks and mortar outlet. The “auction” character of the market place may be a secondary feature of the channel to market, in which case the reasons for the Consumer Guarantees Act exemption for auctions would not apply.

When the Trade Me style auction is being used to sell goods more quickly, it can be likened more to offering a good at a negotiable sale or discounted price rather than a true auction where the rules are “buyer beware”. For goods purchased at a sale or discounted price the guarantees in the Consumer Guarantees Act apply.

The Trade Me style auction also typically does not provide for pre-inspection of the goods prior to sale. Again, this makes the online market place auction different from the traditional auction where the risk between the buyer and seller is in part mitigated by the buyer being able to inspect the item/good prior to the auction to ascertain whether the item meets their needs.

There would appear to be justification, accordingly, to clarify that Trade Me style auctions should not be exempted from the Consumer Guarantees Act. This might be achieved by: clarifying the definition of auction; requiring that auctions exempted from the Consumer Guarantees Act must be conducted by a licensed auctioneer or an auctioneer who belongs to an approved industry body (see section 11 regarding proposals for ongoing occupational regulation of auctioneers); and, requiring that traditional auctions conducted online must make it sufficiently clear they are being conducted on that basis otherwise the Consumer Guarantees Act applies. These approaches are now discussed.

Definition of auction

Desirably there should be one definition of auction that applies with respect to the occupational regulation of auctioneers and to the exemption of auctions under the Consumer Guarantees Act.⁷⁴

The Auctioneers Act definition of sale by auction needs updating. For example, it only applies to sale by auction where a minimum of 6 people are present (in other words are at the place of the auction). The modern day auction does not always meet this requirement. It is possible for people to participate in an auction over the internet with the use of web cameras and other communication technologies. Two people may be attending an auction in the presence of the auctioneer and five may be bidding via the internet. This situation does not meet the sale by auction requirement in the Auctioneers Act that the auction needs to be conducted in the presence of six people despite there being seven potential bidders.

⁷⁴ Any revised definition of an auction may also need to be reflected in section 42 of the Property Law Act, which deals with auctions of land and mirrors section 59 of the Sale of Goods Act.

A possible modern definition of auction could be:

“An auction is the public sale of goods or services of any kind (excluding land covered by section 42 of the Property Law Act) to the highest bidder where the auction has been conducted by a natural person. An auction includes the following features:

- *An auction commences when the person conducting the auction invites a first bid from members of the public participating in the auction.*
- *Bidders may bid in person, via telephone or through the internet or any other means where they can hear (at least) the auction being conducted.*
- *All auctions of goods are subject to the provisions in section 59 of the Sale of Goods Act 1908, namely:*
 - *Where goods are put up for sale by auction in lots, each lot is prima facie deemed to be the subject of a separate contract of sale.*
 - *A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner: until such announcement is made any bidder may retract their bid.*
 - *Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, the seller shall not bid themselves or employ any person to bid at such sale, nor shall the auctioneer knowingly take any bid from the seller or any such person. Any sale contravening this rule may be treated as fraudulent by the buyer.*
 - *A sale by auction may be notified to be subject to a reserved or upset price and a right to bid may also be reserved expressly by or on behalf of the seller.”*

Auctions that meet a definition written along these lines would be exempted under section 41(3) of the Consumer Guarantees Act. In other words, goods purchased at the auction would continue to be exempted from the statutory guarantees under the Act.

Trade Me style auctions, where there is only a computer program conducting the auction rather than a real time auction being conducted by an auctioneer (who is a natural person), would not be covered by the definition, so consumers buying from traders using this selling mode would have the benefit of the statutory guarantees under the Consumer Guarantees Act (assuming the seller is a trader, and the property being purchased is for personal use).

Auctioneer must be licensed or approved

As discussed in section 11, there are a number of possible approaches to the ongoing regulation of auctioneers. With either licensing or an industry-led approach (requiring auctioneers to be members of an approved body), there could be a tie-in to requiring auctions exempted from the Consumer Guarantees Act to be conducted by a licensed auctioneer or member of an approved auctioneers body.

There may need to be some clarification that the exemption would also apply for fundraising type auctions of the sort conducted by communities and charities involving low value and donated items.

Disclosure online that the sale is by traditional auction

Given the current use of auctions and the online environment, it can be difficult to make it clear on an online website what kind of auction the transaction actually is. If a legal distinction between a traditional auction carried out online and a Trade Me style auction was to be mandated, one option may

be to require that traditional auctions conducted online must meet certain defined requirements including that it must be sufficiently clear to participants in the auction that it is an auction being conducted on essentially a “buyer beware” basis.

One potential approach could be to require an acknowledgement from consumers participating in the online auction that they understand no Consumer Guarantees Act rights apply to their transactions prior to their entry into the online “bidding section” of the auction (this could be in the form of requiring a “I agree to these terms and conditions” tick-the-box type form to be completed).

Other requirements which could apply in distinguishing that it is a traditional auction could be that the auction will start at a certain time (having been advertised earlier), that pre-registration may be required for participation and that an auctioneer will be communicating in real time to the bidders through audio, or video or both. These elements would go some way to reducing the potential for consumer confusion as to what kind of auction they are participating in.

Competitive tender

Online auctions may potentially also fall within the exemption for “competitive tenders” under section 41(3) of the Consumer Guarantees Act. Two options to address this are to no longer include an exemption for competitive tenders from the application of the Consumer Guarantees Act or to define competitive tender as follows:

“A competitive tender for consumer goods must be conducted by a natural person and cannot use an online trading mechanism.”

Questions

38. If there is a valid distinction between a traditional auction conducted online and a Trade Me style auction, should purchasers from Trade Me style auctions have the benefit of the guarantees under the Consumer Guarantees Act?
39. What are your views on the suggested ways to clearly identify auctions exempted from the Consumer Guarantees Act (a new definition of auction; that auctions must be conducted by a licensed or approved auctioneer; that online auctions must meet certain requirements)?

12.1.2 Issue: Extended warranties

What is an extended warranty?

An extended warranty is a prolonged warranty offered to consumers to protect their purchase of a consumer good.

The warranty normally relates to the reliability of a good used under conditions of ordinary consumer use. It covers problems that may arise some point after the date of purchase. Should the good prove defective or malfunction within a certain time after the purchase, the person extending the warranty is liable to provide the customer with a replacement of the good, repair it, or refund the purchase money (not a common practice). Such warranties usually do not cover "Acts of God", damage caused by the purchaser, or commercial use.

In New Zealand such warranties are typically related to electronic items. The extended warranty may be offered by the retailer or the manufacturer or a “warranty administrator” (i.e. a third party). Extended warranties are sometimes known as extended guarantees.

Extended warranties are an additional cost on the price of the good being purchased. Warranties are generally sold for a fixed price but can be for a percentage of the item's retail price. As an incentive to sell extended warranties, store retailers can be paid commission on each sale.

What is the issue?

The National Consumer Survey 2009⁷⁵ found that only one third of New Zealanders know that extended warranties generally do not provide more protection than provided by the law. This highlights a large degree of misunderstanding about these warranties. Many consumers are likely to be purchasing extended warranties without realising that they probably already have protections under the Consumer Guarantees Act and may therefore have spent their money unnecessarily.

There are warranties that do offer benefits beyond the Consumer Guarantees Act. For example, they might provide for an on site repair service, or they might cover some forms of fair wear and tear. There is no problem with this kind of benefit being offered to the consumer and they can be useful products. It is also possible that some consumers have difficulty exerting their Consumer Guarantees Act rights with a retailer but feel more comfortable in making a claim under an extended warranty where they feel they are much more likely to get the desired outcome.

However, many of the rights typically offered by an extended warranty are currently already provided for in the Consumer Guarantees Act (repair, replace or refund). The consumer may be no better off by purchasing an extended warranty. In such cases, retailers are effectively extracting an economic rent from consumers by relying on consumers being unaware of, or having insufficient confidence in, their rights under the Consumer Guarantees Act.

Some extended warranties that are purchased for multiple years state that during the first year after a sale, the consumer must deal with the manufacturer where there is a malfunction. This effectively means that what was promoted as a 5-year extended warranty is actually only a 4-year guarantee.

Other issues with warranties include the expiry of the warranty once a claim is made. For instance a 5-year warranty may have a clause saying the warranty expires if the provider repairs or replaces a good covered by the warranty. If such an event happens in the first year the consumer effectively misses out on 4 years worth of warranty. While this will usually be stated somewhere within the warranty, the consumer will normally presume a 5-year warranty means 5 years of coverage. This situation is potentially compounded further if the repair does not work properly or the replacement item also develops a fault.

In 2005, the United Kingdom introduced the *Extended Warranties on Domestic Electrical Goods Order 2005* under its Fair Trading Act. The Order was made following an investigation by the United Kingdom Competition Commission which concluded there was a “complex monopoly situation” in the extended warranties market that was not in the consumer interest. The Commission reached this finding on the basis of the following points:

- almost all extended warranties are bought at the point of sale. Few consumers consider extended warranties before their purchase, and have little opportunity to consider alternatives in the shop
- extended warranties on offer at the point of sale are nearly always from one provider, usually the retailer
- there is generally no information available on the reliability of electrical goods or the likely repair costs

⁷⁵ National Consumer Survey 2009 – <http://www.consumeraffairs.govt.nz>.

- There is generally no information available at the point of sale on the prices, terms or conditions of extended warranties from alternative providers.⁷⁶

It was considered these points allowed profits earned by retailers on extended warranties to be substantially in excess of what should have been expected. Accordingly, the decision was taken to introduce regulation of extended warranties.

The Extended Warranties on Domestic Electrical Goods Order 2005 places obligations on retailers to:

- show the price of the extended warranty alongside electrical goods, in store and in their printed advertising material (including websites)
- provide consumers with information about their statutory rights, cancellation rights and details of the warranty, including whether or not the warranty provides financial protection in the event of insolvency and terminates if a claim is made
- give consumers 45 days to cancel the extended warranty, including providing a written reminder of this right and the right to cancel at any time and receive a refund from the retailer, and
- offer to any consumers, who do not wish to purchase a warranty immediately, quotations stating that the extended warranty remains available on the same terms for 30 days if the consumer chooses not to buy it at that time. Any discounts tied to the purchase of the extended warranty would also be available for 30 days.

The United Kingdom Office of Fair Trading undertook a review of the Order in 2008. It found the Order had encouraged positive impacts on consumer decision-making. The review found there was a rise in the number of consumers who shopped around for extended warranties. It also found that the number of consumers purchasing extended warranties at the point of sale fell from 82 percent to 68 percent. It was noted that 4 percent of consumers used the cooling-off period.⁷⁷

The United States has warranty law under the Magnuson Moss Warranty Act 1972. This Act requires retailers providing warranties to disclose the terms and conditions of the warranty offered in simple and readily understood language. This includes information such as the length of the warranty, what elements of the product are covered (e.g. parts or accessories), a description of any legal remedies available to the consumer, and what the warranty provider will do if a defect or problem occurs.

The circumstances which promoted the introduction of the Extended Warranties and Domestic Electrical Goods Order 2005 in the United Kingdom would appear to be similar to those that are occurring in New Zealand. New Zealand consumers are entering into extended warranty contracts. This is either due to ignorance (National Consumer Survey 2009, two in three consumers believe an extended warranty gives more protection than the Consumer Guarantees Act), or because the retailer is actively promoting the extended warranty. The latter is backed up by a Consumer NZ mystery shopper exercise. Conducted in October 2007 at the premises of three major retailers, it found there was strong emphasis on selling extended warranties, confusing or misleading sales patter and a distinct lack of knowledge of the Consumer Guarantees Act and its proper application to retail situations.

A retailer omitting to inform the consumer that they already have consumer protection rights available to them under the Consumer Guarantees Act and then attempting to “sell” those rights to the consumer may be deliberately misleading the consumer (which could be a breach of the Fair Trading Act).

⁷⁶ <http://www.berr.gov.uk/whatwedo/consumers/fact-sheets/page38190.html>.

⁷⁷ http://www.offt.gov.uk/shared_offt/reports/Evaluating-OFTs-work/oft1024.pdf.

Options to address issues associated with extended warranties

The following are possible approaches to addressing the problems associated with extended warranties:

A. Disclosure to the consumer

Providing information to consumers about the details of an extended warranty provides them with the opportunity to make an informed decision about the purchase of the warranty. Additionally, requiring the publication of information about the warranty may improve competition in the marketing of both goods and extended warranties.

B. Disclosure in advertising – price and rights

The Warranties on Domestic Electrical Goods Order 2005 in the United Kingdom requires retailers to display the cost of an extended warranty in both advertising and on the item being sold. This information must also be included in any website that the retailer administers which is related to the good being sold.

An approach could be to include similar requirements, as well as reference to the statutory rights under the Consumer Guarantees Act.

The benefit of such an approach is that a consumer is provided information about the extended warranty before they become emotionally committed to the purchase of the good. If the information highlights to the consumer the extended warranty only affords them limited benefits, they may be less likely to buy an extended warranty when they do decide to purchase the good.

There is also the question of whether there should be any punishment or detriment for the retailer if it does not comply with the disclosure requirements. Given the Fair Trading Act is the legislation which deals with trader behaviour and also may govern disclosure of information to consumers (and the Consumer Guarantees Act is self-enforcing), it would appear that it may be most appropriate to amend the Fair Trading Act to provide for the enforcement of any extended warranty law. (This would mean enforcement by the Commerce Commission, although consumers and other private parties can also make claims under the Act.)

C. Cooling-off period

Another possibility could be to provide the consumer with the right to “cool-off” and obtain a refund of the money paid for an extended warranty. Giving consumers a cooling-off period which allows them to cancel the purchase of an extended warranty is a means of remedying the situation where a consumer has purchased the warranty without the knowledge of the existence Consumer Guarantees Act rights to only then discover those rights are the same they just purchased.

A cooling-off period also allows the consumer time to recover from any “pressure selling” that may have occurred regarding the extended warranty.

The effectiveness of this approach would depend on consumers being aware there is a cooling-off period, suggesting there would need to be disclosure of its existence in the information provided by the retailer with the extended warranty.

A cooling-off period would be similar in nature to the cooling-off period under the Door to Door Sales Act 1967 and the Credit Contracts and Consumer Finance Act 2003.

When an extended warranty is cancelled under a cooling-off period, the consumer could be entitled to a full refund of the cost of the warranty.

For clarity, the consumer should be unable to cancel the purchase of a good in addition to the cancellation of the extended warranty under the cooling-off period (unless other reasons under the Consumer Guarantees Act allow for the cancellation of the purchase).

D. Right to buy the extended warranty at a later date

A reverse of the cooling-off period is the option to extend the timeframe in which a consumer may purchase an extended warranty for the good they purchased. For example, if a consumer purchases a television on Monday, they could go back to the retailer before the following Tuesday to purchase an extended warranty related to the television.

The reasoning is that the consumer then has seven days to consider if they wish the television to be covered by an extended warranty with the benefit of having had the opportunity to read the required disclosure about their consumer rights (as proposed above) and any additional benefits the warranty may offer. This would allow the consumer to make a more informed decision as to whether they need the warranty, rather than by having to “take it all in” at the point of sale.

Questions

40. What are your views on specific regulation of extended warranties?
41. What are your views on requiring greater disclosure of information to consumers on extended warranties?
42. What are your views on requiring a “cooling-off” period for cancelling an extended warranty?
43. What are your views on providing an “opt-in” period for buying an extended warranty?
44. Should any law regulating extended warranties be enforced by the Commerce Commission under the Fair Trading Act, and for what reasons?

12.1.3 Issue: Bonds to assess faulty goods

The Ministry of Consumer Affairs has received numerous complaints from consumers and consumer agencies about whether suppliers have a right to require consumers to pay bonds before assessing faulty goods for repair. In particular, these complaints are commonly about faulty mobile phones and other portable electronic equipment.

Typically, consumers are seeking a repair for a faulty item which they consider should be covered by the Consumer Guarantees Act, and the retailer requires the consumer to pay a bond for the good to be sent away for assessment. If the assessment establishes that the good’s fault is covered under the Consumer Guarantees Act or a warranty, the consumer receives the bond back. If the fault with the good is not covered, the consumer will not receive the bond back and will be given the option to pay for the repairs or to retrieve the good.

Under the Consumer Guarantees Act, a remedy must be given if the product does not comply with the guarantees. Consumers need only prove to a civil standard (the balance of probabilities) that a retailer has breached a guarantee under the Consumer Guarantees Act, before they are entitled to a remedy.

The problem is that some suppliers are not accepting responsibility for any faults particularly with mobile phones unless the phones are first sent away for assessment. This forces the consumer to bear the initial burden of the assessment through the supplier’s requirement of a bond. Of particular concern is when a bond is sought for an obvious fault with the good. Examples include: a brand new mobile phone’s key number falling off on the second day of use, yet the mobile phone provider insisted

on a bond for assessment; a new phone and the phone would not turn on; a new phone and the battery would not recharge. In these cases, the standard repair, replace or refund remedies should be immediately available without necessarily requiring an assessment to be made as a standard practice.

The bond is effectively creating a barrier to consumers who are trying to access and exercise their normal consumer rights under the Consumer Guarantees Act. It effectively means that consumers who cannot afford to pay the bond or are not willing to risk the possibility that the bond will be retained by the supplier, are prevented from accessing the remedies under the Consumer Guarantees Act

The reverse argument from the retailer is that consumers misuse their products or do not follow directions properly, so any faults developed are not necessarily covered by the Consumer Guarantees Act. The suppliers claim they can only determine where the fault lies by making the off site assessment and this costs them money so the bond is a way of covering that cost.

It is a point of annoyance for many consumers that suppliers do not disclose the requirement for a bond for assessment at the point of sale, or advise consumers they may independently verify whether faults are covered by the Consumer Guarantees Act.

Suppliers may also require consumers to sign repair policy statements which make no mention of the Consumer Guarantees Act and also attempt to avoid liability for consequential loss resulting from repairs, e.g. loss of pictures, games, downloads, phone numbers.

Informing the consumer about the repair assessment bond from the outset

The Consumer Guarantees Act is silent on whether bonds may be charged for the purpose of assessing faults. As such, some suppliers appear to have taken this to mean the practice is permitted. In Canada, there is very similar legislation to the Consumer Guarantees Act. This provides that the only way a supplier can claim compensation for costs spent in a false claim is if there is a term in a written agreement, and that term is restricted to paying the reasonable costs of the supplier in dismantling goods, and that term is brought to the consumer's attention before signing the agreement.⁷⁸

There may be merits in providing a similar provision in the Consumer Guarantees Act. This approach balances the tension between the problem suppliers face of people “trying claims on” when they have caused the problem themselves (thus causing the supplier additional costs), and the genuine complaints made by consumers.

If the consumer has a chance to note specifically that an assessment fee is liable to be charged, they can make an informed purchase decision.

The risk of allowing such an option is that suppliers may introduce this kind of clause as a default component of any contract they use. This effectively means the same problems from the consumer perspective will continue to exist, except that the consumer would have the opportunity to consider making the purchase with the knowledge of this clause (provided it was brought to their attention).

Limiting the amount of any bond to the reasonable costs of the supplier in dismantling the goods would potentially keep high bonds from being charged as a means of reducing claims from consumers.

Questions

45. What are your views on the Consumer Guarantees Act providing that a requirement for any bond for assessment of a faulty good must be disclosed to the consumer in writing before the good is purchased?

⁷⁸ The use of the word “false” in relation to consumer claims in this context does not necessarily imply dishonesty on the behalf of the consumer.

12.1.4 Supplier is unresponsive or does not heed consumer requests

A situation that consumers occasionally find themselves in is that when the consumer has problems with goods or services and contacts the supplier or manufacturer, they are given the impression that the supplier or manufacturer is not prepared to do anything. The consumer may need the goods urgently (e.g. a car for work) and so gets the goods repaired elsewhere at their own cost.

Where the failure can be remedied (i.e. a minor fault) the consumer can require the supplier to remedy the failure under section 18(2). Where a supplier *refuses* or neglects to do so, a consumer can have the failure remedied elsewhere and claim the cost from the supplier. The consumer can also reject the goods. However the supplier must first be given the opportunity to remedy the minor fault.

There is a thin line between a supplier categorically refusing to provide a remedy (which a consumer can then act upon under section 18), and a supplier through their conduct towards the consumer giving the impression that they are not prepared to do anything but falling short of refusing to provide a remedy. The same issue applies equally to manufacturers under section 27(2), and to suppliers of services under section 32(a).

A solution could be to define “refuses” to mean actual refusal (i.e. by letter, in person, telephone call etc) as well as refusal by other conduct which does not explicitly convey a refusal (i.e. impression given, inferences made, non-acknowledgement of consumer).

This amendment could best be used at a Disputes Tribunal hearing where the actions of the supplier or manufacturer could demonstrate the refusal. Broadening the definition of refusal would make it easier to demonstrate that the supplier had refused to remedy a failure, and counter any arguments that “they were doing their best” when in reality were stalling in the hope the consumer would give up seeking redress.

Questions

46. Is it appropriate that "refusing" to remedy a failure under the Consumer Guarantees Act also includes “refusal by words or conduct”, and for what reasons?

12.1.5 Rejection of goods under the Consumer Guarantees Act and collateral credit agreements

A consumer who has purchased goods on credit may have the right to cancel the purchase under the Consumer Guarantees Act, but the consumer will remain liable to pay the price of the goods under the credit agreement.

This situation is dealt with under the Motor Vehicle Sales Act 2003 (MVSA). Section 89(2) provides that a Disputes Tribunal may order the rights and obligations of the buyer of a motor vehicle under a collateral credit agreement (meaning one that is procured by the dealer) vest in a motor vehicle trader if:

- a. the credit agreement is associated with the contract for the sale of that motor vehicle; and
- b. the motor vehicle trader is a party to that contract for sale; and
- c. either:
 - i. the buyer exercises the right to reject the motor vehicle under the Consumer Guarantees Act and the Disputes Tribunal orders a refund be paid; or

- ii. the Disputes Tribunal declares the whole or any part of the contract for sale to be void under section 43(1) of the Fair Trading Act on the basis that the buyer has (or is likely to) suffer loss or damage because of the dealer's misconduct.

There is no equivalent section under the Consumer Guarantees Act. This concept was only thought of at the time of the MVSA introduction which came 10 years after the Consumer Guarantees Act was first introduced.

The lack of an equivalent section in the Consumer Guarantees Act can potentially leave consumers in a difficult position. In instances where they have cancelled the sale and purchase agreement and returned the goods due to a serious fault or where they have been subject to a misrepresentation or practice covered by the Fair Trading Act, they will normally still be liable under the collateral credit agreement (as it is a contractual relationship with a third party). The consumer is potentially able to pay the debt by using the refund of the purchase price of the good. If the money is *not* refunded by the supplier of the goods the consumer is still liable to effectively pay for the goods which have been returned to the supplier. In some cases, this exposure has caused real detriment to consumers.

For example:

A furniture store in Christchurch and Wellington went into liquidation in late 2007. Some consumers had returned furniture under the Consumer Guarantees Act and were told the money would be refunded to the finance company, but it was not. The finance company held these consumers to the contract even though they had returned the furniture. They would have ended up paying for furniture they did not receive, had the finance company not eventually organised replacement furniture from another store.

When a company selling educational software door to door, went into liquidation, it refused to refund money to consumers when they rejected goods under the Consumer Guarantees Act. A finance company then pursued the consumers for the debt, even though the goods were no longer in their possession.

If a provision similar to that in the MVSA was provided for in the Consumer Guarantees Act, in situations where the supplier has not provided the appropriate remedy such as refunding the purchase price (thus allowing the consumer to pay back the finance company), the consumer would be able to take a claim to the Disputes Tribunal. They could seek an order that the supplier be vested with the rights and obligations that the consumer has under the collateral credit agreement.

Effectively this would create an incentive for the supplier to promptly provide repayment when a good has been rejected under the Consumer Guarantees Act. It would also create an incentive for suppliers to properly meet their obligations under the Consumer Guarantees Act, and to not engage in misleading or deceptive behaviour under the Fair Trading Act.

It should be noted that if the trader is in liquidation (like under the above examples), the consumer would be released from their obligation under the credit agreement, and there would be little chance of payment to the finance company by the supplier.

Question

47. What are your views on including the equivalent to section 89(2) of the Motor Vehicle Sales Act in the Consumer Guarantees Act for situations when goods are rejected and there is a collateral credit agreement?

12.1.6 Application to electricity

In 2003, the Consumer Guarantees Act was amended to clarify that it applies to the supply of electricity, gas, telecommunications or water or the removal of waste water. As a result of some continued uncertainty by electricity retailers about their potential liabilities to consumers under the Act, the major retailers took a High Court case against the Electricity and Gas Complaints Commission's interpretation of the Act.

The resulting judgment by the High Court⁷⁹ concluded that electricity retailers may be liable to consumers for breaches of the guarantee of acceptable quality for electricity. This judgment is clear for consumers and accords with the objective of the Consumer Guarantees Act that consumers should be able to seek redress from the retailer, in most instances.

However, electricity retailers are concerned that effectively they could be liable for distribution faults and distribution network defects over which they do not have direct control. Several have raised their concerns in submissions on the Electricity Industry Bill. It is understood by the retailers that the Consumer Guarantees Act works on the basis that retailers would negotiate with their suppliers (electricity lines companies and Transpower) to define the expected quality of electricity supply that they on-sell. However, because electricity lines businesses are monopoly providers of services in situations involving the supply of electricity to domestic consumers, the retailers note that there is no incentive for electricity lines businesses to agree on a fair and efficient allocation of risk, resulting in all of the risk inappropriately resting with the retailer.

Some retailers proposed in their submissions on the Bill that the proposed new Electricity Industry Code include a mandatory requirement for distributors' use-of-system agreements to indemnify retailers for losses incurred under the Consumer Guarantees Act for breaches of acceptable quality caused by faults in the network.

Such a contractual requirement would assist retailers to engage with consumers when they have issues related to the supply of electricity yet not to have sole responsibility for the redress. Consumers would still only have to seek redress through a retailer and not another entity with whom they do not have a contractual relationship.

Some retailers in their submissions alternatively suggested that consideration is given to amending the Consumer Guarantees Act to reflect that consumers only need to deal with their retailer when they have supply issues, but that both an electricity retailer and a lines company would be liable for the quality guarantees set out in the Act, including the guarantee of acceptable quality.

There has not been any analysis of the second possible option as it has been raised late in the Consumer Law reform review process. Views on this option, its implications and how it could work are invited and there will be fuller consideration given in the next stage of the review.

Question

48. What are your views on amending the Consumer Guarantees Act to provide that both an electricity retailer and a lines company would be liable for the quality guarantees set out in the Act?

⁷⁹ *Contact Energy & Ors v EGCC* HC WN CIV 2007-485-2761

13. Enforcement

Introduction

The first objective of the Consumer Law Reform review is:

- To have in place principles-based consumer law that:
 - enables consumers to transact with confidence;
 - protects reputable suppliers and consumers from inappropriate market conduct;
 - is up to date and relevant now and into the future;
 - is easily accessible to those who are affected by it;
 - is in line with international best practice, as appropriate; and
 - is effective and enforceable.

Importantly, in order to achieve the outcomes of effective law that enables consumers to transact with confidence and that protects reputable suppliers and consumers from inappropriate market conduct, the law needs to be both enforceable and enforced. Accordingly, it is important that there are appropriate enforcement provisions in place

Consumer laws in New Zealand are either “self-enforcing” in the sense that they create legal rights enforceable by consumers, or they are enforced by government agencies carrying out investigation and prosecution functions. The self-enforcing laws include the Consumer Guarantees Act, Layby Sales Act, Door to Door Sales Act and parts of the Fair Trading Act. The remedies available to individuals or other private parties generally provide for breaches to be stopped, or for damages or losses to be compensated. These types of remedies are available through the courts (including the Disputes Tribunal) in their civil jurisdiction.

The Commerce Commission is the primary government enforcement agency for consumer law, especially under the Fair Trading Act. The Ministry of Consumer Affairs Measurement and Product Safety Service also has an enforcement role. Public enforcement involves punitive sanctions (fines) where there is a perceived public harm or an offence, rather than individual “private” harms. There is usually some moral wrongdoing underpinning offences enforceable by regulators under consumer laws, and enforcement is technically through the courts’ criminal jurisdiction.

The Commerce Commission has a well-established reputation as an enforcement agency and a quick look at its website indicates that it regularly takes prosecutions, obtains settlement agreements or gives warnings for breaches and possible breaches, in particular, of the Fair Trading Act but also other consumer law. Both the Commerce Commission and the Ministry of Consumer Affairs actively monitor compliance with consumer legislation and work with industry, for example, by providing guidelines and through audit checks of weights and measures accredited persons.

In 2005-2006, the Ministry of Consumer Affairs initiated work reviewing the effectiveness of the enforcement and redress provisions in the Fair Trading Act. *An Initial Think Piece* review was published by the Ministry in July 2005, and an *International Comparison Discussion Paper* was published in May

2006.⁸⁰ The latter paper identified some additional enforcement powers under the Fair Trading Act that could allow for more effective enforcement of the Act by the Commerce Commission. As a result of this initial work two additional provisions are proposed for the Fair Trading Act: court enforceable undertakings and banning orders. These are discussed below.

13.1 Possible additional enforcement provisions

13.1.1 Court enforceable undertakings

The Commerce Commission uses settlement agreements when a person in trade voluntarily admits that they have breached the Fair Trading Act and gives an undertaking to amend its behaviour. Settlement agreements provide an alternative to litigation and have a number of benefits for businesses in that they are more efficient and avoid the associated expense of court proceedings. They can also significantly speed up the process of obtaining compensation for the victims of the breach.

At present, settlement agreements can be problematic for the Commission if a business chooses to disregard the settlement agreement at a later time. The Commission cannot enforce the settlement agreement as it is not an affected party (this would be the affected consumers). The Commission's only option is to take further court action based on the original cause of action, which is time-consuming and expensive. This may fall outside the specified time period set out in section 40(3) of the Fair Trading Act, currently set at 3 years, or in the Limitation Act 1950 for civil proceedings.⁸¹

If the Fair Trading Act had formal provision for undertakings with the Commerce Commission that are enforceable, it would mean that if a business chooses to disregard the undertaking, they will be in breach of the undertaking (not the original cause of action) and this breach can be taken to court by the Commission. Such a provision would make their settlement procedure more transparent and flexible and would incentivise the Commission to use undertakings in preference to prosecution.

The Australian Trade Practices Act (and proposed Australian Consumer Law) has a court enforceable undertakings provision. We understand that the Australian Competition and Consumer Commission uses undertakings in preference to taking court action.

13.1.2 Banning orders

Banning orders are where an individual is restricted from holding a particular position or undertaking particular activities. The objective of banning orders is to protect the public from repeat behaviour by the individual in similar circumstances. There are serious personal consequences to banning orders as they can seriously affect a person's future earning potential. Any decision to use them should not apply lightly.

New Zealand has undertaken several prosecutions of recidivist traders. They were fined for breaches of the Fair Trading Act, but the fines represented a fraction of the profit earned from their scams and acted as no deterrent to subsequent trading activities. In other legislation, repeat offenders may be dealt with by imposing a ban on them undertaking certain activities.

⁸⁰ Ministry of Consumer Affairs, *Review of the Enforcement of Consumer Protection Law: An Initial Think Piece* (July 2005) and *Review of the Redress and Enforcement Provisions of Consumer Protection Law: International Comparison Discussion Paper* (May 2006) – <http://www.consumeraffairs.govt.nz>.

⁸¹ The Limitation Bill, which will replace the Limitation Act 1950, is due to be reported back from the Justice and Electoral Committee in May 2010. The aim of this Bill is to encourage claimants to make claims without undue delay, and protect defendants from the unjust pursuit of stale claims.

It is proposed that the Fair Trading Act include banning orders as part of the offence and penalty provisions. This means that, if convicted, a judge could ban a person from involvement in particular activities.

Question

49. What are your views on including in the Fair Trading Act provisions for court enforceable undertakings?

50. What are your views on including enforcement orders in the Fair Trading Act for the banning of recidivist traders from certain activities?

14. What the Review Might Deliver

The second objective of the Consumer Law Reform review is:

- To achieve simplification and consolidation of the existing law.

Throughout the discussion document there has been consideration of how to meet this objective and whether standalone legislation is still needed to deliver particular consumer and business protections or whether the protections could be included in an enhanced Fair Trading Act.

Initial thinking is that there are three possible consumer law outcomes following consideration of the issues and questions addressed in the review. These are summarised below. The status quo is not considered an option that will meet the objectives of this review.

Option 1: An enhanced Fair Trading Act complemented by the Consumer Guarantees Act and the Weights and Measures Act as standalone laws

An enhanced Fair Trading Act could incorporate provisions as considered appropriate from the Door to Door Sales Act, the Layby Sales Act, the Unsolicited Goods and Services Act and new provisions to ensure this legislation is relevant and up to date with modern transactions and best practice consumer law.

The Consumer Guarantees Act and the Weights and Measures Act would continue to complement the Fair Trading Act. One reason for keeping the Fair Trading Act and the Consumer Guarantees Act as separate laws is that the Fair Trading Act provides for public enforcement of its provisions by the Commerce Commission whereas the Consumer Guarantees Act establishes rights for consumers to take self-enforcement action. Another reason is that both pieces of law have very good recognition. The major survey of consumer awareness undertaken in 2009⁸² indicated that nearly half of New Zealanders could name the Consumer Guarantees Act and about one quarter the Fair Trading Act. There is also very good understanding of the rights consumers have under the Consumer Guarantees Act for faulty goods to be repaired or replaced by the retailer, or for retailers to provide a refund to the consumer.

The Weights and Measures Act is a very important law for defining consumer outcomes, but it is specialist business legislation. There is a trade off between having a lesser number of statutes and ease of access for business wanting to find relevant law. Weights and measures law internationally tends to stand alone. For example, in Australia, they have the National Measurement Act 1960, the United Kingdom has the Weights and Measures Act 1985 and Canada has the Weights and Measures Act.

In the overall consumer law portfolio, these three pieces of law would then be complemented by the Credit Contracts and Consumer Finance Act 2003 (CCCFA) and the Motor Vehicle Sales Act 2003 (MVSA), which are sector specific pieces of law. Both are principles-based and recent law. The MVSA was recently reviewed and the CCCFA is currently being reviewed. It is being proposed that the CCCFA will be amended to incorporate the Credit (Repossession) Act 1997.

⁸² National Consumer Survey 2009 – <http://www.consumeraffairs.govt.nz>.

Option 2: An enhanced Fair Trading Act incorporating as a separate part the Weights and Measures Act and complemented by the Consumer Guarantees Act

The second possible outcome is that an enhanced Fair Trading Act could incorporate provisions from the Door to Door Sales Act, the Layby Sales Act, the Unsolicited Goods and Services Act and new provisions as considered appropriate to ensure this legislation is relevant and up to date with modern transactions and best practice consumer law as referred to in option 1. The Fair Trading Act could also include as a separate part those matters covered by the Weights and Measures Act.

The Weights and Measures Act essentially concerns specific representations as to the weight or measure of a good. Similar to the Fair Trading Act, it is legislation that concerns the regulation of the conduct of businesses in order to achieve good outcomes for consumers and to protect honest businesses from unscrupulous business practices.

Option 3: An enhanced Fair Trading Act incorporating as separate parts the Consumer Guarantees Act and complemented by the Weights and Measures Act

The third option is an enhanced Fair Trading Act, incorporating provisions as considered appropriate from the Door to Door Sales Act, the Layby Sales Act, the Unsolicited Goods and Services Act and new provisions to ensure this legislation is relevant and up to date with modern transactions and best practice consumer law. The Fair Trading Act could also include as a separate part those matters covered by the Consumer Guarantees Act.

The Australian Consumer Law proposes to include within its scope broadly equivalent provisions to the Consumer Guarantees Act. Australia, however, has separate legislation for regulating the use of weights and measures. This option for enhancing the Fair Trading Act would therefore be closest to the Australian Consumer Law in its proposed final form.

Questions

51. What are your views on a single, enhanced Fair Trading Act that also incorporates the Consumer Guarantees Act and/or the Weights and Measures Act?
52. What are your views on continuing to have a separate Consumer Guarantees Act and/or a Weights and Measures Act?

15. Full List of Discussion Document Questions

Principles and Purpose Statement for Consumer Laws

1. What are your views on including purpose statements in the Fair Trading Act, the Consumer Guarantees Act, and the Weights and Measures Act along the following lines:
 - Fair Trading Act – *"To promote consumer wellbeing by fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly and in good faith."*
 - Consumer Guarantees Act – *"To promote consumer wellbeing in markets by:
 - a) defining rights that give consumers confidence that their reasonable expectations about a good or service provided by a supplier or manufacturer will be met, including expectations about the good or service's performance, quality, purpose, or safety.
 - b) defining rights for consumers to seek redress from a supplier or manufacturer where those reasonable expectations have not been met."*
 - Weights and Measures Act – *"To promote consumer and business confidence and effective market competition through ensuring goods are exchanged using accurate measurement, and regulating measuring instruments in use for trade."*
2. Are there other principles or objectives you think should be referred to in the consumer law(s)?
3. Should any purpose statement in the Fair Trading Act include a reference to consumers and suppliers trading in good faith, and for what reasons?

Unfair Practices: Unfair Contract Terms

4. Do you support including unfair contract terms provisions in the Fair Trading Act along the lines of the Australian Consumer Law, and for what reasons?
5. Is it appropriate to include a "good faith" element in the definition of an unfair contract term (like the United Kingdom and Victorian legislation, and the Productivity Commission recommendation), or is the approach used in the Australian Consumer Law preferable?
6. Do you think the approach used in the Australian Consumer Law of providing examples of unfair contract terms would be appropriate for New Zealand law?

Unfair Practices: Unsubstantiated Claims

7. Should there be a general prohibition on unsubstantiated claims under the Fair Trading Act, and for what reasons?
8. Should any general prohibition on unsubstantiated claims (or any other preferred approach) be enforceable by the Commerce Commission and/or privately under the Fair Trading Act?

Door to Door and Other Direct Selling

9. What direct selling (door to door sales, telemarketing, other defined direct selling), if any, should be regulated, and for what reasons?
10. Should direct selling law only apply to purchases above a particular value (for example, \$100)?
11. Do you support a cooling-off period of 7 days, 10 days or another timeframe?
12. Should the supply of the goods or services be prohibited during the cooling-off period, and for what reasons?
13. Should there be any regulation of the hours when direct marketers may call on consumers? Why, and if you think there should be regulated hours, what hours?
14. What are your views on moving regulation of direct selling to the Fair Trading Act?

Unsolicited Goods and Services

15. Do you support unsolicited goods and services provisions along the same lines as those in the proposed Australian Consumer Law, and for what reasons?
16. What are your views on moving regulation of unsolicited goods and services to the Fair Trading Act?

Unconscionable Conduct

17. Is it appropriate to include a prohibition on unconscionable conduct in the Fair Trading Act, along the lines of the Australian Trade Practices Act and the proposed Australian Consumer Law?
18. Should any remedies for unconscionable conduct be restricted to consumers or also available to businesses, and for what reasons?
19. Would it be more effective to amend the Fair Trading Act by applying the broader concept of "oppression" from the Credit Contracts and Consumer Finance Act to the supply of goods and services generally, rather than amending the Fair Trading Act to extend the application of the case law concept of unconscionability?

Product Safety

20. A range of provisions exist under the Consumer Guarantees Act and the Fair Trading Act in relation to consumer product safety. Do you think these provisions are sufficient, and if not, what changes do you suggest?
21. What are your views on New Zealand adopting a "reasonably foreseeable" test of product safety regulation along the lines being considered for the Australian Consumer Law?
22. What are your views on the regulator being able to initiate a product recall itself where a supplier fails to undertake a compulsory recall?
23. What are your views on mandatory notification to the regulator of voluntary recalls and incidents where products are associated with serious injury or death?
24. What are your views on the Fair Trading Act including provisions for the Minister to issue Government product safety policy statements?

Consumer Information

25. The Fair Trading Act provides for consumer information regulations. Do you think these provisions are sufficient, and if not, what changes do you suggest?
26. What are your views about adding testing requirements to the consumer information regulation-making powers?
27. What are your views on including specific disclosure requirements in the Fair Trading Act concerning third party collectors fundraising for charities?

Layby Sales

28. Do we need detailed provisions regulating layby sales or would a more principles-based approach be better?
29. Should the definition of a layby sale be amended so any transaction with less than three instalments (i.e. a deposit and later payment in full) is not a layby sale under the Act, and for what reasons?
30. Is it appropriate that sellers can recover all their costs on the cancellation of a layby sale or should the seller's costs be limited to specific costs associated with the layby transaction?
31. What are your views on moving regulation of layby sales to the Fair Trading Act?

Weights and Measures

32. What are your views on the Weights and Measures Act remaining standalone or moving to the Fair Trading Act?
33. Are there any other areas within the Weights and Measures Act that you think could be improved? Please provide details and supporting explanation.

Carriage of Goods Law and Consumers

34. Is it appropriate for consumers to have rights under the Consumer Guarantees Act in relation to carrier services?

Regulation of Auctioneers and Auctions

35. Which do you consider the most appropriate approach to licensing auctioneers, and why – positive licensing, negative licensing or an industry-led approach?
36. Are there any particular competencies or standards of conduct that should be required of auctioneers by an approved industry body under an industry-led approach or positive licensing?
37. Are the legal rules which apply to auctions (primarily under the Sale of Goods Act) appropriate, or should they be updated?
38. If there is a valid distinction between a traditional auction conducted online and a Trade Me style auction, should purchasers from Trade Me style auctions have the benefit of the guarantees under the Consumer Guarantees Act?

39. What are your views on the suggested ways to clearly identify auctions exempted from the Consumer Guarantees Act (a new definition of auction; that auctions must be conducted by a licensed or approved auctioneer; that online auctions must meet certain requirements)?

Consumer Guarantees

40. What are your views on specific regulation of extended warranties?

41. What are your views on requiring greater disclosure of information to consumers on extended warranties?

42. What are your views on requiring a “cooling-off” period for cancelling an extended warranty?

43. What are your views on providing an “opt-in” period for buying an extended warranty?

44. Should any law regulating extended warranties be enforced by the Commerce Commission under the Fair Trading Act, and for what reasons?

45. What are your views on the Consumer Guarantees Act providing that a requirement for any bond for assessment of a faulty good must be disclosed to the consumer in writing before the good is purchased?

46. Is it appropriate that "refusing" to remedy a failure under the Consumer Guarantees Act also includes “refusal by words or conduct”, and for what reasons?

47. What are your views on including the equivalent to section 89(2) of the Motor Vehicle Sales Act in the Consumer Guarantees Act for situations when goods are rejected and there is a collateral credit agreement?

48. What are your views on amending the Consumer Guarantees Act to provide that both an electricity retailer and a lines company would be liable for the quality guarantees set out in the Act?

Enforcement

49. What are your views on including in the Fair Trading Act provisions for court enforceable undertakings?

50. What are your views on including enforcement orders in the Fair Trading Act for the banning of recidivist traders from certain activities?

Consolidation of Consumer Law

51. What are your views on a single, enhanced Fair Trading Act that also incorporates the Consumer Guarantees Act and/or the Weights and Measures Act?

52. What are your views on continuing to have a separate Consumer Guarantees Act and/or a Weights and Measures Act?