

Regulatory Impact Statement

Consumer Law Reform: Additional Decisions

Agency Disclosure Statement

- 1 This Regulatory Impact Statement has been prepared by Consumer Affairs, Ministry of Business, Innovation and Employment, following the receipt and consideration by the Commerce Committee of submissions to the Consumer Law Reform Bill.
- 2 It is supplementary to two previous Regulatory Impact Statements: Consumer Law Reform, December 2010, and Consumer Law Reform Further Decisions, February 2011. These two statements noted that problems have been identified with consumer laws not meeting the objectives of allowing consumers to transact with confidence and businesses to compete on a level playing field. Specific problems included:
 - a. some consumers and small businesses are detrimentally affected by unfair conduct practices such as unfair contract terms in standard form contracts;
 - b. whilst consumers have good awareness of the Consumer Guarantees Act, they experience confusion and uncertainty about the application of the Act to internet auctions and electricity and gas;
 - c. an important contributor to consumer and business confidence is robust enforcement of the Fair Trading Act. The Commerce Commission's enforcement is impeded by not having the full range of enforcement tools available, which can delay investigations and affect settlements; meaning consumers' redress is also delayed.
- 3 The two previous Regulatory Impact Statements set out in detail an analysis of problems with the wider consumer laws. As a result of decisions taken to address these problems, the Consumer Law Reform Bill sets out amendments to the Fair Trading Act 1986, the Consumer Guarantees Act 1993, the Weights and Measures Act 1987 and 3 other complementary business laws. It revokes 3 consumer laws and replaces the Auctioneers Act 1928 with a new Auctioneers Act based on decisions to address the above problems.
- 4 This additional Regulatory Impact Statement considers additional options to address one additional problem that has been identified with enforcement of the Fair Trading Act by the Commerce Commission when businesses will not voluntarily cooperate to be interviewed. Non-cooperation can result in prolonged investigations, court hearings that could have been avoided and consumers' not obtaining redress in a timely manner.
- 5 The analysis has found that consumers, businesses and the Commerce Commission would benefit from giving the Commerce Commission compulsory interview powers in the Fair Trading Act for investigating possible breaches of Part 1 of the Act (including misleading and deceptive conduct, false representations, bait advertising and pyramid selling schemes). This power would allow the Commission to request and interview in the same manner as provided in the Commerce Act 1986. Safeguards as set out in the Commerce Act are proposed to protect against self-incrimination.
- 6 A significant gap in the analysis is recent consultation on the option with parties who may be affected. The Commerce Commission sought the addition of compulsory interview powers in its submission to the Commerce Committee on the Consumer Law Reform Bill. There was no consultation on this possible enforcement tool in the Consumer Law Reform Discussion document that preceded the Consumer Law Reform Bill. There was discussion in a subsequent Additional Paper that was released in February 2011. The purpose of this paper was to respond to submissions received on the Consumer Law Reform discussion

document on enforcement. No comments on this paper were invited or received. There was discussion in 2006 in a discussion paper "Review of the Redress and Enforcement Provisions of Consumer Protection Law". At that time there was mixed feedback with a clear theme in submissions that if this proposal were to be implemented a number of safeguards would be needed. An assumption has been made that similar feedback would have been received if there had been recent consultation on this issue.

- 7 The analysis of the options has given particular consideration to the Bill of Rights implications of compulsory interview powers.

Evelyn Cole
Manager Consumer Policy
Consumer Affairs

Dated

Status Quo and Problem Definition

- 8 The Fair Trading Act 1986, the Consumer Guarantees Act 1993, the Carriage of Goods Act 1979 and the Weights and Measures Act 1987 set out rules concerning transactions between businesses and consumers and between businesses. These three Acts are being amended by the Consumer Law Reform Bill which is before the Commerce Committee.
- 9 The Commerce Commission is responsible for monitoring and enforcement of the Fair Trading Act. Enforcement of the Act may involve one or more of the following:
- a. working with and providing guidelines to traders,
 - b. if a breach of the Act is suspected contacting the trader to have a voluntary interview and to obtain information,
 - c. requesting information using the powers under section 47G of the Act,
 - d. exercising a search warrant using the powers under section 47 of the Act,
 - e. sending formal warning notices,
 - f. entering into settlement agreements when a breach of the Act is admitted, or
 - g. court proceedings.
- 10 A breach of the Fair Trading Act may result in a civil or criminal conviction, a fine of up to \$60,000 for individuals and \$200,000 for bodies corporate and orders to vary a contract or for damages related to loss and suffering.
- 11 The limitation of these provisions when a person does not want to cooperate at a voluntary interview are set out in the Regulatory Impact Analysis below, which provides an analysis of consumer and business detriment using the OECD Consumer Policy Toolkit Framework.¹

Objectives of Consumer Law Reform

- To improve consumer welfare by having well-functioning markets in which consumers participate confidently knowing their reasonable expectations should be met when they transact and they should have access to redress if reasonable expectations are not met.
- 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.
- To facilitate competition between businesses, for the long term benefit of consumers, by having market rules that protect against inappropriate trader behaviour.
- To achieve good market conduct by businesses, and by consumers and businesses having access to justice and the regulator undertaking effective enforcement of the law.

¹ This OECD 2010 document provides tools for consumer policy makers to assess problems for consumers in markets and develop solutions.

- To facilitate mutually beneficial trade on equitable terms through trading partners trusting that our laws deliver products that are safe and consistent with any measure, quality or other claims made.
- 12 This supplementary Regulatory Impact Statement relates to the objective “To achieve good market conduct by businesses, and by consumers and businesses having access to justice and the regulator undertaking effective enforcement of the law” above. Effective enforcement of the Fair Trading Act is also instrumental to the wider market regulation goals set out above.

Regulatory Impact Analysis

Fair Trading Act – Powers to Require a Person to Appear	
What is the problem?	<p>Difficulties in Fair Trading Act investigations and prosecutions are negatively affecting consumer and business outcomes. Delays impact on the redress that can be awarded to affected consumers. The increased costs must also be recovered from what is usually a limited pool of assets held by infringing traders that are often in liquidation or receivership. This reduces the amount of money available to compensate consumers, who may have suffered significant losses.</p> <p>The Commerce Commission is the responsible regulator under the Fair Trading Act. When it suspects a breach of the Act, it has a number of information-gathering powers. It can request documents and can obtain search warrants and search and seize property. In addition, it can request voluntary compliance, including appearances for interviews. However, the Commission cannot require a person to appear before it to give evidence.</p> <p>Investigations under the Fair Trading Act are expensive and time consuming. Often the Commission begins an investigation with very little information about the events surrounding an alleged offence. The combination of voluntary compliance and the existing powers to compel the provision of documents or obtain a search warrant are deficient for a number of reasons:</p> <ul style="list-style-type: none"> – They do not allow the Commission to receive information quickly and efficiently, – They make it difficult to respond to the information provided with further questions and enter into a dialogue with other parties, – It is not possible to look behind the documents provided to understand the rationales for various actions (in particular, it is very hard to gauge an individual’s intention in undertaking a particular action from a document), – The Commission cannot seek the views of different members of an organisation that may have been involved in the alleged offence (such as the accountants or marketing team) or colleagues, business associates or customers of the person being investigated. – Traders can obstruct the Commission in its work by prevaricating over the conditions around a voluntary interview or providing too much or too little information in response to a document request, deliberately rendering the response unusable.

<p>Measure of Consumer and Business Detriment / Magnitude of Problem</p>	<p>Costs to Consumers</p> <p>When the Commission cannot obtain voluntary cooperation with traders it suspects may be breaching the Fair Trading Act then it may spend its enforcement budget on investigation methods that are not efficient, such as making multiple document requests back and forth. The result is that less positive enforcement outcomes are achieved and the legislation is not as effective as it could be. Contraventions of the Fair Trading Act may remain undetected and consumers may not be compensated at all. Consumer confidence in the market decreases due to the undermining of the Fair Trading Act. Offenders that are not convicted may continue to cause financial and emotional detriment to individual consumers.</p> <p>Where investigations result in awards of compensation to consumers, the costs incurred as a result of delays and investigative difficulties will be drawn from the same limited pool of offender assets. This can mean that less is available to compensate consumers who have been financially affected by the breach.</p> <p>Cost to Businesses</p> <p>Businesses which are complying with the Fair Trading Act face similar harms to consumers as above; losing confidence and may be affected by unfair competition from less positive enforcement.</p> <p>Businesses face most of the cost of complying with the Commission's investigative powers. While they cannot currently be required to appear before the Commission, they can be subject to search warrants and requests to produce documents. These powers are particularly intrusive and involve large costs for target businesses. Search warrants in particular are invasive and can result in the removal of important business records. The ability to require individuals to appear before the Commission may reduce compliance costs for some businesses if search warrants and information requests are avoided.</p> <p>The Commission has examples of where its inability to talk to the different individuals involved and obtain a full picture of an offence, has resulted in the wrong traders being prosecuted. In these cases, the prosecutions were dropped after the Commission was able to access direct evidence from the alleged offenders. Had they had the ability to talk to the alleged offenders earlier in the process, the cost of the unnecessary litigation to both the Commission and the target businesses could have been avoided.</p> <p>Cost to Government</p> <p>In 2009/10 there were 370 investigations completed at a total cost of \$3.9 million. Investigations took 59 days on average. Both these figures will be reduced with more efficient investigative methods. Delays in investigations can be costly – the Commission has one example where a large investigation was delayed for approximately six months and resulted in a cost the Commission of around \$150,000.</p>
<p>The likely consequences of</p>	<p>While some traders will voluntarily attend an interview with the Commission, increasingly many are advised by their employers or</p>

<p>taking no policy action / Cost of Status Quo</p>	<p>legal counsel not to do so because of the risk of opening the business up to future liability. The Commission has provided details of seven examples, and can name around twenty, where the investigation was significantly damaged by the Commission's inability to talk to traders. The Commission could not obtain a full picture of the offending and the culpability of the relevant actors and so took prosecutions that turned out to be unjustified, or could not prosecute and was forced to terminate the investigation. Taking no action will result in these issues continuing in relation to future market conduct and investigations.</p>
<p>POLICY OPTIONS</p>	
<p><i>(1) No change</i></p>	<p>Consumer Affairs does not favour this option.</p> <p>The benefits are that businesses and individuals under investigation retain the right to refuse to appear before the Commerce Commission for any suspected breach of the Fair Trading Act. Fair trading issues range from minor misdemeanours concerning consumer information to significant breaches involving misrepresentation, pyramid selling and other unfair conduct. For suspected small misdemeanours it can be intimidating for a small business to be contacted by the Commission. The status quo provides some privacy and general liberty rights for businesses and individuals.</p> <p>The costs to consumers, businesses and government are as above.</p>
<p><i>(2) Encourage and provide funding to the Commerce Commission to promote the use of voluntary interviews (Education).</i></p>	<p>Consumer Affairs does not favour this option.</p> <p>The benefits are:</p> <p>Businesses: The Commerce Commission must work with business and there continues to be emphasis on voluntary compliance and cooperation. Businesses retain the right to refuse to appear before the Commission and compulsory interviews cannot be used in an intimidating way.</p> <p>The costs are:</p> <p>The Commission currently has in place cooperation and immunity policies and uses a conciliatory approach as a first resort for all investigations. An education campaign would need to be ongoing and would incur costs to be successful. As identified above, the Commission often finds that defendants are unwilling to cooperate with voluntary interviews due to the nature of legal advice provided to them and the risks. Therefore this option is not likely to be successful, and the costs outlined in consumer and business detriment above would continue.</p>
<p><i>(3) Amend the Fair Trading Act to allow the Commerce Commission to require people to appear before it for Part 1 investigations, and include an appropriate protection against</i></p>	<p>Consumer Affairs favours this option.</p> <p>The benefits are:</p> <p>Consumers: Will receive the benefit of more effective and efficient enforcement of the Fair Trading Act, including increased confidence in the marketplace and reduced financial and emotional detriment from individual offending. Consumers directly affected by offending are also more likely to be adequately compensated for their losses.</p> <p>Businesses: Will benefit from increased freedom from losses of market</p>

<p><i>self-incrimination.</i></p>	<p>share to businesses that do not comply with the Act.</p> <p>Limiting the power to Part 1 means that it is only available for investigating potentially serious offences. A self-incrimination protection accords with s 25(g) of the Bill of Rights Act.</p> <p>Government: The Commerce Commission's enforcement budget will be able to be used efficiently and effectively by requiring individuals to appear before the Commission. There will be a direct saving as a result of unnecessary litigation being prevented.</p> <p>The costs are:</p> <p>Businesses: Some additional costs may be associated with a business' compliance with this power, including legal costs and disruption to business.</p> <p>Government and consumers: The self-incrimination protection, may mean that the Commission is unable to prosecute individuals that reveal themselves to have breached the Fair Trading Act during the course of a compulsory interview. This may marginally decrease the effectiveness of the tool, but is necessary to avoid significant infringement of the rights of interviewees.</p> <p>Limiting the powers to Part 1 means the Commission will not be able to use the powers for product safety and consumer information standard investigations and the proposed new layby sales, uninvited direct selling, extended warranties and auctions conduct provisions.</p>
<p><i>(4) Amend the Fair Trading Act to allow the Commerce Commission to require people to appear before it for all Fair Trading Act matters and include an appropriate protection against self-incrimination.</i></p>	<p>Consumer Affairs does not favour this option.</p> <p>The benefits are as for option 3 above, but applied across the full range of Fair Trading Act provisions. The costs are:</p> <p>Businesses: If the powers applied to the whole Fair Trading Act, this would be seen as intimidating by businesses regarding investigations of less significant matters such as layby sales and extended warranties disclosure.</p> <p>Government: Such a wide-reaching power may impact on the public's perception of the state's coercive powers in general and may discourage traders from participating in the Commission's investigations voluntarily.</p>

Consultation

- 13 There was no consultation on the possible inclusion of compulsory interview powers as an enforcement tool added to the Fair Trading Act in the Consumer Law Reform Discussion document that preceded the Consumer Law Reform Bill. However, the Commerce Commission proposed such powers be added to the Fair Trading Act in its submission on the discussion document.
- 14 There was discussion in 2006 in a discussion paper "Review of the Redress and Enforcement Provisions of Consumer Protection Law". At that time there was mixed feedback, including concern about the Fair Trading Act having criminal convictions compared to civil penalties under the Commerce Act. The preferred option partially addresses this concern through providing a self-incrimination protection. The Legislative Design Committee was also consulted in 2008 and expressed general concern about having compulsory interview powers, in particular applying to all suspected Fair Trading Act

breaches. The preferred option partially addresses this concern by limiting the application of compulsory interview powers to investigations of potential breaches of Part 1 of the Fair Trading Act.

- 15 An assumption has been made that similar feedback would have been received if there had been recent consultation on this issue.
- 16 There has been consultation at various stages with the Ministry of Justice to ensure Bill of Rights compliance. Justice officials have raised no significant issues with the preferred option.

Conclusions and Recommendations

- 17 Consumer Affairs recommends adding to the Fair Trading Act provisions allowing the Commission to undertake compulsory interviews of individuals who are potentially involved in, or aware of, offending under the Act, on the basis that the ability to fall back on compulsory interview powers would-
 - a. expedite the gathering of evidence by the Commission and the time needed before prosecutions can be brought; and
 - b. plug the gap that exists between the limitations of requesting voluntary interviews and the significant consequences of issuing search warrants (a power that is already available under the Act).
- 18 While less disruptive than undertaking a search of an individual's premises, compulsory interview powers are still intrusive and as such need to be cast in a way that is reasonably justifiable in a free and democratic society under the New Zealand Bill of Rights Act 1990. This means only allowing their use in circumstances where it is both necessary and proportionate to the sale of the societal harm at stake. As such, interview powers under the Fair Trading Act should be available only in relation to investigations of the significant offences set out in Part 1 of the Fair Trading Act.
- 19 Compulsory interview powers also should include a protection against self-incrimination similar to the "use immunity" in section 106 in the Commerce Act. A "use immunity" protection means that, while the individual must still answer a question that is potentially incriminating to them, their answer cannot be used against them in a prosecution.

Implementation

- 20 It is proposed the above recommendation is implemented through the Consumer Law Reform Bill. At the time of Report-back on the Bill this Regulatory Impact Statement will be made publicly available and the Minister of Consumer Affairs will make a media statement.
- 21 The Commerce Commission has a duty under section 6 of the Fair Trading Act to provide general information guidance to persons in trade with respect to their rights and obligations under the Act. It will be undertaking an information campaign following the passage of the Consumer Law Reform Bill. Consumer Affairs will work with the Commission on this campaign, as appropriate. It is hoped to work with organisations such as the NZ Retailers Association, the New Zealand Chambers of Commerce, Employers and Manufacturers Associations and Business New Zealand to assist with the information campaign.
- 22 The Consumer Law Reform Bill provides for a transition period of 6 months for certain new sections and it is proposed compulsory interview powers are available after a 6 month transition period.

Monitoring, Evaluation and Review

23 It is proposed that Consumer Affairs undertakes a review of the effectiveness of the amended Fair Trading Act, Consumer Guarantees Act and Weights and Measures Act in achieving the Consumer Law Reform objectives, and report to Parliament within 5 years of the amendment legislation coming into force. The review will include consultation with representatives of consumer and business interests. If possible, there will be a survey undertaken of consumer confidence and understanding of consumer laws prior to the new laws and then 3-4 years later.