



Cabinet Economic Growth and Infrastructure Committee

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Minute of Decision

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Consumer Law Reform

Portfolio: Consumer Affairs

On 8 December 2010, the Cabinet Economic Growth and Infrastructure Committee (EGI):

Background on Consumer Law Reform

- 1 **noted** that the Consumer Law Reform process:
 - 1.1 comprises a review of the Fair Trading Act 1986, Consumer Guarantees Act 1993, Weights and Measures Act 1987, Auctioneers Act 1928, Door to Door Sales Act 1967, Layby Sales Act 1971, and Unsolicited Goods and Services Act 1975;
 - 1.2 also covers the Carriage of Goods Act 1979 and the Sale of Goods Act 1908 with respect to consumer transactions and auctions;

- 2 **noted** that:
 - 2.1 the primary objective of the Consumer Law Reform is to have in place principles-based consumer law that:
 - 2.1.1 contributes to consumer confidence and successful consumer participation in the market place;
 - 2.1.2 creates a competitive business environment where reputable suppliers are protected from the inappropriate market conduct of competitors;
 - 2.2 additional objectives are:
 - 2.2.1 to achieve simplification;
 - 2.2.2 to have law that is:
 - 2.2.2.1 up to date and relevant now and into the future;
 - 2.2.2.2 easily accessible to those who are affected by it;
 - 2.2.2.3 effective and enforceable;

- 3 3.1 **noted** that the Consumer Law Reform project is relevant to the single economic market (SEM) agenda;
- 3.2 **noted** that another objective of the Reform project is to achieve harmonisation with the Australian Consumer Law, as appropriate, in accordance with SEM;
- 4 **noted** that:
- 4.1 a consultation paper on the Consumer Law Reform was released in June 2010;
- 4.2 there has been considerable engagement with business and consumer representatives including receiving written submissions, hearing oral submissions and meetings, and the release of Additional Papers (on Unfair Contract Terms, Unconscionability, Referencing Good Faith in the Fair Trading Act Purpose Clause, Electricity and the Consumer Guarantees Act, and Layby Sales);
- 4.3 the Ministry of Consumer Affairs has also met with the Legislation Design Committee (LDC) and the Small Business Advisory Group (SBAG);

Principles-based law

- 5 **noted** that the Fair Trading Act, Consumer Guarantees Act and Weights and Measures Act are sound pieces of principles-based law which are well-recognised by businesses and consumers;
- 6 **noted** that none of these laws have purpose clauses which could be useful as a guide to the courts when applying the laws;
- 7 **agreed** to add a purpose clause to the Fair Trading Act that accords with the Australian consumer policy objective:
- “to improve consumer well-being through consumer empowerment and protection fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly”;
- which references the confident participation of consumers in markets, the outcome of consumer protection, consumers and suppliers trading fairly and consumer well-being or benefit;
- 8 **agreed** to add a purpose clause to the Consumer Guarantees Act along the lines of promoting consumer well-being or confidence in markets by:
- 8.1 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
- 8.2 defining rights for consumers to seek redress from a supplier or manufacturer where those reasonable expectations have not been met;
- 9 **agreed** to add a purpose clause to the Weights and Measures Act along the lines of promoting consumer and business confidence and effective market competition through ensuring goods are exchanged using accurate measurement, and regulating measuring instruments in use for trade;

Fair Trading Act amendments

- 10 **noted** that the Fair Trading Act is substantially similar to the consumer provisions in the Australian Trade Practices Act 1974 which will be replaced by the Competition and Consumer Law 2010 (which incorporates the new Australian Consumer Law) on 1 January 2011;
- 11 **noted** that the Australian Consumer Law includes new unfair contract terms, substantiation notices, unsolicited sales and layby sales provisions, and carries forward unconscionability provisions as well as, substantially, the same provisions on unfair practices and product safety as New Zealand;
- 12 **noted** that analysis has been undertaken of including in the Fair Trading Act unfair contract terms, unconscionability and unsubstantiated claims provisions (set out in Additional Papers available on the Ministry of Consumer Affairs website), and that adding these provisions to the Fair Trading Act is contentious;
- 13 **noted** that there is support for including unfair contract terms and unconscionability provisions in the Fair Trading Act from the Small Business Advisory Group, the Legislation Design Committee, and consumer organisations;
- 14 **noted** that many submitters, particularly business representatives, oppose including unfair contract terms and unconscionability provisions in the Fair Trading Act on the basis that there is not enough evidence of a problem and compliance cost considerations;
- 15
 - 15.1 **agreed** not to include unfair contract terms provisions in the Fair Trading Act;
 - 15.2 **directed** the Ministry of Consumer Affairs to revisit this issue in three years time taking into consideration the Australian experience from 1 July 2010;
- 16 **agreed** not to include unconscionability provisions in the Fair Trading Act;
- 17 **agreed** to include in the Fair Trading Act provisions providing for a general prohibition on making unsubstantiated claims enforceable by the Commerce Commission;
- 18 **noted** that the general prohibition on making unsubstantiated claims is different from, although in accord with, the Australian Consumer Law, as the general prohibition provides a wider protection for consumers and honest traders and better accords with the New Zealand Bill of Rights Act 1990;

Layby sales, unsolicited direct sales, unsolicited goods and services

- 19 **noted** that:
 - 19.1 analysis has been undertaken that supports including in the Fair Trading Act principles-based provisions on layby sales, unsolicited direct selling, and unsolicited goods and services provisions;
 - 19.2 this analysis was set out in Additional Papers that are available on the Ministry of Consumer Affairs website and were sent to all those who made submissions on the Consumer Law Reform;

- 20 **agreed** to add principles-based layby sales provisions to the Fair Trading Act that include:
- 20.1 adopting the Australian definition of a layby sale that three or more payments is a layby sale while two instalments will only be a layby if this is specified in the layby sales agreement;
 - 20.2 retaining, for clarity, provisions equivalent to sections 6, 10 and 11 of the Layby Sales Act regarding respectively:
 - 20.2.1 the passing of risk;
 - 20.2.2 the ability of a consumer to complete the layby sale in the event of a seller liquidation when the goods are available;
 - 20.2.3 preferential creditor status when the goods are not available;
 - 20.3 adopting provisions along the lines of the Australian Consumer Law with respect to “termination fee”, requiring a clear written layby sales agreement, specifying the conditions upon which a seller may cancel the agreement, and that if a seller cancels, then all instalments must be reimbursed;
 - 20.4 the Commerce Commission may enforce layby sales;
- 21 **agreed** to add principles-based unsolicited direct sales provisions to the Fair Trading Act that include:
- 21.1 a definition of unsolicited direct sales that covers door to door selling, telephone selling and a trader not being invited to a place for the purposes of entering into negotiations relating to the supply of goods or services;
 - 21.2 requiring traders entering into unsolicited direct sales of \$100 or more to provide a written and verbal statement:
 - 21.2.1 advising the consumer of a seven day cooling off period;
 - 21.2.2 how to cancel an agreement;
 - 21.2.3 a written statement of the full name and address of the vendor, a physical address and telephone number of the vendor;
 - 21.2.4 the total consideration of the purchase;
- 22 **agreed** to add principles-based unsolicited goods and services provisions to the Fair Trading Act that address the following principles:
- 22.1 recipients are not liable to pay for goods and services they did not order;
 - 22.2 goods become the property of the recipient after a period of 10 working days or two weeks if not retrieved;
 - 22.3 it is an offence to send an invoice to someone when the sender knows they have no right to be paid;

Fair Trading Act enforcement powers

- 23 **noted** that a considerable amount of enforcement of the Fair Trading Act is through Disputes Tribunals, but that the Disputes Tribunals do not have authority to consider allegations of misleading and deceptive conduct, which is a fundamental principle of the Fair Trading Act;
- 24 **noted** that the Motor Vehicle Disputes Tribunal and industry ombudsman schemes provide for full consideration of alleged breaches of the Fair Trading Act;
- 25 **directed** officials from the Ministry of Consumer Affairs and the Ministry of Justice to report jointly to the Minister of Justice, the Minister for Courts, and the Minister of Consumer Affairs on the implications of amending the Fair Trading Act to provide for the Disputes Tribunal to consider alleged breaches of section 9 of the Fair Trading Act, by mid-February 2011;
- 26 **agreed** to amend section 39 of the Fair Trading Act to provide for the Disputes Tribunals to have jurisdiction to make orders intervening in contracts under sections 43(2)(a) and (b) of the Fair Trading Act, which will address an anomaly with section 19 of the Disputes Tribunals Act 1988;

Auctioneer licensing

- 27 **noted** that there has been an analysis of the occupational regulation of auctioneers using the Ministry of Economic Development's Occupational Licensing Framework, and that this supports a registration (negative licensing) regime for auctioneers;
- 28 **noted** that an Additional Paper on Auctions, Auctioneers and the Consumer Guarantees Act has been prepared by the Ministry of Consumer Affairs, which sets out in detail the scope of the recommended registration regime for auctioneers;
- 29 **agreed** to:
- 29.1 repeal the Auctioneers Act;
- 29.2 include a registration regime within the Fair Trading Act consistent with the approach outlined in the Additional Paper referred to in paragraph 28 above, which requires that any person conducting an auction must be registered in accordance with requirements broadly similar to the licensing and registration requirements respectively of the Secondhand Dealers and Pawnbrokers Act (including in Part 2 and section 22) and the Motor Vehicle Sales Act (including sections 23-30 and Part 3), and which provide for Police checks and appeal rights to the District Court if registration is declined;
- 30 **agreed** to exempt a person undertaking a fundraising/charity auction from the registration requirements in a manner similar to the exemption of fundraising raffles and games under the Gambling Act 2003;
- 31 **agreed** to provide exemptions from registration for:
- 31.1 internet auction providers except those who hold money with respect to auctioned goods;

- 31.2 those who are licensed under the Real Estate Agents Act and the Motor Vehicle Sales Act to undertake auctions;
- 31.3 the matters covered in section 44 of the Auctioneers Act (sales by Police of unclaimed property, sale of animals not claimed from a pound, sale of goods by Customs, and auction sales authorised under other legislation), except to provide that it is not an offence for an auctioneer to have an arrangement with a person that is licensed under another Act in relation to goods or property that that person is able to auction under any other Act;
- 32 **agreed** to a modern definition of auction along the following lines:
- 32.1 an auction is the sale of any property including goods, land or services of any kind to the highest bidder;
- 32.2 an auction includes any process commonly known and understood to be by way of auction, which commences when the person conducting the auction invites a first bid from persons participating in the auction, and where bidders may bid in person, via telephone, or through the internet, or any other means, provided each bidder can participate in real-time in the auction being conducted;

Appropriation for auctioneers registration

- 33 **agreed** that the Ministry of Economic Development be responsible for the appointment of a registrar and for the administration of auctioneer registration;
- 34 **noted** that there will need to be a change to appropriations to Vote Commerce to provide for the delivery of auctioneer registration;
- 35 **invited** the Minister of Consumer Affairs, in consultation with the Minister of Commerce, to report to EGI on proposed appropriations by 31 March 2011;

Auction conduct

- 36 **noted** that the Sale of Goods Act, the Property Law Act, the Fair Trading Act, and the Auctioneers Act all apply to conduct at auctions, and that there is legal simplicity in having the conduct provisions in one law;
- 37 **agreed** to repeal, and enact instead in the Fair Trading Act, section 59 of the Sale of Goods Act and section 42 of the Property Law Act;
- 38 **agreed** that the Fair Trading Act include auction conduct provisions that cover the following principles:
- 38.1 people attending an auction should not be at risk of misunderstanding whether a bid was made by a genuine bidder or on behalf of the vendor;
- 38.2 it would be misleading to make a bid by or on behalf of the vendor in relation to a lot or auction that was advertised as 'no reserve' or in relation to any lot where the bidding for the relevant lot is at or above the reserve price;
- 38.3 it would be misleading for post-auction advertising of any goods or property to refer to any bid made by or on behalf of the vendor;

Consumer Guarantees Act

- 39 **noted** that the Consumer Guarantees Act provides to consumers the right when obtaining goods from a person in trade that the goods:
- 39.1 have clear title;
 - 39.2 meet acceptable quality including that the goods are safe;
 - 39.3 are fit for particular purpose;
 - 39.4 correspond with description;
- 40 **noted** that three areas (electricity supply, extended warranties, and auctions exemptions), where there is uncertainty about the application of the Consumer Guarantees Act, have been examined to identify how to improve clarity;
- 41 **agreed** to amend the Consumer Guarantees Act to:
- 41.1 remove the exemption for sales by auction and competitive tender (by traders), except for the acceptable quality guarantee for sales of secondhand goods by a registered auctioneer;
 - 41.2 require disclosure for extended warranties that indicates what the warranty provides above the statutory guarantees of the Act;
 - 41.3 provide that:
 - 41.3.1 electricity and gas distribution and transmission companies are suppliers who must meet the acceptable quality guarantees for electricity and gas;
 - 41.3.2 there is a statutory indemnity for electricity and gas retailers against a distribution or transmission company, as appropriate, in respect of payments made to consumers where the breach of acceptable quality was caused by an event on the distributor's or transmitter's network;
 - 41.3.3 there is no statutory indemnity:
 - 41.3.3.1 if the retailer has already received compensation for the same event under rules or regulations made under the Electricity Industry Act or the Gas Act 1992;
 - 41.3.3.2 if the defect in supply was caused by the distribution and transmission company following a rule or instruction under the Electricity Industry Act or the Gas Act 1992;
- 42 **agreed** to amend the Electricity Industry Act 2010 to allow the approved electricity and gas dispute resolution scheme to mediate and arbitrate on disputes relating to liability under the Consumer Guarantees Act between electricity and gas retailers, and distribution and transmission companies;
- 43 **noted** that the removal of the Consumer Guarantees Act exemption for sales by auction potentially raises issues regarding the definition of in-trade for consumers selling items on Trade Me;

Secondhand Dealers and Pawnbrokers Act

- 44 **noted** that the Secondhand Dealers and Pawnbrokers Act, section 6, provides that:
- “a person is presumed (in the absence of evidence to the contrary) to be engaged in business as a secondhand dealer if, in any 12 month period, the person:
- (a) buys secondhand articles for the purpose of trade on 6 or more different days; or
 - (b) sells or otherwise deals in secondhand articles on 6 or more different days or so as to receive revenue of \$2,000 or more from the sale”;
- 45 **noted** that this definition provides some guidance for consumers about whether they may be traders but the definition would benefit from some greater clarity about “evidence to the contrary”;
- 46 **agreed** to amend the definition of trader in the Secondhand Dealers and Pawnbrokers Act to clarify that “evidence to the contrary” may include that the goods were purchased or acquired for personal use and are being sold as they are no longer required;
- 47 **noted** that the Minister of Consumer Affairs proposes to consult with the Minister of Justice on the definition of trader in the Secondhand Dealers and Pawnbrokers Act, as he is concerned that the revenue limit of \$2,000 is inappropriate;

Consumer Law Reform Bill

- 48 **noted** that a Consumer Law Reform Bill has a category 5 priority on the 2010 Legislation Programme (instructions to be provided to Parliamentary Counsel in 2010);
- 49 **agreed** that the Consumer Law Reform Bill:
- 49.1 amend the Fair Trading Act 1986, the Consumer Guarantees Act 1993, the Weights and Measures Act 1987, and the Sale of Goods Act 1908 in accordance with the above paragraphs;
 - 49.2 repeal the Door to Door Sales Act 1967, the Layby Sales Act 1971, the Unsolicited Goods and Services Act 1975, and the Auctioneers Act 1928;
- 50 **invited** the Minister of Consumer Affairs to issue drafting instructions to the Parliamentary Counsel Office for a Consumer Law Reform Bill, drawing the attention of the Parliamentary Counsel Office to the detailed Additional Papers that discuss the general principles behind the proposals set out above;
- 51 **invited** the Minister of Consumer Affairs to report back to EGI on outstanding matters that may be included in the Consumer Law Reform Bill by 23 February 2011;

Publicity

- 52 **noted** that the Minister of Consumer Affairs has directed that the paper under EGI (10) 298 and the Regulatory Impact Statement attached to the paper, be published on the Ministry of Consumer Affairs website.