



# Cabinet Economic Growth and Infrastructure Committee

EGI Min (11) 1/12

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## Minute of Decision

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### Consumer Law Reform: Further Decisions

#### Portfolio: Consumer Affairs

On 9 February 2011, 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 the 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 to achieve simplification and have law that is:
    - 2.2.1 up to date and relevant now and into the future;
    - 2.2.2 easily accessible to those who are affected by it;
    - 2.2.3 effective and enforceable;
- 3 **noted** that:
  - 3.1 the Consumer Law Reform project is relevant to the single economic market (SEM) agenda;

3.2 another objective of the Reform project is to achieve harmonisation with the Australian Consumer Law, as appropriate, in accordance with the SEM agenda;

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, meetings, and the release of Additional Papers;

### **Consumer Law Reform Bill**

5 **noted** that on 8 December 2010, EGI agreed to the drafting of a Consumer Law Reform Bill (the Bill) which will:

5.1 amend the Fair Trading Act 1986, the Consumer Guarantees Act 1993, the Weights and Measures Act 1987, and the Sale of Goods Act 1908;

5.2 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;

[EGI Min (10) 30/18]

6 **noted** that a bid has been made for the Bill to have a category 2 priority on the 2011 Legislation Programme (must be passed in 2011);

7 **noted** that on 8 December 2010, EGI invited the Minister of Consumer Affairs to report back in February 2011 on outstanding matters to be included in the Bill;

8 **noted** that the outstanding matters cover product safety, consumer information, Fair Trading Act enforcement provisions, the Disputes Tribunal's powers under the Fair Trading Act, contracting out of the Fair Trading Act, collateral credit and the Consumer Guarantees Act, the relationship between the Carriage of Goods Act and the Consumer Guarantees Act, and the Weights and Measures Act;

### **Product safety**

9 **noted** that the Consumer Guarantees Act provides that manufacturers and retailers are responsible for the safety of the products they supply, and must provide redress when an unsafe product is supplied;

10 **noted** that when there is more than a one-off safety incident with a product, this may result in a voluntary product safety recall;

11 **noted** that the Fair Trading Act includes product safety regulation-making powers, and provides for the Minister of Consumer Affairs to issue an unsafe goods notice and to require a compulsory product recall;

12 **noted** that there is good co-operation between regulators and manufacturers and retailers, and accordingly these Fair Trading Act powers are rarely used, although they provide an essential backstop;

- 13 **agreed** that the Fair Trading Act be amended, as a further backstop measure, to provide that the Minister may require recalled unsafe products to be destroyed, subject to the Minister being satisfied that destruction is needed because the supplier has made, or intends to make, the product again available for sale and the product remains unsafe;
- 14 **noted** that typically voluntary product safety recalls are notified in newspapers, but that there is declining readership of newspapers and more reliance on the internet and social media for information;
- 15 **agreed** that the Fair Trading Act be amended to provide for mandatory notification to the Ministry of Consumer Affairs of product safety recalls, and for these recalls to be listed on the Ministry's website for up to two years;
- 16 **noted** that unsafe goods notices and compulsory recalls can only be made where it appears a good will, or may, cause injury to a person;
- 17 **noted** that Australia and some other countries also include the test that reasonably foreseeable misuse of a product will or may cause injury, which, if added to the Fair Trading Act provisions, would usefully widen the test for an unsafe product;
- 18 **agreed** to amend the Fair Trading Act unsafe goods notices and compulsory recall provisions to cover where reasonably foreseeable use or misuse will or may cause injury to any person;
- 19 **noted** that there are situations when it is useful for the government to provide guidance on acceptable product safety, rather than put in place regulations, for example, the *Government Product Safety Policy Statement on Acceptable Levels of Formaldehyde in Clothing and Textiles* (which was strongly supported by industry affected by allegations in 2007 of high formaldehyde levels in clothing as a better alternative to regulation);
- 20 **noted** that it would be useful to formally provide for Government Product Safety Policy Statements in the Fair Trading Act, with requirements for the Minister of Consumer Affairs to formally consult with affected parties prior to making any such statement;
- 21 **agreed** to amend the Fair Trading Act to provide for the Minister of Consumer Affairs to make a Government Product Safety Policy Statement, with an obligation to consult with parties likely to be affected, along the lines of the consultation requirements for making consumer information standards and product safety regulations;
- 22 **noted** that the Ministry of Consumer Affairs (responsible for providing advice on unsafe products) and the Commerce Commission (responsible for monitoring and enforcement of product safety regulations and unsafe goods notices) are restricted in undertaking product safety functions, as there are no specific enforcement-type powers in the Fair Trading Act, for example, rights of entry on to premises;
- 23 **agreed** to amend the Fair Trading Act to:
- 23.1 provide that the Minister may authorise named Ministry of Consumer Affairs and Commerce Commission officers to enter premises during normal working hours, purchase goods, and ask for sellers' or suppliers' identification information;
- 23.2 provide that the Minister's authorisation of Commerce Commission officers is for the purposes of monitoring and enforcement of unsafe goods notices and product safety regulations;

- 23.3 provide that the Minister's authorisation of Ministry of Consumer Affairs officers is to allow the use of the powers, as outlined in paragraph 23.1 above, only when there is a reasonable belief an unsafe product is for sale;
- 23.4 allow a Ministry of Consumer Affairs' authorised officer to ask for a person to stop selling a good that has been implicated in a serious incident (when using the good as intended);
- 23.5 provide that the above powers are subject to appropriate checks and balances in line with other legislation and the New Zealand Bill of Rights Act 1990;

### Consumer information

- 24 **noted** that the Fair Trading Act includes generic regulation-making provisions related to providing consumer information, for example labelling about a good's performance or care;
- 25 **noted** that Amy Adams MP has a Private Member's Bill (the Fair Trading (Soliciting on Behalf of Charities) Amendment Bill) that aims to provide consumers with information about third parties collecting monies for charities;
- 26 **noted** that the Fair Trading Act consumer information provisions do not allow for regulations providing for:
  - 26.1 the testing of products that supports the information that must be disclosed (while this can be achieved in part through citing standards with testing requirements, this is not always sufficient);
  - 26.2 greater disclosure related to collecting for charitable purposes;
- 27 **agreed** to add to the consumer information regulation-making provisions in the Fair Trading Act powers enabling:
  - 27.1 the testing of goods and product-related services;
  - 27.2 disclosure related to collecting for charitable purposes;
- 28 **invited** the Minister of Consumer Affairs to seek the agreement of Mrs Adams to her Private Member's Bill being considered alongside the Consumer Law Reform Bill;
- 29 **agreed** to amend the Fair Trading Act to provide the Commerce Commission with similar powers to those for product safety, in paragraph 23 above, allowing entry to premises to check compliance with consumer information standards regulations' disclosure requirements;

### Contracting out of the Fair Trading Act

- 30 **noted** that:
  - 30.1 the Fair Trading Act is silent on whether parties can contract out of that Act's provisions;
  - 30.2 although the common law and the Contractual Remedies Act 1979 set out a number of limits to contracting out, these are not transparent to consumers and small businesses;

31 **agreed** that the existing common law rules concerning contracting out of the Fair Trading Act, including the Contractual Remedies Act test, should be codified in the Fair Trading Act;

### **Fair Trading Act enforcement**

32 **noted** that the Commerce Commission is responsible for monitoring and enforcement of the Fair Trading Act, and that it uses settlement agreements as its primary enforcement tool;

33 **noted** that:

33.1 in comparison to the Securities Act 1978, the Commerce Act 1986, and the Telecommunications Act 2001, there is no formal provision in the Fair Trading Act for settlement agreements;

33.2 this weakens the effectiveness and enforcement of settlement agreements;

34 **agreed** to amend the Fair Trading Act to provide that:

34.1 the Commerce Commission may accept a written court enforceable undertaking in connection to a matter related to the enforcement of the Fair Trading Act, similar to sections 69J and 69K of the Securities Act;

34.2 the Commerce Commission may apply to the court for an order requiring a party to an undertaking to comply with a term of the undertaking, pay money to the Crown (not exceeding the financial gain the person obtained by breaching the undertaking), and/or compensate others for loss or damage caused by the breach;

34.3 a party to an undertaking and the Commerce Commission may agree to alter or withdraw an undertaking;

35 **noted** that there are several repeat Fair Trading Act offenders that cause serious detriment to consumers, and who are not deterred by the penalties under the Act;

36 **noted** that banning orders are used in other laws as a tool to protect the public from recidivists, rather than as a deterrent, but that they are penal in nature;

37 **agreed** to amend the Fair Trading Act to enable the court to give banning orders along the following lines, similar to section 248 of the Australian Consumer Law, as follows:

37.1 allow the court to ban an individual from being a director or promoter of a business engaged in trade, or being involved in the management of a business engaged in trade (whether or not the business is incorporated), for up to 10 years, subject to conditions as necessary;

37.2 applications can only be made when an individual has been convicted, or was involved in the management of a company that has been convicted, of two or more offences under the Fair Trading Act within a 10 year period;

37.3 the court can order a ban where it is satisfied that the ban is justified in that particular case, and only to the extent necessary to protect the public from being harmed by more of the individual's offending;

37.4 applications for banning orders can be made to the District Court only by the Commerce Commission;

- 37.5 when deciding whether to ban an individual, the District Court can hear evidence from the Commerce Commission, the defendant, and other people that are connected with the proceedings (for example, other enforcement entities or people affected by the individual's offending);
- 37.6 appeals against the District Court's decisions can be made to the High Court;
- 37.7 banned individuals can apply to the Court for leave to participate in activities prohibited by the ban;
- 37.8 breaches of a banning order are an offence, the maximum penalty of which will include imprisonment and a fine in line with similar offences in the Companies Act 1993 and the Credit Contracts and Consumer Finance Act 2003;
- 38 **noted** that there is currently no efficient enforcement tool for minor breaches of the clear-cut provisions in the Fair Trading Act;
- 39 **agreed** that the Fair Trading Act should specify a limited number of infringement offences and provide for the Commerce Commission to issue infringement notices for minor breaches;
- 40 **invited** the Minister of Consumer Affairs, in consultation with the Minister of Justice, to determine those matters to be included as infringement offences, and the appropriate penalty levels;

#### **Fair Trading Act offences and penalties**

- 41 **noted** that, with the incorporation of a number of new provisions into the Fair Trading Act, it is necessary to establish some new offences;
- 42 **noted** that the Fair Trading Act maximum penalties were last updated in 2003;
- 43 **invited** the Minister of Consumer Affairs, in consultation with the Minister of Justice, to review the maximum penalty levels in the Fair Trading Act and determine new maximum penalty levels if necessary;

#### **Disputes Tribunal jurisdiction**

- 44 **noted** that a considerable amount of enforcement of the Fair Trading Act is through the Disputes Tribunal, but that the Disputes Tribunal can only consider a limited range of allegations of misleading and deceptive conduct, and not allegations of misleading and deceptive conduct generally, which is a fundamental principle of the Act;
- 45 **noted** that, following consideration of submissions from the Principal Referee of the Disputes Tribunal and reports from the Ministry of Justice and Ministry of Consumer Affairs, the Ministers of Justice, Courts, and Consumer Affairs recommend extending the jurisdiction of the Disputes Tribunal to examine allegations of misleading and deceptive conduct;
- 46 **agreed** to amend the Fair Trading Act to provide for the Disputes Tribunal to consider alleged breaches of section 9 of the Fair Trading Act;

**Consumer Guarantees Act and collateral credit**

- 47 **noted** that:
- 47.1 consumers do not have adequate redress in the event that goods purchased on credit are rejected under the Consumer Guarantees Act 1991 (for example, because of a substantial failing) and the supplier fails to provide redress;
  - 47.2 this means that the consumer remains responsible for a credit contract, even though the consumer is no longer the owner of the goods;
- 48 **noted** that the Motor Vehicle Sales Act enables the Motor Vehicle Disputes Tribunal to vest motor vehicle collateral credit agreements with the vehicle trader if the vehicle is rejected or the trader contravenes the Fair Trading Act;
- 49 **agreed** that provisions be included in the Consumer Guarantees Act which enable the Disputes Tribunal or courts to vest a consumer's rights and obligations under a collateral credit agreement that is arranged by the supplier, with the supplier, where:
- 49.1 the consumer has rejected the goods under the Consumer Guarantees Act; or
  - 49.2 the consumer has been subject to conduct, by the supplier, that contravenes any provision in Parts 1 to 4 of the Fair Trading Act;

**Consumer Guarantees Act and the Carriage of Goods Act**

- 50 **noted** that the Consumer Guarantees Act provides a statutory guarantee of due care and skill with respect to services, but that the consumer has to prove that this guarantee has been breached;
- 51 **noted** that the Carriage of Goods Act provides the following four approaches to contracts that may be offered:
- 51.1 owner's risk;
  - 51.2 limited carrier's risk (the intended default option);
  - 51.3 declared value risk;
  - 51.4 on declared terms;
- 52 **noted** that the limited carrier's risk is capped at \$1,500, and is a strict liability risk (meaning that the consumer or business does not have to prove fault with care or skill);
- 53 **noted** that the practice under the Carriage of Goods Act is not always to offer limited carrier's risk, meaning that consignors cannot make an informed decision on the cost of protection or the risk they may choose to take;
- 54 **noted** that consumers can have lesser or no rights (guarantees) with respect to carrier services that come under the Carriage of Goods Act because that Act implicitly overrides the Consumer Guarantees Act regarding loss or damage, and also allows for businesses and carriers to contract out of the Act;
- 55 **agreed** that carriers should be required to offer the limited liability carrier's risk option under the Carriage of Goods Act when they offer carriage services to any consignor;

- 56 **agreed** that, if the limited liability carrier's risk option is not used, the service guarantees under the Consumer Guarantees Act should apply for the benefit of consumers when they are supplied carrier services;
- 57 **agreed** that the carrier's liability for loss or damage to goods through the Consumer Guarantees Act service guarantee should not be restricted by a contract of carriage under the Carriage of Goods Act unless the contract of carriage imposes a stricter liability on the carrier, or provides a more advantageous remedy to the consumer than is otherwise available under the Consumer Guarantees Act;
- 58 **agreed** to amend the Carriage of Goods Act so that it specifically does not allow for the contracting out of the Consumer Guarantees Act's obligations, except as provided for in section 43 of the Consumer Guarantees Act;
- 59 **noted** that the carrier's risk liability under the Carriage of Goods Act was set in 1989 at \$1,500;
- 60 **noted** that removal of the liability cap has not been examined as it has wider business implications that are outside the scope of the Consumer Law Reform review;
- 61 **agreed** that the amount of the carrier's liability under the Carriage of Goods Act be increased in line with inflation from \$1,500 to \$2,500, and that future increases are able to be made by Order in Council;

### **Weights and Measures Act**

- 62 **noted** that:
- 62.1 the Weights and Measures Act is very prescriptive law that regulates the accuracy of weighing and measuring instruments;
  - 62.2 the Act needs updating in several areas to provide for new retailing and supplier approaches (for example, supermarket self-checkout);
- 63 **agreed** to amend the Weights and Measures Act to:
- 63.1 enable the making of regulations for the retesting of a weighing or measuring instrument's accuracy;
  - 63.2 provide that persons offering goods for sale (for example, retailers) are responsible for the accuracy of weighing equipment used to determine the sale of their goods;
  - 63.3 add an offence for removing, defacing or obliterating a stamp or mark depicting reverification;
  - 63.4 require that the weighing instrument and indicator of the weight of a good must be in close proximity so that the consumer can see both at the same time, if desired;
- 64 **noted** that the Weights and Measures Act provides that the Secretary (Chief Executive of the Ministry of Economic Development) only may hold a District Standard, which is the working standard for calibrating weights and measures;



- 65 **agreed** to amend the Weights and Measures Act to provide that:
- 65.1 the Secretary may approve a person (company) that meets appropriate IANZ and ISO requirements, as defined in regulations, to hold the equivalent of the District Standard;
  - 65.2 this can be used in the same manner as a District Standard for calibrating weights and measures;

### **Next steps**

- 66 **invited** the Minister of Consumer Affairs to issue additional drafting instructions to the Parliamentary Counsel Office to give effect to the above paragraphs, drawing Parliamentary Counsel Office's attention to the detailed Additional Papers that discuss the general principles behind the proposals in the paper under EGI (11) 9;
- 67 **noted** that the Minister of Consumer Affairs intends to publish the paper under EGI (11) 9, the corresponding Minute, and the Regulatory Impact Statement on the Ministry of Consumer Affairs' website, at an appropriate time.