

**OFFICE OF THE MINISTER  
OF CONSUMER AFFAIRS**

The Chair  
CABINET ECONOMIC GROWTH AND INFRASTRUCTURE COMMITTEE

**CONSUMER LAW REFORM**

**PROPOSAL**

1 This paper recommends the Committee agree to the drafting of a Consumer Law Reform Bill with provisions:

- amending the Fair Trading Act 1986, the Consumer Guarantees Act 1993, the Weights and Measures Act 1987, the Carriage of Goods Act 1979 and the Sale of Goods Act 1908; and
- repealing the Door to Door Sales Act 1967, the Layby Sales Act 1971, the Unsolicited Goods and Services Act 1975 and the Auctioneers Act 1928.

**EXECUTIVE SUMMARY**

2 This paper predominately concerns updating and simplifying consumer law. Laws covering door to door sales, layby sales, unsolicited goods and services and auctioneers regulation have not been reviewed for many years and are prescriptive and in parts out-of-date. The paper proposes modernising these laws, taking a more principles-based approach. It proposes incorporating the laws on these matters within the Fair Trading Act and using the recently enacted Australian Consumer Law, as appropriate, as a model for the provisions.

3 The paper considers three additional practices that could be added to the provisions in the Fair Trading Act dealing with misleading and deceptive conduct, misrepresentations and unfair practices (Part 1 of the Act). They are: unfair contract term provisions (with respect to pre-written terms in standard form contracts); unconscionability provisions; and a prohibition on making unsubstantiated claims. Submitters hold different views about including unfair contract terms and unconscionability provisions in the Act and I have given most consideration to these issues.

4 The paper outlines the reasons for and against incorporating provisions on unfair contract terms and unconscionability into the Fair Trading Act. This includes consideration that the Australian Consumer Law has unfair contract terms from 1 July 2010 and unconscionability provisions and that alignment of New Zealand and Australian consumer law is part of the SEM objectives. I have considered these arguments and on balance do not support incorporating the provisions.

5 A prohibition on making unsubstantiated claims is also potentially contentious with support both for and against. I am proposing a prohibition on making

unsubstantiated claims is added to the Fair Trading Act. This will assist the Commerce Commission's enforcement of the Fair Trading Act, assist good market conduct and assist consumer confidence.

6 The paper also proposes amendments to the Consumer Guarantees Act (CGA). These concern providing information on extended warranties, removing the exemption that the CGA does not apply to auctions and competitive tenders (except the auction of secondhand goods by a registered auctioneer), and amending the CGA's application to electricity and gas suppliers. The latter is a contentious issue.

7 The CGA applies to electricity and gas. If there is a problem with the acceptable quality of supply a consumer may seek a remedy from the retailer. Electricity (and gas) retailers have a strict liability with respect to acceptable quality but lines distributors only have the lesser reasonable skill and care obligation. There is a problem with this balance and the paper proposes that electricity and gas suppliers – retailers, distributors and transmission companies – all have strict liability with respect to acceptable quality and that there is a statutory indemnity for retailers from distributors and transmission companies.

8 The paper also proposes auctioneers regulation (licensing) is reformed in line with that for motor vehicle traders and secondhand dealers and pawnbrokers. It further proposes auctions regulation is all within the Fair Trading Act.

## BACKGROUND

9 In March 2010, Cabinet Economic Growth and Infrastructure Committee (EGI) noted the Minister of Consumer Affairs has initiated a Consumer Law Reform and agreed to include the Consumer Law Reform initiative on the Regulation Review Programme for 2010 [EGI Min (10) 50 refers].

10 In June 2010, EGI agreed to the release of the discussion document entitled "Consumer Law Reform" and invited the Minister of Consumer Affairs to report back to EGI on the outcome of consultation on possible amendments to consumer legislation, by 1 December 2010 [EGI Min (10) 12/10 and CAB Min (10) 20/7 refer].

11 The objectives of the Consumer Law Reform initiative 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 (SEM) with Australia.

12 The main consumer laws under consideration are the Fair Trading Act 1986, the Consumer Guarantees Act 1993 and the Weights and Measures Act 1987. These are fundamental business and consumer laws that regulate the conduct of traders in order to provide protections for consumers and to promote a fair and competitive market place. The Fair Trading Act complements the Commerce Act 1986.

13 The Door to Door Sales Act 1967, the Layby Sales Act 1971 and the Unsolicited Goods and Services Act 1975 are other consumer laws that prescribe very specific behaviours for traders using these transaction methods in order to protect consumers and businesses.

14 The Auctioneers Act 1928 is the responsibility of the Minister of Consumer Affairs and concerns the licensing of auctioneers. Some aspects of conduct at auctions is prescribed under the Sale of Goods Act. With the agreement of the Minister of Commerce, the Consumer Law Reform review has looked at the Sale of Goods Act with respect to its relevance to consumer transactions and auctions, and also the Carriage of Goods Act and its relationship to the Consumer Guarantees Act.

15 Following the release of the discussion document "Consumer Law Reform", two stakeholder meetings were held – one in Auckland and one in Wellington. Both were well attended with between 60-100 present at each covering business and consumer interests. 112 submissions were received commenting on the discussion document proposals. Oral hearings of submissions were also held on 9 and 10 August.

16 As part of the consultation process, five Additional Papers were produced by the Ministry of Consumer Affairs on unfair contract terms, unconscionability, referencing good faith in a Fair Trading Act purpose clause, electricity and the Consumer Guarantees Act and layby sales. The latter four topics are contentious issues and these papers respond to comments made in the submissions and provide further analysis. These papers were forwarded to all those who made submissions and the opportunity afforded for further response (though with a short response period). A number of submissions on these papers were received. Several other Additional Papers have also been forwarded to submitters for their information providing background to the recommendations in this EGI paper as a result of the consideration of submissions.

17 I have also met with a number of stakeholders including businesses, the Commerce Commission and the Disputes Tribunal Referees. Officials from the Ministry of Consumer Affairs met with the Legislative Design Committee (LDC) and the Small Business Advisory Group.

### **Single Economic Market (SEM)**

18 The review is relevant to achievement of SEM outcomes agreed by Australia and New Zealand Prime Ministers in August 2009 to advance a single economic market.

These outcomes are included under the revised Memorandum of Understanding of Business Law Coordination. The SEM promotes a trans-Tasman economy or market and is based on the objective that deeper economic linkages 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.

19 The Fair Trading Act 1986 is very similar to the consumer provisions in Australia's Trade Practices Act 1974. On 1 January 2011, this law will become the Australian Competition and Consumer Act 2010. It will include the Australian Consumer Law (ACL) that is the result of a significant reform of consumer laws across the Commonwealth and States and Territories. For the first time, Australia will have a single consumer law applying across Australia. It has not been possible previously to progress harmonisation of consumer law between Australia and New Zealand when there have been nine different laws applying in Australia.

20 The review of our consumer law at the same time as the ACL reforms has provided the real-time opportunity to achieve harmonisation of approach where this is appropriate. Australia has incorporated into the ACL provisions based on our Consumer Guarantees Act. (They did not have such clear provisions regarding statutory warranties.) The ACL has updated provisions on layby and unsolicited sales. It also includes new unfair contract terms provisions based on those that have applied in Victoria for some years. The discussion document noted these were areas where adoption of a similar approach to Australia may be appropriate.

## COMMENT

21 The laws included in the Consumer Law Reform in most cases are old and have not been reviewed or updated for many years. Some of the laws have a very narrow subject area and do not need to exist as stand-alone law. There are specific individual problems with each of the laws that need to be addressed. For example:

- The Consumer Guarantees Act was written prior to internet (Trade Me-style) auctions and there is uncertainty about how its provisions apply.
- The Door to Door Sales Act was written prior to the availability of credit cards and there is consumer confusion about its application to credit sales compared to payment by credit card.
- The licensing of auctioneers under the Auctioneers Act (and associated regulations) is not in accordance with the occupational regulation framework. The definition of auction does not recognise participation in auctions by the internet or telephone.
- The prescriptive requirements of the Layby Sales Act and Unsolicited Goods and Services Act are not understood by businesses and consumers. There is confusion about laybys and deposits.

- The Fair Trading Act does not give jurisdiction to the Disputes Tribunal to hear cases concerning misleading and deceptive behaviour.

22 Consumer NZ, Trade Me, the NZ Retailers Association and others have been asking for some time for one or more of these problems to be addressed.

23 There is a cost to businesses and consumers when laws are out-of-date and not working effectively. Businesses have to find work-arounds and there is uncertainty about whether the approach taken is lawful. Clear consumer laws enable consumers to transact with confidence, protect reputable suppliers and consumers from inappropriate market conduct, and enable honest businesses to compete on a level playing field.

24 Whilst there are various problems with consumer laws, overall, the Fair Trading Act, the Consumer Guarantees Act and the Weights and Measures Act are very sound pieces of law. These laws are strongly principles-based. The Fair Trading Act provides that traders should not undertake conduct that is misleading or deceptive, a misrepresentation, or other unfair practice. The Consumer Guarantees Act provides that goods sold must have clear title and must be safe, fit for purpose and of acceptable quality and that services should be provided with due skill and care. The Weights and Measures Act is based on the principle that representations as to weight and measure must be accurate.

25 I consider these laws should continue. There is very good recognition and understanding of these laws. The 2009 National Consumer Survey<sup>1</sup> found nearly half of New Zealanders could name the Consumer Guarantees Act and about one quarter the Fair Trading Act. It found 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 Fair Trading Act has generated considerable case law and is well-understood by businesses.

### **Consolidation of Consumer Laws**

26 The Consumer Law Reform discussion document noted the possibility of having either a single consumer law based on the Fair Trading Act, or an enhanced Fair Trading Act including the Weights and Measures Act but a separate Consumer Guarantees Act, or an enhanced Fair Trading Act but separate Consumer Guarantees Act and Weights and Measures Act. The discussion document indicated the latter option was preferred and this has been generally supported by submissions.

27 Businesses which apply the Weights and Measures Act strongly supported keeping this legislation separate. There was very strong support generally from submitters for keeping a separate Consumer Guarantees Act, and incorporating provisions in the Fair Trading Act covering door to door/direct selling, layby sales, unsolicited goods and services and auction licensing and conduct and taking a similar principles-based approach as the rest of this Act. This approach is also supported by LDC.

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<sup>1</sup> National Consumer Survey 2009, <http://www.consumeraffairs.govt.nz/consumersurvey-2009.pdf>

28 Accordingly, I propose the Fair Trading Act is amended to include provisions covering unsolicited direct selling, layby sales, unsolicited goods and services and auctions and that the existing legislation addressing these matters is repealed. I propose the complementary continuation of the Consumer Guarantees Act and the Weights and Measures Act.

### **Purpose Clauses**

29 Modern New Zealand laws tend to be principles-based, with clear purpose clauses. Purpose clauses provide a guide to interpreting the law for its users, as well as for the courts when they are required to apply the law. Neither the Fair Trading Act nor the Consumer Guarantees Act nor the Weights and Measures Act have purpose clauses.

30 The discussion document canvassed the option of a purpose clause in the Fair Trading Act 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*."

31 This wording matches that recommended by the Australian Productivity Commission following their review of Australia's Consumer Policy Framework. Whilst there was considerable support for including a purpose clause in the Fair Trading Act, a large number of submissions from the business sector raised concerns with the reference to *good faith* saying it would increase uncertainty with respect to contracts. The Commerce Commission and other submitters noted that a reference to good faith could weaken the strict liability provisions of the Fair Trading Act.

32 An Additional Paper looked at these views. It concluded there was insufficient basis for the uncertainty argument but that the concern a reference to good faith could weaken the application of the Fair Trading Act was valid. LDC shares this view also.

33 Other comments on the proposed purpose clause raised a concern about the term *consumer well-being* and what this means, and that the wording did not give emphasis to consumer protection. The Commerce Commission noted that the courts have concluded the Act's central purpose is protection of consumers. The policy objective agreed by the Council of Australian Governments (COAG) includes a reference to protection and well being. This policy statement, however, is not included in the Australian Consumer Law but rather in the Intergovernmental Agreement supporting the law. The COAG agreed objective is: "*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.*"

34 I propose a purpose clause is included in the Fair Trading Act that accords with the Australian consumer policy objective and references the confident participation of consumers in markets, the outcome of consumer protection, consumers and suppliers trading fairly and consumer well-being or benefit, but does not reference good faith.

35 I propose a purpose clause for the Consumer Guarantees Act along the lines of promoting consumer well-being or confidence 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.

36 I propose a purpose clause for 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.

37 Purpose clauses of this nature were canvassed in the discussion paper and received general support although some questioned the need for purpose statements.

### **Principles of Confident Participation in Markets and Trading Fairly**

38 The policy underpinning consumer law is essentially that consumers individually and the economy as a whole benefit from consumers making effective purchasing choices from a range of competing offerings. In order to make effective choices, consumers need to have access to both good and accurate information and to be able to make their decisions without undue pressure or duress. The same consumer protections also enable honest suppliers to compete on a level playing field. When products and services do not live up to the expectations set for them by the information provided by the seller, consumers can hold the seller to account. 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 with respect to promoting good market conduct), but in the bulk of cases consumer law requires consumers themselves to take action.

39 The Fair Trading Act includes provisions covering misleading and deceptive behaviour, misrepresentations, bait advertising, pyramid selling and demanding and accepting payment without intending to supply as ordered. Internationally, including Australia, other behaviours regulated by consumer law are unfair contract terms, unconscionable conduct and making claims that cannot be substantiated. The discussion paper canvassed adding provisions in the Fair Trading Act regulating these behaviours along the lines of the Australian Consumer Law. It noted, however, that any law on unsubstantiated claims would need to take a slightly different form because of New Zealand's Bill of Rights, and that an alternative approach to regulating unconscionable conduct could be along the lines of the oppressive contracts and conduct provisions in the Credit Contracts and Consumer Finance Act 2003. Following consideration of submissions, Additional Papers on these topics were also produced.

### *Unfair Contract Terms*

40 Consumer law provisions covering unfair contract terms concern pre-written terms in standard form contracts which usually cannot be negotiated by a consumer or small business. 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. An unfair term in a standard form contract is considered to be one 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).

41 The Australian Consumer Law (ACL) provides that a term found to be unfair in a standard form consumer contract is void. Unfair is defined in the paragraph above and can cause financial or non-financial detriment to a party. The ACL also includes a grey list of 14 examples of terms that may be unfair. This law has been in place across Australia since 1 July 2010. Previously, unfair contract terms provisions had applied in Victoria for about five years. The inclusion of unfair contract terms provisions in the ACL was supported by analyses undertaken by the Australian Productivity Commission<sup>2</sup>, the Standing Committee of Officials of Consumer Affairs, Consumer Affairs Victoria and the Australian Treasury.

42 In New Zealand, one option is to add unfair contract terms provisions to the Fair Trading Act which are similar to those in the ACL. This option is contentious. The Additional Paper on Unfair Contract Terms prepared by the Ministry of Consumer Affairs supports this option. It notes that Australia and New Zealand consumers purchase a similar range of goods and services from similar (and, in many cases, the same) suppliers and that the evidence is strong that Australian suppliers have been taking advantage of unfair contract terms at the expense of consumers and economic efficiency generally, even if the evidence is largely anecdotal. The Additional Paper outlines the research supporting the Australian unfair contract terms provisions and that the policy development process undertaken in Australia was extensive over the last six years. It concludes it is efficient to take advantage of the Australian analysis.

43 If this option is adopted, it would mean the laws applying to consumer transactions were harmonised trans-Tasman which would accord with the SEM agenda and the principle of reducing discrimination and costs arising from different, conflicting or duplicate regulatory requirements.

44 Those supporting this option, on the basis that it is an important provision to have in the Fair Trading Act to protect against unfair practices, include the Commerce Commission, and consumer representatives such as Consumer NZ, Citizens Advice Bureau NZ and the Banking Ombudsman. The Additional Paper on Unfair Contract Terms was discussed with LDC and the Small Business Advisory Group (SBAG). SBAG strongly and unanimously supports including provisions on unfair contract terms. Their formal response says they "agree with the underlying principle that the proposed reforms will contribute to developing stronger and more efficient markets by encouraging improved competition through better information and transparency around allocation of risk in standard form contracts. The ultimate outcome of these changes is more efficient markets delivering better economic growth for the New Zealand economy." LDC also supports this option and several Disputes Tribunal referees have indicated they consider provisions on unfair contract terms would assist consumers and small businesses, and would have been useful in considering past cases.

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<sup>2</sup> The Productivity Commission considered economic, ethical and other policy arguments. It also noted arguments against unfair contract terms, particularly regulatory over reach and limited information on the extent of consumer detriment. On balance, it supported a carefully crafted unfair contracts provision (which was incorporated into the ACL).



45 Many submitters on the Consumer Law Reform, particularly business representatives, opposed this option including NZ Retailers Association, NZ Business Roundtable, New Zealand Chambers of Commerce, Auckland District Law Society, the Bankers Association and individual banks, Telecom, NZ Post, electricity retailers and fitness industry representatives. Most of the business sector submitters commented that there was not enough evidence of problems that would justify the addition of regulatory provisions on unfair contract terms in standard form contracts and noted that the proposals were being promoted to address anecdotal problems. (Some submitters such as Business New Zealand did not oppose the possibility of including unfair contract terms provisions but did not consider the regulatory case was made for them.) Others suggested New Zealand should observe how the unfair contracts terms provisions in Australia worked before considering their inclusion in our law. For example, the NZ Law Society did not have a firm position regarding the inclusion of unfair terms provisions but noted they may encourage increased litigation (and transaction costs to businesses) and suggested it may be appropriate to delay having unfair contract terms provisions until the experience in Australia can be properly assessed and considered.

46 Discussions with businesses in most cases indicate that they do not want to have terms in their own standard form contracts that could be seen as unfair contract terms. There is a concern though that statutory unfair contract terms provisions would impose compliance costs on businesses especially related to uncertainty. Businesses argue that standard form contracts are designed to not be negotiable and provide for a standard approach to all consumers. If a consumer with a grievance is able to challenge a standard form contract this creates uncertainty and associated costs.

47 Another compliance cost concern relates to having to check existing standard form contracts to ensure they are not unfair. Using the banking sector as an example, Westpac has estimated it has many hundreds of standard form contracts and letters that would have to be checked. I expect all the banks have a similar number. The BNZ has advised me it has cost it in the order of \$5million to comply with the new financial advisors legislation and that to comply with unfair contract terms provisions could be the same cost. The BNZ supports adding unfair contracts provisions to the law but notes that there would be an upfront business compliance cost. I expect all the major trading banks would have similar costs. The Banking Ombudsman in her submission noted that the inclusion of unfair contract terms within the provisions of consumer law may be helpful although she had not been able to identify specific instances where this would have helped in the past.

48 I have considered these cost arguments and am concerned that unfair contract terms provisions could cause significant uncertainty and expense to businesses, in particular because consumers could individually challenge particular clauses in standard form contracts. These transaction costs will be passed on to consumers. I consider these concerns outweigh the SEM arguments. However, it may be appropriate to consider adding unfair contract terms to our law in the future after observing their application in Australia over the next few years. Accordingly, I do not support including unfair contract terms provisions in the Fair Trading Act.

49 If the Committee considers that the benefits, including the SEM arguments, outweigh these concerns, one compromise would be to provide that unfair contract terms are added to the Fair Trading Act but provide that the remedy that the courts

may strike out an unfair term in a standard form contract is enforceable only through the Commerce Commission. This approach would assist certainty with respect to enforcement, but would still involve some compliance costs. I understand it is usual for the Commission to take an educative rather than strict enforcement approach to unfair contract terms provisions for the first 2-3 years<sup>3</sup>. I would also seek a transition so that any new provisions also only applied to existing contracts to the extent that these are renewed or varied after the commencement date of the provisions. This would not affect any existing rights at law to challenge unfair contractual terms.

### *Unconscionability*

50 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. In practice, the legal test for unconscionability is difficult to meet, as the stronger party needs to be found to have taken advantage of the weaker to an extent which is "against good conscience". One option is to add specific unconscionability provisions to the Fair Trading Act which are similar to those in the ACL. This also is a contentious issue.

51 Australia has had unconscionability provisions in the Trade Practices Act for many years and has established a body of law around the provisions. There has also been a Senate Inquiry and report into the need, scope and content of a definition for unconscionable conduct and two Australian Treasury reports on unconscionability regulation. An Additional Paper on Unconscionability, prepared by the Ministry of Consumer Affairs, examines these Australian reports and supports this option. It also lists a number of cases taken by the Australian Competition and Consumer Commission (ACCC) where the Australian courts found that a trader acted unconscionably. In New Zealand, a case could be taken only under common law which would be much more difficult to establish than in the ACL (which is specifically designed to make it less difficult than the very high test of the common law). It is unlikely, for the same case situations, that convictions would have been established with New Zealand's current law.

52 Although the Disputes Tribunals Act already allows referees to consider unconscionable conduct, this is a higher test to establish than that under the ACL. Very few cases have been taken to the Disputes Tribunal. (The Disputes Tribunal monetary limit also limits the application of this test. Until recently the limit was \$7,500 – now \$15,000.) As well as the unconscionability provisions in the Disputes Tribunals Act, there are unconscionability provisions in the Residential Tenancies Act and oppression provisions in the Credit Contracts and Consumer Finance Act (CCCFA). (The CCCFA meaning of oppressive includes unconscionable.)

53 If unconscionability provisions were added to the Fair Trading Act this would extend the scope of statutory unconscionability provisions to all trade areas. It would also strengthen the principles of the Act with respect to fair market conduct and would align with the ACL. This would accord with the SEM objective and also mean that the

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<sup>3</sup> The Commission has advised however that it does not have the power under the Fair Trading Act to require businesses to make changes. Consequently, if a company was resistant to a Commission approach regarding an unfair contract term, then the Commission may be forced to initiate court action to resolve the impasse. The Commission has also commented that as only a civil remedy is proposed, any litigation on unfair contract terms would not be punitive in its purpose.

New Zealand courts are able to take advantage of the more extensive jurisprudence in Australia for guidance. LDC has noted the latter as an advantage of having consumer law that is harmonised with the law in Australia. On the other hand, the Commerce Commission considers if any unconscionability type provision is added to the Fair Trading Act there would be an advantage in having an oppressive conduct rather than unconscionability provision so that CCCFA case law could be referenced. Submitters supporting unconscionability provisions in the Fair Trading Act include the Salvation Army, Consumer NZ and the Motor Trade Association. Other consumer representatives favoured oppression provisions on the basis that these were wider in scope.

54 Various submitters opposed unconscionability provisions being added to the Fair Trading Act. Reasons given included that: unconscionability is an emotive and uncertain term; existing case law includes the equitable remedy of unconscionability and provides sufficient protection for vulnerable consumers; adding unconscionable conduct provisions to the Act would compromise freedom of contract; and there is no evidence of a problem. Businesses opposing unconscionability provisions include Fonterra, Business NZ, the Franchise Association of NZ, Telecom, NZ Retailers Association, NZ Business Roundtable and New Zealand Chambers of Commerce. There was a strong view that: harmonisation with Australia is not a sufficient reason for making a change in New Zealand law; there needs to be conclusive evidence of a problem that supports a law change; and any law change brings an element of uncertainty and associated costs.

55 I have considered the two positions and do not support adding unconscionability provisions to the Fair Trading Act. Consumers have some protection under the Disputes Tribunals Act and the CCCFA. If the Committee considers that the benefits, including the SEM arguments, support unconscionability provisions I would propose consideration is given to having oppression provisions similar to those in the CCCFA.

#### *Making Unsubstantiated Claims*

56 Submissions gave mixed support to a prohibition on making unsubstantiated claims. Deliberately making a claim known not to be true is a misrepresentation. The Commerce Commission, however, has to prove (often at considerable expense) that such a claim was an intended misrepresentation. Increasingly, claims are being made about products especially with respect to "green washing" and health benefits. It is likely that many of these claims are exaggerations rather than deliberate misrepresentations or misleading information. They put at a disadvantage, however, a trader who has properly undertaken tests to establish the validity of a claim about a product. This has been identified by the OECD as a particular concern with respect to environmental claims. It is an area of potential trade concern for New Zealand when unsubstantiated claims are made about such matters as food miles and environmental footprint. In order to allow for better enforcement of unsubstantiated claims work is in progress by ISO, the European Commission and the US Federal Trade Commission on reliable green labelling.

57 The Banking Ombudsman specifically commented that a prohibition on making unsubstantiated claims could assist with the better regulation of the finance sector and improve consumer confidence.

58 Most OECD countries have protections of some form against making unsubstantiated claims and I propose that a clear prohibition on making unsubstantiated claims should be added to the Fair Trading Act. Whilst many businesses support a prohibition on making unsubstantiated claims, there is a concern that if businesses were able to self-enforce such provisions this could lead to allegations being made in order to obtain commercial information from competitors and or to impose costs on competitor businesses. This is not the aim of such a provision and would be an undesirable effect.

59 Accordingly, I propose that the Commerce Commission only has the power to enforce provisions on making unsubstantiated claims.

### **Enforcement of Part 1 of the Fair Trading Act**

60 Most transactions between consumers and businesses and businesses to businesses are straightforward and without any problems. Occasionally, a transaction will go wrong. Our consumer laws promote self-enforcement and usually problems with a transaction are sorted between the parties. Fair Trading Act disputes are predominantly low-end (low value) commercial disputes. When a problem is not sorted, in most instances the dispute is taken to the Disputes Tribunal for a hearing.

61 The Fair Trading Act does not allow the Disputes Tribunal to consider civil claims under section 9 of misleading and deceptive conduct generally, although it provides that the Tribunal may consider claims of misleading conduct in relation to goods and services and misrepresentation (a much tougher legal test). This is not consistent with the scope of the Motor Vehicle Disputes Tribunal or industry ombudsman schemes. and relates to a much earlier time when there was a smaller proportion of referees with full legal qualifications.

62 Elsewhere in this paper, the Ministry of Justice raise concerns at the suggestion to extend the Disputes Tribunal to Section 9 cases. This suggestion was a specific request of the former Chief Referee, Judge Spiller, and the current Chief Referee, Anne Darroch. I have met with both the Chief Referee and many other Referees, who confirm to me that extending jurisdiction to include Section 9 would allow them to deal with a wider range of consumer rights cases, enabling the Government to provide a better service to consumers. While the Ministry of Justice is concerned at the Tribunal's increased work level and perceive this as a negative, it is actually a very positive improvement in terms of access to justice for consumers.

63 I propose that the Act is amended to provide for the Disputes Tribunal to consider alleged misleading and deceptive conduct generally. Effective laws are enforceable and enforced. It is important that section 9 of the Fair Trading Act, which is a fundamental section, can be fully enforced by the Disputes Tribunal. The LDC supports this proposal.

64 The remedies available through the Disputes Tribunal under the Fair Trading Act are also limited: the Tribunal does not have the jurisdiction to make orders intervening in contracts under sections 43(2)(a) and (b) although it does have other powers under sections 43(c)-(f). This limitation in the Tribunal's powers is inconsistent with section 19 of the Disputes Tribunals Act 1988 and is an anomaly that should be rectified.

## Consumer Guarantees Act Application and Acceptable Quality

65 The Consumer Guarantees Act (CGA) provides that when consumers obtain goods from a person in trade, the seller has must have clear title and the goods must meet acceptable quality including that the goods are safe, are fit for particular purpose and correspond with description. The CGA is self-enforced and is very effective legislation on the whole. There are three areas where there has been uncertainty of application:

- Electricity supply;
- Extended warranties; and
- CGA auctions exemptions.

### *Electricity and the CGA*

66 Under the CGA, electricity as supplied by a retailer is defined as a good. The supply of lines function services is defined as a service. This different categorisation means consumers have a statutory guarantee from retailers for the acceptable quality of electricity and from lines companies that they will provide line function services with reasonable skill and care. The latter is a lesser responsibility.

67 Retailers are concerned they are accountable for compensating consumers for “unacceptable” electricity supply when they cannot influence or control its quality. Most faults that cause unacceptable quality result from a failure related to lines or other associated equipment –under the responsibility of lines companies or Transpower. In submissions on the Electricity Industry Bill, retailers raised these concerns noting that lines companies as monopolies had no incentive to negotiate with retailers to enable any pass through of appropriate costs.

68 The Consumer Law Reform discussion paper sought views on amending the CGA to provide that electricity retailers and lines companies would be liable for the acceptable quality guarantees. This discussion was supported by an Additional Paper. In brief, the Additional Paper notes electricity is not a conventional good and its quality relates to the reliability of its supply, and whether it has the technical attributes necessary to power electrical appliances sufficiently and safely. A failure in the quality of electricity occurs when its supply is interrupted, or when the electricity causes damage to electrical appliances or property. The quality of supply is integrally related to its distribution.

69 The problem with lines companies having the lesser reasonable skill and care obligation is that it puts the incentives and responsibilities in the wrong place. Lines companies are more likely than retailers to be able to address the causes of breaches of the acceptable quality guarantee and should have a responsibility for acceptable quality.

70 Transpower and the lines companies are strongly opposed to any change in the CGA obligations. Transpower argues it will impose significant costs on it and noted that in 2009 it estimated outages cost the New Zealand economy \$48.9million. The Ministry of Consumer Affairs does not consider it appropriate to equate this cost estimate with possible liabilities under the CGA. There is no indication of the length of

these outages. The CGA acceptable quality guarantee does not require gold-plated supply that is 100% reliable. The cost estimate covers the cost to businesses which is outside of the scope of the CGA. Retailers and business and consumer stakeholders support the proposals.

71 Failures in the quality of electricity can cause actual physical damage to consumers' electrical appliances and property, can risk injury to people and cause inconvenience. There are cases outlined in the High Court case of *Contact Energy v Jones* (retailers v the Electricity and Gas Complaints Commissioner (EGCC)) where consumers suffered actual physical damage from the poor quality of their electricity and if there had been no coverage under the CGA guarantees, the individual consumers would have had to bear the losses caused by the faulty electricity.

72 It is important that the acceptable quality guarantee that applies to electricity as a good continues as it provides appropriate remedies for consumers. Consumers should be able to go to retailers with a claim in the normal manner under the CGA. I propose the CGA is amended, however, so that anyone responsible for any aspect of the supply of electricity to a consumer is subject to the acceptable quality guarantee. This includes the retailer, lines company and Transpower.

73 I propose the retailer should have a statutory indemnity from lines companies and Transpower in respect of payments made to consumers where the breach of acceptable quality was caused by an event on the lines companies' networks, except if the retailer has already received compensation for the same event under the Electricity Industry Code made under the Electricity Industry Act or if the defect in supply was caused by the lines company or Transpower following a Code rule or instruction. I also propose that identical provisions apply to gas. Although specific issues have not been raised with respect to gas it would not be sensible to have different provisions applying to gas and electricity under the CGA.

74 There are likely to be disputes between retailers and lines companies from time to time. I propose the EGCC's jurisdiction is extended to include mediation or arbitration on indemnity disputes.

### *Extended Warranties*

75 The sale of extended warranties is considered an issue by consumer groups and consumer media (Fair Go, Target). Their sale is the subject of a Private Member's Bill in the name of Dr Jackie Blue and internationally they are seen as problematic. The concern is that many consumers are purchasing extended warranties without realising they probably have most of the protections they need under the CGA and therefore by purchasing an extended warranty they will be gaining little, if no, additional benefit.

76 There are extended warranties that offer benefits beyond the CGA, eg, they may offer an onsite repair service or cover some forms of fair wear and tear. However, many of the rights typically offered by an extended warranty are currently offered by the CGA (repair, replace or refund if something goes wrong). The consumer having made an often expensive purchase is then offered the extended warranty which may not have been expected and there can be a feeling of pressure that a decision must be made immediately or else an opportunity of insurance may be forgone.

77 The discussion paper sought views on regulation of extended warranties including greater disclosure to consumers on extended warranties, a cooling-off period and an opt-in period. There was support from both consumer and business submitters for regulated greater disclosure of information to consumers on extended warranties, which clearly explained the additional benefit of the warranty above the CGA guarantees. There was also broad support for a seven day cooling-off period. Some retailers already provide this option.

78 Accordingly, I propose that there is an amendment to the CGA to provide that any retailer warranties offered for sale must disclose in writing to the consumer the warranties that are additional to those provided by the CGA and that it must also be disclosed that there is a cooling-off period of seven days, the same as to that for direct selling (discussed below).

### *Auctions*

79 Section 41(3) of the CGA exempts goods supplied by auction from the CGA. The discussion paper canvassed a particular issue with this exemption relating to goods sold by traders on Trade Me style auctions. In brief, the same good could be offered for purchase as Buy Now/Confirm Purchase or by auction. If bought BuyNow /Confirm Purchase the CGA rights apply; and if bought by auction they do not.

80 The discussion document noted that it is confusing and illogical for consumers that CGA rights may or may not apply depending on the transaction method. Views were sought on the application of the CGA to Trade Me style auctions and the response was strongly in favour of the CGA applying.

81 In an Additional Paper, the Ministry of Consumer Affairs questions why any auctions and competitive tenders are excluded from the CGA. Whilst auctions provide an important market mechanism to dispose of used or secondhand goods in situations where it may be impractical to establish the acceptable quality, this ignores the other guarantee rights in the CGA, most importantly the guarantee as to title and also the guarantee that goods comply with description. There is also no justification for CGA rights to not apply to new goods sold at auction. The goods will be represented as new and there will be a consumer expectation that they will perform as new goods, including that the consumer would have access to manufacturers' guarantees if something went wrong with the good.

82 Accordingly, I propose that the exemption for goods supplied by auction at s.41(3) of the CGA is amended to provide that secondhand goods sold by a trader through a registered auctioneer are exempt from the acceptable quality guarantee defined at s.7 of the CGA but that all other provisions of the CGA apply to traders selling goods by auction. The auctioneer will not be required to provide the statutory guarantees; the CGA will apply to the traders who are the vendors. I also propose to delete the reference to exempting competitive tenders at s.41(3). These are not defined in the CGA or in other legislation.

83 The effect of the above proposals is that the CGA will apply to goods sold by traders using Trade Me auctions rather than to Trade Me as it is not a registered auctioneer but rather a sales transaction platform. There is a question about who is a trader. The Secondhand Dealers and Pawnbrokers Act, s.6, provides 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 six or more different days; or (b) sells or otherwise deals in secondhand articles on six or more different days or so as to receive revenue of \$2,000 or more from the sale.

84 I propose this definition is amended by clarifying 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. If amended, this definition would assist people in determining whether or not they are traders. It would mean that although many sellers on online auction websites may conduct in excess of six "trades" they would not be a trader unless they purchase items on six or more days for the purpose of resale, or have sales on six or more days totalling more than \$2,000 of goods or items which they purchased for the purpose of selling. For example, a mother of a young child may have far more than six trades of secondhand baby clothes that her quickly growing child no longer requires, but provided the items were purchased for the child's personal use (rather than for the purpose of secondhand trade) then the mother would not be a trader.

85 I am also concerned more generally with the Secondhand Dealers and Pawnbrokers Act definition of trader as revenue of \$2,000 seems a very low amount. I propose to contact the Minister of Justice to see if this amount can be reviewed.

86 A potential issue noted by auctioneers is sales concluded outside of the auction. I propose the auctioneer and purchaser should be able to agree that a sale by the auctioneer of a lot to a purchaser who was present at the auction for the sale of that lot within one business day of the auction can be deemed to be a sale at auction.

87 The sale of used cars by Trade Me style auctions has been identified by traders as particularly problematic. The issue is determining acceptable quality of an older used car. The motor trade industry would prefer some form of bright-line test that says the CGA acceptable quality guarantee does not apply when a vehicle is older than, say, 10 years or has done a particular number of kilometres, say, 100,000km.

88 The Ministry of Consumer Affairs is not supportive of a bright-line test because this will always be arbitrary. Any line will be subject to ongoing debate and also other goods providers will want bright-line tests. This will undermine the strong principles-based approach of the CGA. The acceptable quality test has a wide range of parameters that must be considered which recognise the age of a good and its condition when purchased.

89 The extent of any problem with the application of the CGA to used motor vehicles has not been established by industry. I understand there is a valid concern about uncertainty of application of the acceptable quality test to secondhand goods. A possible means of addressing this issue could be an industry code of practice that sets out in more detail the parameters that will be used for considering acceptable quality. I have asked the Ministry of Consumer Affairs to discuss with the Commerce Commission the possibility of amending the Fair Trading Act to provide for the Commerce Commission to approve industry codes of practice such that compliance with an approved code could be used as guidance before the Motor Vehicle Disputes Tribunal, the Disputes Tribunal or other court.



## Auction Conduct and Licensing

90 The approach to licensing of auctioneers under the Auctioneers Act is not in accordance with the occupational licensing framework. An assessment against this framework has been undertaken which is outlined in detail in an Additional Paper prepared by the Ministry of Consumer Affairs. The analysis concludes that significant harm could potentially be caused to individuals selling or purchasing at auctions -

- by auctioneers failing to account to vendors for the proceeds of sales,
- by auctions being used as a mechanism to sell stolen goods,
- by manipulation of the auction so that lower prices are obtained (particularly relevant to repossessed goods being auctioned).

91 The analysis supports registration<sup>4</sup> of auctioneers broadly similar to the licensing and registration requirements respectively in the Secondhand Dealers and Pawnbrokers Act and the Motor Vehicle Sales Act and, accordingly, I propose this approach is adopted. I propose the Ministry of Economic Development is responsible for the registration process. The analysis also supports exemptions from registration as already provided for in the Auctioneers Act (eg, sales by police of unclaimed property). Additionally, I propose the exemption of fundraising/charity auctions in a similar manner to the exemption of fundraising raffles and games under the Gambling Act 2003. This recognises in a similar way to the Gambling Act that it is impractical to legislate fundraising auctions undertaken by not for profit societies/organisations, eg, school fair auctions.

92 I also propose to specifically exempt internet auction providers, except if the internet auction provider is holding the proceeds of a sale from an auction.

93 In most cases, harm is unlikely to arise as per the assessment above with respect to failure to account for the proceeds of a sale where purchasers pay the vendors directly. In relation to the potential for the auction process to be used to sell stolen goods, this is already addressed by s.69 of the Secondhand Dealers and Pawnbrokers Act. I also note that Trade Me has over 1.2 million registered users and it would be impractical to require all users listing on Trade Me to become registered auctioneers.

94 I have considered the definition of auction and propose a modernised definition along the following lines –

- An auction is the sale any property including goods, land or services of any kind to the highest bidder.
- 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.

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<sup>4</sup> Registration is a form of negative licensing. A person is able to be registered provided they meet certain criteria defined in the law and are not disqualified because they do not meet other prescribed requirements such as not being adjudged bankrupt in the last 10 years. Currently, auctioneers are licensed by the District Court.

- 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.

95 The structure of the legislative requirements has also been considered. At the moment there are specific provisions regarding auctions in the Sale of Goods Act, Property Law Act and the Auctioneers Act. I propose that for legislative simplicity, the provisions currently in section 59 of the Sale of Goods Act and section 42 of the Property Law Act should be repealed and enacted in the Fair Trading Act. I propose auctions' conduct is in a separate part of the Fair Trading Act and registration provisions are included in a schedule to the Act. This has the advantage of having auction regulatory requirements clearly stated in one law.

96 I propose the conduct requirements provide for the following principles –

- 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;
- 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; and
- 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.

### **Layby Sales, Direct Selling, Unsolicited Goods and Services**

97 Layby sales, door to door sales and unsolicited goods and services are all currently regulated under separate laws. The Ministry of Consumer Affairs has established that there is a continuing need for laws regulating these types of transactions. As noted above, I propose that this law is all within the Fair Trading Act rather than separate laws. I also propose that the provisions applying to these transactions are simplified and modernised along the lines of the Australian Consumer Law. This accords with the Single Economic Market agenda.

98 For layby sales, I propose:

- the provisions are principles-based;
- the Australian definition of a layby sale is adopted, i.e. 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;
- provisions equivalent to section 6 of the Layby Sales Act regarding the passing of risk are retained for clarity;
- the current detailed requirement for the provision of statements when requested is replaced by a principles-based statement within the termination provisions;
- provisions along the lines of the Australian Consumer Law "termination fee" are adopted;

- a clear written layby sales agreement is required, along the lines of the Australian Consumer Law;
- the conditions upon which a seller may cancel the agreement are specified along the lines of the Australian Consumer Law and that if a seller cancels, then all instalments must be reimbursed;
- provisions similar to section 10 of the Layby Sales Act regarding the ability of a consumer to complete the layby sale in the event of a seller liquidation when the goods are available are retained;
- provisions similar to section 11 of the Layby Sales Act preferential creditor status when the goods are not available is retained; and
- the Commerce Commission may enforce layby sales.

99 The Ministry of Consumer Affairs' work examining unsolicited direct selling is outlined in an Additional Paper and has identified an ongoing need for laws covering uninvited pressure sales situations. These situations include door to door selling, telephone selling or a trader not being invited to a place for the purposes of entering into negotiations relating to the supply of goods or services. Various problems with the current Door to Door Sales Act have been identified, in particular the confusion about its application to credit sales only (people who use credit cards do not realise that this does not count as a credit sale under the current law; and the anomaly that the law does not apply to cash sales).

100 I propose that all unsolicited direct sales made person to person, including by telephone, are regulated when valued \$100 or more. (The current law applies to credit sales of \$40 or more.) I propose a continuation of the current law provisions providing a seven day cooling off period, and disclosure that consumers must be advised of the cooling off period, how to cancel an agreement, the full name and address of the vendor plus a physical address and telephone number, and the total consideration of the purchase.

101 These proposals are similar to those in Australia. Australia provides for a 10 day cooling off period and also regulates the hours of direct selling and the supply of goods in the cooling off period. There have been no problems regarding the latter two matters in New Zealand justifying regulation and there does not seem to be a reason to change to a 10 day cooling off period.

102 Regulation of unsolicited direct sales under the Fair Trading Act will enable the Commerce Commission to undertake enforcement in this area. It is an area where the Commission gets a number of complaints but has been unable to take action unless it can clearly establish misleading and deceptive conduct.

103 The Unsolicited Goods and Services Act protects consumers against being billed for goods and services not requested. The principles underlying this law are:

- recipients are not liable to pay for goods and services they did not order,
- goods become the property of the recipient after a period of time if not retrieved,

- it is an offence to send an invoice to someone when the sender knows they have no right to be paid.

104 I propose that the Fair Trading Act includes provisions addressing all these principles. An area of concern with the present legislation is that consumers who receive unrequested goods are liable to look after them for three months or they can be billed. This is not something many consumers (including business consumers) are aware of and places unjustified risk with consumers. I propose to reduce this risk by providing in the Fair Trading Act provisions on unsolicited sales for a shorter period of 10 working days, or two weeks, within which suppliers must follow up on the receipt of an unsolicited good and to collect it if not wanted.

105 It is a simple approach, which allows suppliers to sell using unsolicited goods, but gives recipients only a short time for which they have to look after the goods. An alternative would be to require that a notice is sent with unsolicited goods telling consumers their right to contact the supplier to collect the goods.

### **Product Safety, Consumer Information, Fair Trading Act Enforcement Provisions, Contracting Out of Fair Trading Act, Collateral Credit and CGA, Carriage of Goods Act and CGA**

106 The Consumer Law Reform analysis is also considering a number of proposals relating to product safety, consumer information, Fair Trading Act enforcement provisions, contracting out of the Fair Trading Act, collateral credit and the Consumer Guarantees Act (CGA) and the Carriage of Goods Act and CGA. I propose to provide a further paper to Cabinet Committee on these issues in the New Year.

### **MINISTRY OF CONSUMER AFFAIRS (MCA) COMMENT**

#### *Unfair Contract Terms*

107 Good business practices should not include unfair contract terms or acting in an unconscionable manner. MCA notes the cost arguments from business against unfair contract terms. MCA has been advised that similar arguments about cost on a similar basis were made prior to Europe introducing their unfair contract terms directive. It was found that feared costs did not arise as European firms used UK standard form contracts as their model (the UK had unfair contract terms legislation in place before Europe). Many of the New Zealand firms that have expressed concern about compliance costs if unfair contract terms provisions are included in the Fair Trading Act also operate in Australia. It is expected that standard form contracts used in Australia could provide a low cost model for use by New Zealand firms. Most of the banks in New Zealand are Australian owned and already need to comply with the Australian unfair contract terms legislation.

108 Having unfair contract terms provisions will also allow industry dispute resolution schemes to give consideration to standard form contract terms in the electricity, gas, telecommunications and finance sectors.

109 In order to help drive competitive markets and efficient business practices information about cost and risk need to be transparent to consumers so that they can choose from competing offerings.

*Unconscionability*

110 MCA considers unconscionability provisions, if added to the Fair Trading Act, would provide additional protections for consumers and small businesses. Whilst cases can be taken under the law of equity, for consumers the cost of taking such cases is mostly prohibitive. MCA considers it is important for consumer protection and good market conduct that the Commerce Commission is able to take action regarding unconscionability. Cases on unconscionability will likely be a difficult test which is why such cases are outside the means of individuals to pursue but, from a regulation of market conduct perspective, should be appropriately taken by the Commerce Commission.

*Regulatory Impact Statement*

111 The Regulatory Impact Statement gives more information on the extent of consumer and business detriment and costs to consumers and small businesses that supports the addition of unfair contract terms and unconscionability provisions to the Fair Trading Act.

**MED, MFAT, MCA COMMENT CONCERNING ACHIEVEMENT OF SINGLE ECONOMIC MARKET OUTCOMES**

112 MED, MFAT and MCA support the alignment of the Australian and New Zealand consumer laws as part of the effort to advance a single economic market. Prime Minister Key and former Prime Minister Rudd in August 2009 agreed to ambitious joint objectives including, in the area of consumer law, under an Outcomes framework for regulatory coordination. There is a real opportunity now to build on those objectives to achieve alignment of consumer law in the interest of ensuring that businesses and consumers are not faced with discriminatory practice or costs arising from different, conflicting or duplicate regulatory requirements. Alignment of our consumer laws would build on the benefits of the trans-Tasman Mutual Recognition Arrangement which provides that goods that can be legally sold in one jurisdiction can be sold in the other without the need for further testing or certification and that a person registered to practise an occupation in one jurisdiction is entitled to register to practise an equivalent occupation in the other.

**TREASURY COMMENT**

113 Treasury supports the updating and consolidation of New Zealand's existing consumer law and the alignment of Australian and New Zealand consumer laws, where appropriate, as part of the Government's single economic market (SEM) agenda. However, the objectives of the SEM agenda need to be balanced with the Government's regulatory commitments set out in the Government Statement on Regulation. In particular, the statement provides a commitment to only introduce regulation where the benefits of regulation to New Zealanders exceed the costs and a requirement for there to be a particularly strong case in relation to regulatory proposals that impose additional costs on business.

114 Based on an analysis of the submissions on the discussion document, there appears to be little evidence of a widespread problem with unfair and unconscionable contract provisions and the introduction of these additional consumer protections was

not supported by the majority of submitters. Introducing unfair and unconscionable contract provisions will involve compliance costs for business and the few anecdotal cases identified in submissions suggests that the benefits of these provisions are unlikely to exceed the costs. These provisions also have the potential for significant unintended consequences in relation to the conduct of economic activity and contract enforceability. In light of these risks, Treasury recommends delaying decisions on introducing unfair and unconscionable contract provisions for two to three years to allow evidence from their introduction at the Commonwealth level in Australia to be considered.

115 Given the considerable fiscal pressures the Government is facing and its desire to return the Budget to surplus as soon as possible, funding for a \$500,000 education programme or any other costs associated with the Consumer Law reforms should be reprioritised within the baselines of relevant agencies.

#### **MINISTRY OF JUSTICE COMMENT**

116 The Ministry of Justice (MOJ) considers that, while the proposal to allow the Disputes Tribunal to consider claims under section 9 of the Fair Trading Act, may increase access to justice, care needs to be taken as claims under section 9 of the Fair Trading Act can often be legally complex. The Disputes Tribunal is not equipped nor intended to deal with complex legal claims – the parties cannot be legally represented; referees are not required to be legally trained; and there are limited appeal rights. The strength of the Disputes Tribunal is its ability to provide cheap, simple and fast access to justice, in determining disputes that are not legally complex.

117 The Disputes Tribunals Act does enable the Tribunal to transfer complex legal disputes to the District Court for adjudication, but this provision needs to be used sparingly. There must be confidence that disputes, arising under section 9 of the Fair Trading Act and that fall within the Tribunal's financial thresholds, are capable of being resolved by the Tribunal.

118 MOJ is also concerned if this proposal will result in a significant increase in the caseload of the Tribunal, as this would have financial implications, both in determining cases, and in training costs, at a time when there are already increased costs arising from recent increases in the Disputes Tribunal's jurisdiction.. MOJ proposes that MCA and MOJ officials jointly report back to the Minister of Justice, the Minister for Courts and the Minister of Consumer Affairs on the implications of the change in the Disputes Tribunal jurisdiction by mid February 2011.

#### **CONSULTATION**

119 There has been extensive consultation with stakeholders as noted in the Background, including consultation on a discussion paper, stakeholder meetings, oral submissions, the release of Additional Papers and receipt of further submissions on these papers and the release of Information Papers. I and my officials have also met and discussed the Consumer Law Reform with a wide range of stakeholders.

120 The following government departments and agencies have been consulted: Ministries of Economic Development, Foreign Affairs and Trade and Justice, the

Treasury and the Commerce Commission. The Department of Prime Minister and Cabinet and the Electricity Authority have been informed.

#### FISCAL IMPLICATIONS

121 The majority of consumer law is self-enforcing. In order to ensure that the benefits of the consumer law reform initiative are realised, consumers, and businesses, will need to understand the impacts of the changes in terms of their rights and responsibilities.

122 A thorough national information programme was undertaken by Consumer Affairs immediately following the introduction of the Consumer Guarantees Act 1993. A consumer survey undertaken afterwards indicated that a high level of awareness of the consumer protections provided by that legislation resulted from the campaign.

123 To achieve similar success for this new legislation I consider it would be useful to deliver an information programme with adequate impact. This programme would require additional funding of approximately \$500,000. I intend to discuss possible ways of securing these funds with other Ministry of Economic Development Ministers. The information programme must encompass a number of initiatives to ensure key messages are underscored and key communities including advisors are adequately targeted. It will include the following elements.

- A national public awareness campaign to alert consumers and business to changes in core consumer law. This may include avenues such television, radio, online and press advertising.
- Community based events in regional centres targeting community organisations which need to understand the law in order to assist their clients and local business organisations who can help ensure their members' business practices are compliant.
- Training and print and/or online resources for community agencies, such as citizens' advice bureaux, budget advisory services and community law centres. Community agencies, such as these, represent the 'front line' for the Ministry in ensuring that consumers have ready access to information and advice on how to address their consumer issues.

124 The Commerce Commission will have an expanded enforcement role as a result of the proposed amendments to the Fair Trading Act. There could be fiscal implications which would require a reprioritisation of the Commission's existing budget or additional funding. The Commission notes that "the paper proposes new responsibilities for the Commission in the areas of extended guarantees, auctions, layby sales and door to door sales. While the direct selling provisions would be a useful complement to the Commission's existing work, the other areas would be primarily new areas of responsibility and may require additional funding if they are to be enforced effectively. In addition, the Commission would wish to prepare educative material for business outlining the Commission's approach to the new provisions. This would be an important part of any effective outreach to industry as it would provide greater certainty to business as to how the provisions were likely to be enforced."

125 If there is agreement to auctioneers registration being undertaken by the Ministry of Economic Development (MED) this will have fiscal effects for both MED and the Ministry of Justice. I will report further on this and other fiscal implications in my paper to the Committee in the New Year.

#### **HUMAN RIGHTS**

126 The proposal in this Cabinet paper appears to be consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. A final view as to whether the proposals will be consistent with the Bill of Rights Act will be possible once the legislation has been drafted.

#### **LEGISLATIVE IMPLICATIONS**

127 The paper proposes:

- amending the Fair Trading Act 1986, the Consumer Guarantees Act 1993, the Weights and Measures Act 1987, and the Sale of Goods Act 1908; and
- repealing the Door to Door Sales Act 1967, the Layby Sales Act 1971, the Unsolicited Goods and Services Act 1975 and the Auctioneers Act 1928.

128 The Consumer Law Reform has a priority 5 on the 2010 Legislative Programme: instructions to Parliamentary Counsel to be provided in the year.

#### **REGULATORY IMPACT ANALYSIS**

129 The Regulatory Impact Analysis (RIS) requirements apply to the proposals in this paper. Attached is a RIS prepared by the Ministry of Consumer Affairs that has been considered by the Treasury.

#### **QUALITY OF THE IMPACT ANALYSIS**

130 The Regulatory Impact Analysis (RIA) requirements apply to the proposals in this paper and a Regulatory Impact Statement (RIS) has been prepared and is attached.

131 The Regulatory Impact Analysis Team (RIAT) has reviewed the RIS prepared by the MCA and associated supporting material, and considers that the information and analysis summarised in the RIS partially meets the quality assurance criteria.

132 While the RIS clearly lays out a qualitative analysis of the costs and benefits of the options considered, there is little presentation of evidence of the magnitude of the problems considered and the range of options considered is limited (eg, there are no non-regulatory options considered, such as education etc., other than maintaining the status quo).



### **Consistency with Government Statement on Regulation**

133 I have considered the analysis and advice of my officials, as summarised in the attached Regulatory Impact Statement and I am satisfied that, aside from the risks, uncertainties and caveats already noted in this Cabinet paper, the regulatory proposals recommended in this paper:

- are required in the public interest,
- will deliver the highest net benefits of the practical options available, and
- are consistent with our commitments in the Government Statement on Regulation.

### **PUBLICITY**

134 I may make a press statement and advise submitters of the decisions taken from this paper.

## RECOMMENDATIONS

135 It is recommended that the Committee –

### *Background on Consumer Law Reform*

- 1 **Note** the Consumer Law Reform 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, Unsolicited Goods and Services Act 1975 and also covers the Carriage of Goods Act 1979 and the Sale of Goods Act 1908 with respect to consumer transactions and auctions;
- 2 **Note** the primary objective of the Consumer Law Reform is to have in place principles-based consumer law that contributes to consumer confidence and successful consumer participation in the market place and creates a competitive business environment where reputable suppliers are protected from the inappropriate market conduct of competitors, and that additional objectives are to achieve simplification and have law that is up to date and relevant now and into the future, is easily accessible to those who are affected by it, and is effective and enforceable.
- 3 **Note** the Consumer Law Reform project is relevant to the single economic market (SEM) agenda and that another objective of the Reform project is to achieve harmonisation with the Australian Consumer Law, as appropriate, in accordance with SEM.
- 4 **Note** a consultation paper on the Consumer Law Reform was released in June 2010, and 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, and that the Ministry of Consumer Affairs has also met with the Legislative Design Committee (LDC) and the Small Business Advisory Group (SBAG).

### *Principles-Based Law*

- 5 **Note** 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 **Note** none of these laws have purpose clauses which could be useful as a guide to the courts when applying the laws.
- 7 **Agree** to adding to the Fair Trading Act a purpose clause 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”* and 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 **Agree** to adding to the Consumer Guarantees Act a purpose clause along the lines of promoting consumer well-being or confidence 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.
- 9 **Agree** to adding to the Weights and Measures Act a purpose clause 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 **Note** 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 on 1 January 2011, and that this new law incorporates the new Australian Consumer Law.
- 11 **Note** 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 **Note** examinations have 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 **Note** there is support for including unfair contract terms and unconscionability provisions in the Fair Trading Act from the Small Business Advisory Group, the Legislative Design Committee and consumer organisations.
- 14 **Note** 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 **Agree either**
- (a) not to include unfair contract terms provisions in the Fair Trading Act, and **direct** the Ministry of Consumer Affairs to revisit this issue in three years time taking into consideration the Australian experience from 1 July 2010; **or**
  - (b) to amendments to the Fair Trading Act to include additional provisions on unfair contract terms similar to the Australian Consumer Law provisions but with enforcement of these provisions and the remedy that the courts may strike out an unfair term in a standard form contract **only** through the Commerce Commission,

and also provision for the Commerce Commission to obtain from the Court a ban on the use of specified unfair terms by particular suppliers; **or**

(c) to amendments to the Fair Trading Act to include additional provisions on unfair contract terms similar to the Australian Consumer Law provisions but also provision for the Commerce Commission to obtain from the Court a ban on the use of specified unfair terms by particular suppliers and provide for the provisions to cover small businesses (allowing any person to take a claim including to the Disputes Tribunal).

16 **Agree either**

(a) not to include unconscionability provisions in the Fair Trading Act; **or**

(b) to include unconscionability provisions in the Fair Trading Act similar to the Australian Consumer Law provisions; **or**

(c) to include oppressive conduct provisions in the Fair Trading Act similar to those in the Credit Contracts and Consumer Finance Act 2003.

17 **Agree** to include in the Fair Trading Act provisions providing for a general prohibition on making unsubstantiated claims.

18 **Note** the general prohibition on making unsubstantiated claims is different from, although in accord with, the Australian Consumer Law as this provides a wider protection for consumers and honest traders and better accords with the Bill of Rights Act.

*Layby sales, unsolicited direct sales, unsolicited goods and services*

19 **Note** that examinations have been undertaken that support including in the Fair Trading Act principles-based provisions on layby sales, unsolicited direct selling and unsolicited goods and services provisions, that these examinations are 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 **Agree** 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 the passing of risk, the ability of a consumer to complete the layby sale in the event of a seller liquidation when the goods are available, and 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 **Agree** 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 advising the consumer of a seven day cooling off period and how to cancel an agreement, and a written statement of the full name and address of the vendor, a physical address and telephone number of the vendor, and the total consideration of the purchase.

22 **Agree** to add principles-based unsolicited goods and services provisions to the Fair Trading Act that address the principles: recipients are not liable to pay for goods and services they did not order; goods become the property of the recipient after a period of 10 working days or 2 weeks if not retrieved; 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 **Note** a considerable amount of enforcement of the Fair Trading Act is through Disputes Tribunals but the Disputes Tribunals do not have authority to consider allegations of misleading and deceptive conduct, which is a fundamental principle of the Act.

24 **Note** that the Motor Vehicle Disputes Tribunal and industry ombudsman schemes provide for full consideration of alleged breaches of the Fair Trading Act.

25 **Agree** either

(a) to amend the Fair Trading Act to provide for the Disputes Tribunal to consider alleged breaches of section 9 of the Fair Trading Act; or

(b) to direct Ministry of Consumer Affairs and Ministry of Justice officials to jointly report back to the Minister of Justice, the Minister for Courts and the Minister of Consumer Affairs on the implications of the change in the Disputes Tribunal jurisdiction by mid February 2011 (**Ministry of Justice recommendation**).

26 **Agree** to amend section 39 of the Fair Trading Act to provide for the Disputes Tribunal to have jurisdiction to make orders intervening in contracts under sections 43(2)(a) and (b), which will address an anomaly with section 19 of the Disputes Tribunals Act 1988.

*Auctioneer Licensing*

- 27 **Note** that there has been an examination of the occupational regulation of auctioneers using the Ministry of Economic Development's Occupational Licensing Framework and this supports a registration (negative licensing) regime for auctioneers.
- 28 **Note** that an Additional Paper has been prepared by the Ministry of Consumer Affairs which sets out in detail the scope of the recommended registration regime for auctioneers.
- 29 **Agree** to repeal the Auctioneers Act and to include a registration regime within the Fair Trading Act consistent with the approach outlined in the Additional Paper 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 **Agree** that the Ministry of Economic Development is responsible for the appointment of a registrar and administration of auctioneer registration.
- 31 **Note** there will need to be a change to appropriations to Vote Commerce to provide for delivery of auctioneer registration.
- 32 **Invite** the Minister of Consumer Affairs in consultation with the Minister of Commerce to report to the Committee on proposed appropriations by 31 March 2011.
- 33 **Agree** 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.
- 34 **Agree** to provide exemptions from registration for: internet auction providers except those who hold money with respect to auctioned goods; those who are licensed under the Real Estate Agents Act and the Motor Vehicle Sales Act to undertake auctions; and as detailed in section 44 of the Auctioneers Act (eg sales by police of unclaimed property) except to provide 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.
- 35 **Agree** to a modern definition of auction along these lines: an auction is the sale of any property including goods, land or services of any kind to the highest bidder; 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.

*Auction Conduct*

- 36 **Note** 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 legal simplicity in having the conduct provisions in one law.
- 37 **Agree** 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 **Agree** to the Fair Trading Act including auction conduct provisions that cover the following principles,
- 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
  - 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
  - it would be misleading for post-auction advertising for any goods or property to refer to any bid made by or on behalf of the vendor.

*Consumer Guarantees Act*

- 39 **Note** the Consumer Guarantees Act provides to consumers the right when obtaining goods from a person in trade that the goods have clear title, meet acceptable quality including that the goods are safe, are fit for particular purpose and correspond with description.
- 40 **Note** 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 **Agree** to amend the Consumer Guarantees Act to:
- 41.1 remove the exemption for sales by auction and competitive tender (by traders), except 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 electricity and gas distribution and transmission companies are suppliers who must meet the acceptable quality guarantees for electricity and gas and that 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, except 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 or 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 **Agree** 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 **Note** 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.
- 44 **Note** the Secondhand Dealers and Pawnbrokers Act, section 6, provides 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, and this definition provides some guidance for consumers about whether they may be traders but would benefit from some greater clarity about "evidence to the contrary".
- 45 **Agree** 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.
- 46 **Note** I propose to consult with the Minister of Justice on the definition of trader in the Secondhand Dealers and Pawnbrokers Act as I am concerned the revenue limit of \$2,000 is inappropriate.

#### *Consumer Law Reform Bill*

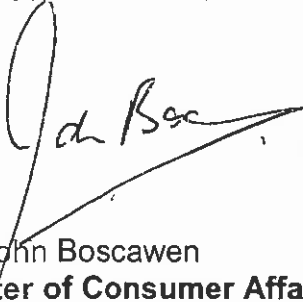
- 47 **Note** a Consumer Law Reform Bill has Category 5 on the 2010 Legislation Programme: instructions to Parliamentary Counsel to be provided in the year.
- 48 **Agree** the Consumer Law Reform Bill
- 48.1 amends the Fair Trading Act 1986, the Consumer Guarantees Act 1993, the Weights and Measures Act 1987, and the Sale of Goods Act 1908 in accordance with the recommendations above; and
- 48.2 repeals the Door to Door Sales Act 1967, the Layby Sales Act 1971, the Unsolicited Goods and Services Act 1975 and the Auctioneers Act 1928.
- 49 **Invite** the Minister of Consumer Affairs to issue drafting instructions to the Parliamentary Counsel Office for a Consumer Law Reform Bill, drawing Parliamentary Counsel Offices' attention to the detailed Additional Papers that discuss the general principles behind the recommendations above.



- 50 **Invite** the Minister of Consumer Affairs to report back to Committee on outstanding matters that may be included in the Consumer Law Reform Bill by 23 February 2011.

*Publicity*

- 51 **Agree** to the publication of this Cabinet Paper and the Regulatory Impact Statement on the Ministry of Consumer Affairs website.

A handwritten signature in black ink, appearing to read "John Boscawen", written over a horizontal line.

Hon John Boscawen  
**Minister of Consumer Affairs**

Date signed: 1/12/10