



Consumer Law Reform Additional Paper – February 2011

Consumer Information Standards

Introduction

- 1 The Ministry of Consumer Affairs released the discussion paper “Consumer Law Reform” in June 2010. The discussion paper included a section which discussed the consumer information standards regulation-making powers in the Fair Trading Act 1986.
- 2 Section 27 of the Fair Trading Act provides for the making of regulations to prescribe the content, form or manner in which the information about a particular good or service is required to be disclosed in a consumer information standard. The regulation-making powers are quite extensive covering information relating to the kind, grade, quality, origin, performance, care, composition, contents, design, construction, use, price, finish, packaging, promotion, or supply of the goods or services. Five consumer information standard regulations have been made covering: country of origin labelling of clothing and footwear, fibre content labelling of textile products, care labelling of clothing, textiles, furnishings and various household products, and consumer information notices for used motor vehicles and water efficiency labels.
- 3 The discussion paper proposed amendments to the consumer information standard regulation-making powers under section 27:
 - to include that testing requirements for products could be directly specified; and
 - to provide for consumers to obtain information about traders soliciting on behalf of charities. This matter is also covered in the Private Members Bill in the name of Amy Adams MP, “Fair Trading (Soliciting on Behalf of Charities) Amendment Bill”. The Commerce Committee considering the Bill asked the Ministry of Consumer Affairs to consider the issues the Bill raised as part of the Consumer Law Reform.

Submissions

Consumer Information Standards Provisions in General

- 4 28 submitters (24%) to the discussion paper commented on the consumer information standards regulation-making powers. Most of the submitters felt the existing provisions are adequate with regard to the scope of information to be provided to consumers. Several submitters indicated they would like to see more

consumer information regulations in place. They suggested regulations covering country of origin food labelling, environmental claims, existence of an overseas policy holder/depositor preference, telecommunications product and service marketing guidelines, and credit contracts.

Testing Requirements

- 5 The proposal to allow for consumer information standards regulations to specify testing requirements had split opinions. Half of the submitters who commented thought any testing requirements would impose additional compliance costs.
- 6 Specific concerns with the proposal were:
 - it would mean that prescriptive testing requirements could be mandated, leading to unnecessary compliance costs;
 - it may lead to relabeling of product specifically for New Zealand to display testing requirements, when this is not required in other countries;
 - it could be a non-tariff barrier to trade and result in a possible withdrawal from the market by importers.

Soliciting on Behalf of Charities - Submissions to the Consumer Law Reform Discussion Paper

- 7 21 submitters commented on the proposal to include either in the Fair Trading Act, or through consumer information standards regulations, information on third party fees for collecting on behalf of charities. Only two of the 21 submitters also made a submission to the Commerce Committee (Consumer NZ and National Council of Women).
- 8 Most of the submitters supported the concept of greater transparency and accountability of third-party collectors. Views were fairly evenly divided between having disclosure requirements specified in the Fair Trading Act or through consumer information standards regulations.
- 9 The Commerce Commission supported the idea of consumer information standard regulations. It is noted that regulations would keep the necessary detail out of the Fair Trading Act and maintain the Act as principles-based legislation.
- 10 The Public Fundraising Regulatory Association and the NZ Marketing Association favoured a self-regulatory model and therefore did not support regulation of any kind. This view is in line with the majority of submitters to the Commerce Committee on the Amy Adams Private Members Bill "Fair Trading (Soliciting on Behalf of Charities) Amendment Bill" which favoured a self-regulatory model. They also considered the Bill's limitation to registered charities was too narrow, as there are many not-for-profit organisations that fundraise for their causes.

Inclusion of testing requirements

- 11 As described in the discussion paper, during development of the Consumer Information Standards (Water Efficiency Labelling) Regulations, the Ministry was not able to directly specify in the regulations specific requirements relating to testing of the water-using products that would support the water using label applying to the particular product.
- 12 The regulation-making powers are limited in that they do not allow for testing requirements to be directly specified. The scope of the powers currently is restricted to prescribing information that is to be displayed, rather than specifying how that information must be derived. Testing requirements can only be established by declaring an official standard (or part(s) of an official standard) as a consumer information standard and modifying it as necessary. Therefore testing requirements are part of the consumer information standard by implication, rather than specifically.
- 13 This issue is problematic either where there is no standard to refer to, or the tests in a standard are not fully adequate or are more extensive than those needed for the information requirements or do not apply to the New Zealand situation.

Impact on Consumers

- 14 The disclosed information is used by consumers in their decision-making about purchasing a product. If a label or other disclosure is not supported by a testing requirement, the information provided to consumers may not be reliable and consistent across industry. Consumers rely on the information in a consumer information standard with the expectation that the information is robust and supported by testing (if relevant). They are adversely impacted and lose general confidence in consumer information standard and related information if they discover this information is not robust or they may have made a poor choice based on the information and no redress is available. This can be a cost impact or if the consumer was persuaded by the information to purchase a product based on their personal preferences, self-interests or ethics, they may feel betrayal or disappointment at their purchase if they find it does not meet that information.
- 15 Where there are testing requirements which address more than the consumer information requirement, a supplier can be unclear about what testing needs to be done (and what does not). This is a compliance burden, which may be in the form of an additional unnecessary testing cost or trying to get a clear understanding of the requirements applying.
- 16 In comparison, the product safety standard regulation-making powers under section 29 provide for regulations relating to the testing of the goods during or after manufacture and processing. If the consumer information standards regulation-making powers included a similar provision, this would enable regulations to clearly specify any testing necessary to support information requirements.
- 17 If there is no standard, then the proposal to specify testing methods allows consultation with all interested parties regarding which tests are suitable and relevant.

- 18 As noted, some submitters were concerned that adding testing requirements to the regulation-making powers could increase regulatory burden. Any decision made to have regulations would only follow after a full regulatory impact assessment. This assessment would include consultation on any testing requirements to be specified in the consumer information standards regulations. Any testing requirements would need to be supported by technical analysis.

Information disclosure about third parties soliciting on behalf of charities

- 19 As noted, there is general support for either a specific provision in the Fair Trading Act or consumer information standard regulations providing for disclosure by third parties collecting for charitable entities and retaining a percentage of that donation. Either of these approaches would require amendment to the Fair Trading Act.
- 20 Collectors for charitable entities can either be paid collectors or volunteers, taking part in street, web site, or telemarketing collections. There is concern that third party collectors are being paid out of the donations they collect and that in some cases a large proportion and even the majority of the donation does not reach the charitable cause. Complaints by the public and in the media indicate that people are concerned that they cannot identify paid collectors and thereby make an informed decision on the amount they donate, if any.
- 21 Paid collectors for some charities can include employees of the charity. While it is possible to try and separate paid employees from third party collectors, this would probably not provide consumers with any additional information to assist their decisions as payments to employees could provide for similar commissions to third party collectors. It would probably penalise charities that use third party collectors and incentivise the employment of their own staff on commission.
- 22 Other countries require disclosure by way of a “solicitation statement” (UK) or identify that they are a paid collector by way of a statement or in the case of street collection, by a badge (South Australia).

Consumer Information Standard for Soliciting on Behalf of Charities

- 23 The Ministry considers that the best way of providing information about third parties collecting funds for charitable purposes is through regulations. Regulations provide more flexibility for specifying detailed disclosure requirements.

Initial Regulatory Impact Assessment

- 24 The challenge for policy makers is in detecting and evaluating consumer problems and determining whether consumer detriment requires government action. The Organisation for Economic Co-operation and Development (OECD) Consumer Policy Toolkit, and specifically Step 2 *measurement of consumer detriment* and Step 3 *determine whether consumer detriment warrants a policy action*, has been used to make an initial assessment of the problem of third parties soliciting on behalf of charities. A number of methods have been used to determine consumer detriment including assessment of complaints data, a consumer survey, independent research and consultation with stakeholders.

Type of Detriment

- 25 There are two forms of consumer detriment: structural and personal. Structural focuses on the loss of consumer welfare due to market or regulatory failure, while personal focuses on the negative outcomes for consumers relative to a benchmark such as reasonable expectations.
- 26 Approximately 1.5 million New Zealanders donated money in the six months between December 2009 and June 2010. The median amount donated per month is approximately \$37 (the average is approximately \$135. Preliminary analysis by the Office of Community and Voluntary Sector suggests this skewing of the average is driven by large donations to religious, education and health-related organisations).
- 27 It is assumed that the majority of donors have an expectation that most of the money they donate will be used towards the charitable activities promoted by the charity. As people gain altruistic welfare improvements, rather than tangible improvements, it has been identified that the detriment suffered by donors to charities would fall clearly into the personal detriment category.

Measurement of Consumer Detriment

- 28 In assessing whether this detriment warrants a policy action, an initial evaluation of information from several sources has been undertaken. The OECD Consumer Policy Toolkit states that the number of consumer complaints recorded by public bodies or consumer organisations can be used as a sign of market problem¹.

Consumer NZ

- 29 Consumer NZ, a consumer organisation, informs that costs of third party collectors for charities is a common complaint, and a recent on-line poll shows that 95% of respondents want greater transparency of the costs of the third parties².

The Charities Commission

- 30 The Charities Commission regularly receives complaints relating to third party collectors for charities, and has noted a rising awareness of the use of third party contractors in both charities and the media. The Charities Commission has conducted two surveys on public trust and confidence in charities, the *Trust and Confidence Survey*³ and *Empathy Insight Report*⁴. In these, they noted an increasing public concern over the fundraising techniques of charities and a reduction in confidence in the charities sector. Participants were more likely to feel trust and confidence in a charity if they felt donations were being spent wisely. They wanted to see how charities were spending donations, in particular,

¹ Consumer Policy Toolkit 2010. OECD, page 72.

² Consumer NZ states on its website that "Consumer polls are a quick way to gauge public opinion about an issue. They are not necessarily scientific, but provide a snapshot of public opinion at a particular time".

³ Trust and Confidence Survey, July 2010, Charities Commission (placed on their website November 2010)

⁴ Empathy Insight Report, Public Trust and Confidence, Charities Commission, August 2010

- No frivolous spending
- No waste
- A large proportion (ideally all) of the funds going to the cause
- Doing the best thing for the cause.

31 Additional outcomes from the survey include:

- A majority of respondents (55%) continue to report high levels of trust and confidence in charities, however this figure has slipped slightly from 58% in 2008.
- There has also been a slight decrease in the levels of trust that charities are operating effectively. Of the six statements tested on this topic, the greatest decrease was 6% down to 34% of respondents reporting high levels of trust that charities, “Ensure a reasonable proportion of donations get to the end cause”.
- On a similar theme respondents were also asked their level of agreement with a range of statements that related to the administration of charities. This statement testing showed that respondents were far more comfortable with charities that were transparent in the way they operated.
- Eighty-two percent (down 2%) of respondents agreed that, “I feel more confident in charities that are open about how they use their resources”. 70% (down 3%) of respondents agreed that, “I trust charities more if they are clear about how they are managed”.
- Compared to the 2008 results, the movements in levels of agreement have generally been negative for charities. The largest example of this was a 7% increase up to 38% of respondents who agreed with the statement, “Charities use more dubious fundraising techniques these days”.
- The most common mode that respondents reported donating via within the last 12 months continues to be street collections (at 54%).

Submissions

32 The submissions received through both the Commerce Committee process and the Consumer Law Reform discussion paper show there is public distaste for less money than expected reaching the charity.

Justification for a Policy Action

33 Taking this information into account, a decision on taking a policy action is required.

34 The Toolkit helpfully asks several guiding questions:

What is the scale of consumer detriment and; Who is experiencing the consumer detriment?

- 35 As stated above, up to 1.5 million New Zealanders are affected by fundraising/donating practices, according to the Office of Community and Voluntary Services. However, the amount of individual detriment is small, as it is mainly dissatisfaction and loss of confidence in the sector. Donating is undertaken by New Zealanders of all socio-economic groups, genders, ethnic backgrounds and ages.
- 36 Importantly, few members of the public raised the issue of prohibitions, preferring information provision. The majority of people donate through street collections (probably giving less than \$20 at a time).

What is the expected duration of the detriment?

- 37 The detriment will remain and may increase with increasing awareness of the use of third party collectors through reports in the media and monitoring practices of entities such as the Charities Commission.

What are the likely consequences of taking no policy action? Are there any other substantial costs to the economy?

- 38 Consumer confidence in the charitable sector may be eroded, placing greater pressure on charities for money. If there is a decline in donations, charitable services may cease, resulting in considerable detriment for those who would no longer receive those services. Their quality of life may be significantly reduced and the burden on other areas of the economy may be increased, i.e. healthcare.
- 39 In summary, there is evidence of detriment that may require a policy action.

Identification of practical policy actions

- 40 Consumers/the public make their own choices about whether to donate, to whom and how much. This can be considered a “demand-side” focus. The usual policy tools for this type is education and awareness initiatives and information provisions.
- 41 The information from the surveys and comments clearly indicates that transparency of information would alleviate some of the personal detriment felt by the public around third party collectors, as this was self-identified by many of the participants in surveys and complaints.
- 42 If the problem is considered to be from the supply side (i.e. the third parties themselves), then codes of conduct and prohibitions can be considered such as unfair practices prohibitions. Third party collectors are commercial entities and therefore are contracted to charities to undertake their fundraising functions. It is also up to the charity to contract a reputable collector and negotiate fairly on behalf of the charity. Commercial contractual information is often considered confidential, and therefore getting figures on costs can be difficult. Third parties may contract either set-fees or percentage costs. The Fundraising Institute does not encourage percentage costs, citing that they consider them unethical.
- 43 Accounts are made available by charities through the Charities Commission. However, costs can be “tagged” in various ways and it is extremely difficult to

compare apples with apples. This leads to the public, if they do undertake their own research, being unable to accurately judge who the most efficient charities are with their donations.

- 44 The Ministry of Consumer Affairs considers that, based on the information from the surveys and the difficulty of defining prohibitions and therefore enforcing them, that a consumer information standard regulation is the preferred option.
- 45 An examination of the section 27 regulation-making powers, however, suggests there would need to be amended or additional regulation-making powers added to the Fair Trading Act to provide for disclosure of information on third parties collecting funds for charitable purposes.
- 46 Section 27(1)(a) provides for the “disclosure of information relating to the kind, grade, quantity, origin, performance, care, composition, contents, design, construction, use, price, finish, packaging, promotion, or supply of goods or services”. On first glance, there does not appear to be an option for the disclosure of the benefit derived for the third party (or the charitable entity). The closest may be the “use” description. “Use” in the Oxford Dictionary states “application to a purpose” (noun) and “cause to act or serve a purpose” (verb). It is possible this could be used to provide for disclosure of information on the benefit derived by the charitable entity of the third parties activities, probably under the noun definition, if the purpose is considered as benefiting the charitable cause.
- 47 It would be preferable for clearer regulation-making powers to be in place to provide for disclosure by third party collectors.
- 48 One option is to add a new word to the list in section 27(1)(a) the verb “benefit”. “Benefit” would refer to that which is derived by the collector or the charitable entity, although it is preferable to be positive with the disclosure and require disclosure of the benefit to the charitable entity and/or their activities⁵. As for “testing”, the inclusion of “benefit” fits with the Fair Trading Act’s proposed purpose statement. This option potentially also could be used for other information disclosure, rather than narrowly only applying to third party collectors soliciting for charities.
- 49 Another option is to add a new provision to the Fair Trading Act specifically identifying third party collectors for charitable entities.

Recommendations

- 50 We consider that the analysis supports the following recommendations, to:
 - a Add the testing of goods and product related services to the consumer information regulation making provisions in the Fair Trading Act.

⁵ Although not part of the Consumer Information Standard regulation-making powers amendment, one of the concerns from submitters was the unintended consequence of the public being dissuaded from donating due to the proportion (or lack of) their donation that went to the charitable organisation. This is a real risk with disclosure of this type. Therefore, it may be mitigated by providing within the Consumer Information Standard regulation-making powers that disclosure is from the point of the charitable entity, rather than from the third party. This framing technique would put the benefit to the charity as the main information.

- b Amend the Fair Trading Act to provide for consumer information regulation-making powers enabling greater disclosure related to collecting for charitable purposes.