



Consumer Law Reform Additional Paper – December 2010

Unsolicited Goods and Services

Introduction

- 1 The Consumer Law Reform review includes consideration of the Unsolicited Goods and Services Act 1975 (UGSA). The Consumer Law Reform discussion paper concluded that regulation of unsolicited goods and services is still necessary. It proposed that regulation of unsolicited goods and services should be included in the Fair Trading Act rather than in stand-alone law.
- 2 This paper discusses the feedback from submissions on ongoing regulation of unsolicited goods and services and its proposed form.

What is the policy underlying regulation of unsolicited goods and services?

- 3 The three policy principles behind the UGSA are to protect recipients of unsolicited goods and services by providing that:
 - 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, and
 - It is an offence to send an invoice to someone when the sender knows they have no right to be paid.

Does this behaviour still need to be regulated?

- 4 Before UGSA, suppliers of unsolicited goods relied on:
 - recipients' inertia to not return unsolicited goods, and
 - the Sale of Goods Act 1908, which said that retaining the goods demonstrates an intention to accept the goods, even if the recipient does not actually indicate acceptance (section 20).
- 5 When suppliers send consumers or businesses goods and services that they have not asked for and the recipients are deemed to have accepted them, it removes the recipients' right to choose whether to purchase the goods.
- 6 As noted in the discussion paper, suppliers still try to take advantage of consumers through unsolicited goods and services. The Ministry of Consumer

Affairs gets complaints about people demanding payment for unsolicited goods or services ranging from telecommunications services (like text messages), to educational DVDs. The Commerce Commission gets complaints about traders sending invoices for unsolicited goods and services. The Commission says that false billing is a significant issue causing detriment, particularly to small businesses. (The Commerce Commission's prosecution cases regarding this behaviour, however, have been taken under section 13 of the Fair Trading Act rather than the UGSA, because of the small fines available under the UGSA.)

- 7 From time to time the media reports on unsolicited services. For example an October 2010 article in *The Horowhenua Chronicle* provided advice on unsolicited services (where service providers are asked for a quote but complete the entire job without permission).
- 8 About a quarter of the submissions on the Consumer Law Reform commented on unsolicited goods and services, and about half represented businesses and half consumers. All submitters who commented on this area agreed it should continue to be regulated.
- 9 The recently passed Australian Consumer Law (ACL) continues regulation of unsolicited goods and services in Australia.

How should we regulate unsolicited goods and services?

Inclusion in the Fair Trading Act

- 10 As noted, the discussion paper proposed regulation of unsolicited goods and services in the Fair Trading Act. No one submitted against this proposal. Comments made included that:
 - it would aid enforcement and the penalties would be more appropriate, and
 - it would not change the applicability of unsolicited goods and services regulation to business-to-business transactions.
- 11 There are no other Acts, regulations or Bills that reference the UGSA that will be affected by its repeal.
- 12 The discussion paper noted two different approaches taken to regulating unsolicited goods and services by Australia and the United Kingdom (UK)¹. The ACL approach more closely aligns with the current New Zealand regulatory provisions. The ACL's provisions on unsolicited goods and services, however, are drafted in a more modern, principles-based form. The discussion paper suggested New Zealand could take the same approach.

¹ Under the UK Unsolicited Goods and Services Act 1971 goods become an unconditional gift as soon as they are intentionally sent to someone who did not order them. This puts all the risk on the sender of the goods but does not allow suppliers to send unsolicited goods as a direct selling mechanism (discussed below).

- 13 Importantly, the three policy principles noted above need to be addressed by regulation of unsolicited goods and services. The method of achieving this is now discussed.

Recipients are not liable for things they did not order.

- 14 The ACL and the UGSA include a provision stating that a recipient of unsolicited goods is not liable for the goods.
- 15 Continuation of provisions that say the recipient is not liable for goods not ordered is necessary in New Zealand and Australia to overturn presumptions in the Sale of Goods Act 1895 (Australia) and Sale of Goods Act 1908 (New Zealand) that a recipient intends to buy the goods if they retain the goods and stay silent.
- 16 The UGSA only refers to recipients not being liable for unsolicited services that are “prescribed” by regulations, and no services have ever been prescribed under the UGSA. Regardless of this, recipients of unsolicited services are currently not liable for services they did not order because there is no presumption in relation to services in the Sale of Goods Acts as there is for goods.
- 17 The ACL does explicitly provide that recipients are not liable for unsolicited services. The provision was included because Victoria already had such a provision, and incorporating it in the ACL ensured consistency without removing Victoria’s existing protections. It also increased protection to recipients from liabilities arising indirectly out of unsolicited services.
- 18 Should New Zealand adopt Australia’s new provision? In the UGSA, demanding payment for unsolicited services is already an offence (see below). In the 2009 National Consumer Survey, 77% of people already knew that they did not have to pay for work that a mechanic did on their car without asking first, suggesting that there may not be a problem in New Zealand that needs to be addressed.
- 19 From a principles-based perspective, however, clarifying in legislation that a recipient is not liable for both unsolicited goods and services makes it clear that the supplier of either goods or services is liable. In its submission, Contact Energy identified compliance costs with this change but in Australia the compliance costs for businesses to comply with the new provision were considered to be minor.
- 20 Accordingly, we recommend including a provision that explicitly states that recipients of unsolicited goods and services are not liable for the goods or services. This is effectively an extension of the UGSA to cover an area of law previously governed by the common law, but the extended coverage of services is consistent with the ACL.

Goods become the property of the recipient.

- 21 As well as stating that the recipient is not liable for unsolicited goods (to overturn the presumption in the Sale of Goods Act), it is also necessary for the legislation to deal with who actually owns the goods.
- 22 Under the ACL and the UGSA an unsolicited good becomes the property of the recipient three months after it is sent or delivered. During those three months the supplier owns the goods and can collect them. If the recipient wants the supplier to pick the goods up earlier, they can tell the supplier that they do not want the goods, and the supplier has one month to collect the goods.
- 23 The UGSA also gives recipients a duty of care during this period - they have to look after the goods as if they own them.
- 24 This approach allows suppliers to use the direct selling method of sending goods to people to entice them to buy the goods, giving the recipient the option to agree to buy the goods or have them collected. Under the UGSA, however, the duty to care for the goods for up to three months means that the recipient cannot do anything inconsistent with the supplier's ownership of the goods, for example damage the goods, leave them outside in the rain or throw them out, because they are still the property of the supplier. A recipient must leave them for collection, for example, on the front door step, until the three months is up (or one month with notice). This approach puts the risk of caring for the goods on the recipient until the three months has passed. This puts considerable risk on to the recipient, and very little on the supplier of the good.
- 25 Australia has a similar 3 month collection period (or 1 month with notice) but, unlike the UGSA, the ACL does not impose a duty of care, and does not make the recipient liable for the any damage to the goods (unless they damage them unlawfully and on purpose). The UK has a more straightforward approach – any unsolicited goods become the property of the recipient immediately.
- 26 In its submission, the NZ Marketing Association said it expected a business using this direct selling method to carry all the risk of caring for the goods, and for the consumer to not be required to carry any risk. Other business submitters prefer Australia's approach.
- 27 Submissions from consumer representatives indicate a preference for the UK approach because it is easier for recipients to understand and aligns with certain assumptions a recipient of unsolicited goods would make.² Given that only 1% of New Zealanders can name the UGSA, it is likely that most people

² Recipients who do not want to purchase an unsolicited good would assume that the best thing to do to indicate their lack of intention would be to will throw it in the bin, or leave it where the delivery person put it. If a supplier came back to pick up the goods, the consumer would have to pay for the goods, because these actions do not match with ownership of the goods.

do not know they are technically liable for not looking after or disposing of unsolicited goods for a 3 month period.³

- 28 Australia's approach allows the direct selling practice of suppliers sending unsolicited goods. There is evidence that some suppliers use this sales technique, but it is not clear how common the practice is in New Zealand (there were no submitters who said they used the method).
- 29 An option to allow the direct selling practice while providing more protection to recipients is to require suppliers to inform recipients of what they must do if they do not want to keep the good – for example, how to store it and how to allow collection. This was suggested by the NZ Law Society, which also suggested that if the information is not sent with the good then the good becomes an unconditional gift immediately, and if the information is included the status quo remains (good becomes a gift after 3 months or 1 month).
- 30 Another way to reduce the risk is to give suppliers a shorter period, say 10 working days, or two weeks, within which to follow up on the receipt of the good and to collect it if not wanted. This is a simple approach, which allows suppliers to sell using the unsolicited goods sales technique, but only gives recipients a short time for which they have to look after the good. The shorter collection period with notice would be removed.

Offence to demand payment

- 31 The USGA currently has three separate offences for:
- i Demanding payment for an unsolicited good (section 4)
 - ii Threatening to take action to enforce payment for an unsolicited good (section 5), or
 - iii Sending an invoice for an unordered good or service (section 8).
- 32 It is proposed that the first and third offences are amalgamated into one section, which will make it an offence to demand payment for unsolicited goods and services. The offence would apply when a supplier demands payment when they have no reasonable cause to believe they have a right to payment. Australia has one offence for asserting a right to payment for unsolicited goods and services.
- 33 In NZ, Australia and the UK an invoice is assumed to be demanding payment unless it has an obvious statement on it that the supplier does not claim a right to be paid (for example, where the supplier is just informing the recipient how much the good or service costs in case they would like to purchase it).
- 34 Australia and the UK regulate the words that must be included on invoices that do not demand payment, to increase certainty for suppliers and aid enforcement. Australia is currently consulting on regulations that require that

³ The 2009 National Consumer Survey undertaken by Colmar Brunton on behalf of the Ministry of Consumer Affairs.
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invoices must say “This is not a bill. You are not required to pay any money.” In the UK the words are “This is not a demand for payment. There is no obligation to pay. This is not a bill.”

- 35 Given advice from the Commerce Commission that false billing is an ongoing problem, it is proposed that the law should require a supplier to make a clear statement if not demanding payment. It is also proposed that there be regulation making powers providing for the form of this statement (if this becomes necessary).

Reasonable belief in a right to payment

- 36 It is necessary to have an element of the trader’s belief in the offence of demanding payment for unsolicited goods and services, because the intention behind the offence is not to prosecute people who send invoices by mistake. The sender must know, or reasonably believe that they do not have a right to payment, but are deliberately sending an invoice anyway.
- 37 Australia has adopted a reverses onus for proving this element of the offence (the supplier has to prove it *did* have a reasonable belief, rather than the prosecuting party proving that it did not). The Commerce Commission supports having a reserve onus in New Zealand because it is practically difficult for it to prove that a supplier did not have a certain belief.
- 38 Reverse onuses are more difficult to put in New Zealand legislation because our Bill of Rights Act 1990 includes the right to be presumed innocent until proved guilty (section 25(c)).
- 39 Another way to make the offence easier to enforce without reverting to a reserve onus is to make the offence of demanding payment for an unsolicited good or service a strict liability offence, with a defence if the supplier had a reasonable belief that they had a right to payment (which they would have to prove). This approach matches up with other offences in the Fair Trading Act, which are strict liability (the intention of the trader is not relevant) and the defences in section 44 (which incorporate an element of intention or belief).⁴

Offence for threats

- 40 The UGSA makes it an offence to threaten legal proceedings, put recipients on a list of defaulters or begin debt collection procedures in respect of goods only, with maximum penalties of \$750 for individuals and \$1,500 for businesses. The UK has a similar provision but Australia does not. It is proposed that this extra offence is not necessary with a more general offence of demanding payment and higher maximum penalties.

⁴ For example, section 9 of the Fair Trading Act says that no person shall engage in misleading or deceptive conduct, and the intention of the trader is not relevant. The prosecution only has to prove that the conduct was misleading or deceptive, not that the trader was deliberately trying to be misleading. The offence is strict liability. Section 44 then provides a defence if the misleading conduct was due to a mistake, or reliance on information supplied by another person. These defences incorporate elements of intention but require the defendant to prove them.

Specific coverage of other services

- 41 Australia has a separate provision that makes it an offence to demand payments for putting an unauthorised entry or advertisement in a publication, unless the publication has a large circulation of 10,000 or more. To authorise a publication a business has to sign a document that includes certain information. The UK has a similar provision.
- 42 The Commerce Commission identifies that small businesses have problems with unsolicited internet directory entries. They say it can be difficult to prove that traders do not have the right to receive payment for the entries.
- 43 The Direct Selling Association says that small businesses know enough to protect themselves from this practice so extra protection in this area is not necessary. They believe the current Fair Trading Act protections are enough.
- 44 It is an offence to invoice someone for unsolicited goods or services, and a requirement for clear wording on invoices that they do not need to be paid, and a strict liability offence will assist the Commission's enforcement. There is not enough evidence of a problem to create another separate offence for unsolicited directory entries.
- 45 Australia also prohibits the sending of unsolicited credit and debit cards. Any regulation of this practice is more appropriately considered as part of the Credit Contracts and Consumer Finance Act review, being undertaken by the Ministry of Consumer Affairs.

Recommendations

- 46 We recommend that:
- Regulation of unsolicited goods and services remain, and is included in the Fair Trading Act.
 - A provision is included that says that recipients of unsolicited goods and services are not liable to pay for them.
 - Unsolicited goods become the property of the recipient 10 working days after they arrive and there is no explicit duty of care imposed on the recipient.
 - A strict liability offence is created for asserting a right to payment for unsolicited goods and services.
 - Including an obvious statement in an "invoice" that it is not demanding payment should be a defence to the strict liability offence of asserting a right to payment for unsolicited goods and services. Regulation-making powers will enable the words in the statement to be regulated if necessary.
 - It will also be a defence if the sender had a reasonable belief that they had a right to be paid.