

**OFFICE OF THE MINISTER
OF CONSUMER AFFAIRS**

The Chair
CABINET ECONOMIC GROWTH AND INFRASTRUCTURE COMMITTEE

CONSUMER LAW REFORM: FURTHER DECISIONS**PROPOSAL**

1 This paper recommends the Committee agree to a number of additional matters to be covered in the Consumer Law Reform Bill. It follows from EGI Paper (10) 298 Consumer Law Reform. This paper and EGI Min (10) 30/18 noted that decisions would be sought in early 2011 on the following additional areas to be included in the Consumer Law Reform Bill: product safety, consumer information, contracting out of the Fair Trading Act, Fair Trading Act enforcement provisions, collateral credit and the Consumer Guarantees Act, the relationship between the Carriage of Goods Act and the Consumer Guarantees Act, and updating of the Weights and Measures Act.

EXECUTIVE SUMMARY

2 The Minister of Consumer Affairs initiated a major review of consumer law in 2009. Following this review, EGI agreed to drafting of the Consumer Law Reform Bill which will:

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

3 This paper addresses additional matters not covered in EGI Paper (10) 298 where the Fair Trading Act, Consumer Guarantees Act, Carriage of Goods Act and the Weights and Measures Act are not meeting their objectives or could meet their objectives in a different way with more positive outcomes have been identified

4 The purpose of the review includes updating consumer laws that in parts have become out of date and ensuring consumer laws are effective and enforceable. There is a cost to businesses and consumers when laws are out-of-date and not working effectively.

5 The Fair Trading Act 1986 provides for regulation of unsafe products. When a fault in a product is found this can be addressed through a voluntary recall. The recall provisions would be strengthened and difficulties for consumers and regulators finding out about product safety recalls improved, with mandatory notification of recalls. The unsafe goods notices and compulsory recall provisions would be strengthened also by extending their scope to include where reasonably foreseeable use and misuse will or may cause injury. This aligns with product safety law in

Australia. Formally providing for the Minister of Consumer Affairs to issue Government Product Safety Policy Statements would provide a low key regulatory tool avoiding the need for more intrusive product safety regulation.

6 The Fair Trading Act provides for consumer information regulations. Whilst the scope of the regulation-making powers is very wide, the powers would be improved by providing for testing related to information that must be disclosed and information related to collecting for charitable purposes. The latter is relevant to addressing the matters raised in Amy Adams' Fair Trading (Soliciting on Behalf of Charities) Amendment Bill.

7 Case law provides that traders cannot contract out of the Fair Trading Act in transactions with consumers and where there is an imbalance of power. It would be more transparent if the existing common law rules concerning contracting out of the Fair Trading Act, including the Contractual Remedies Act test, were codified in the Fair Trading Act.

8 To enable appropriate monitoring and enforcement of the Fair Trading Act by the Commerce Commission, it needs a range of enforcement tools. Enforcement of the Fair Trading Act would be strengthened by providing for court enforceable undertakings, infringement notices, and banning orders for recidivist offenders. The penalty levels for new and current offences under the Act should also be reviewed.

9 The Disputes Tribunal plays a major role in considering disputes related to the Fair Trading Act. To improve consumer access to justice and after considering submissions from the Disputes Tribunal, the Ministers of Justice, Courts and I support extending the scope of the Tribunal's jurisdiction to include section 9 (misleading and deceptive conduct generally).

10 The Consumer Guarantees Act provides for consumer redress when products do not meet expectations, including products that are not safe. Providing that when a consumer rejects goods that any collateral credit agreement may be vested in the supplier would address a weakness in the redress provisions. The Motor Vehicle Sales Act allows for such re-vesting of the collateral credit agreement where a vehicle is rejected.

11 There should not be any lesser rights for consumers using carrier services than generally provided in the Consumer Guarantees Act for using other services. Amending the Carriage of Goods Act to allow for the best protections of either the carriage contract or the Consumer Guarantees Act to apply when consumers suffer loss or damage of their goods during carriage would improve consumer outcomes whilst still enabling businesses to address risk liability. Similar to other consumer contracts, carriers should not be able to contract out of the Consumer Guarantees Act. It is also proposed that the limited carrier's risk liability limit be increased from \$1,500 to \$2,500 in line with inflation since 1989.

12 The Weights and Measures Act regulates accuracy of weighing and measuring instruments. It is very prescriptive and needs updating to provide for new retailing approaches such as supermarket self-checkouts. Extending the regulation-making powers to allow for periodic retesting of instrument accuracy will allow for alignment with future Australian weights and measures legislation. Providing for

private companies that are IANZ and ISO accredited to hold the equivalent of a District Standard would improve access of accredited persons to accuracy checking instruments. Making it clear that a customer should be entitled to see the weighing instrument and recorded weight in order to be satisfied there are no weighing anomalies is also proposed.

BACKGROUND

13 On 8 December 2010 the Cabinet Economic Growth and Infrastructure Committee (EGI) agreed to a Consumer Law Reform Bill that:

- Amends the Fair Trading Act 1986, the Consumer Guarantees Act 1993, the Weights and Measures Act 1987, and the Sale of Goods Act 1908; and
- 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.

14 EGI invited the Minister of Consumer Affairs to issue drafting instructions to the Parliamentary Counsel Office for a Consumer Law Reform Bill and invited the Minister to report back to the Committee on outstanding matters that may be included in the Consumer Law Reform Bill by 23 February 2011 [EGI Min (10) 30/18 and CAB Min (10) 45/8 refer]. This paper addresses the outstanding matters.

15 The Fair Trading Act, the Consumer Guarantees Act and the Weights and Measures Act 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.

16 The Door to Door Sales Act 1967, the Layby Sales Act 1971 and the Unsolicited Goods and Services Act 1975 are consumer laws that prescribe very specific behaviours for traders using these transaction methods in order to protect consumers and businesses. The Auctioneers Act 1928 concerns the licensing of auctioneers. Some aspects of conduct at auctions are regulated under the Sale of Goods Act.

17 The decision to have a Consumer Law Reform Bill was taken following a major review of consumer law initiated late 2009. In March 2010, 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]. 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 [EGI Min (10) 12/10 and CAB Min (10) 20/7 refer].

18 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.

19 The key decisions taken to date for the Consumer Law Reform Bill are:

- To add purpose clauses to the Fair Trading Act, Consumer Guarantees Act and Weights and Measures Act;
- To include in the Fair Trading Act provisions providing for a general prohibition on making unsubstantiated claims;
- To add principles-based layby sales provisions, unsolicited direct sales provisions and unsolicited goods and services provisions to the Fair Trading Act;
- To include a registration regime for auctioneers and auction conduct provisions in the Fair Trading Act;
- To remove the exemption in the Consumer Guarantees Act for sales by auction and competitive tender (by traders), except the acceptable quality guarantee for sales of secondhand goods by a registered auctioneer (i.e. sales by traders using Trade Me type internet auctions will be covered by the Consumer Guarantees Act);
- To require disclosure for extended warranties that indicates what the warranty provides in addition to the statutory guarantees of the Consumer Guarantees Act;
- To provide that electricity and gas distribution and transmission companies are suppliers who must meet the acceptable quality guarantees for electricity and gas;
- To amend the definition of trader in the Secondhand Dealers and Pawnbrokers Act 2004 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.

20 EGI Paper (10) 298 noted at paragraph 106 the following additional areas would be addressed in a paper to EGI early 2011: product safety, consumer information (including soliciting on behalf of charities), contracting out of the Fair Trading Act, Fair Trading Act enforcement provisions, collateral credit and the Consumer Guarantees Act, the relationship between the Carriage of Goods Act and the Consumer Guarantees Act, and updating of the Weights and Measures Act. This paper addresses these additional topics and also considers the Disputes Tribunal's powers under the Fair Trading Act.

21 There has been consultation on these matters as part of the overall Consumer Law Reform, in particular through the release of the discussion paper, receipt of submissions and the hearing of oral submissions. As well, a number of Additional Papers have been produced following consideration of the submissions which provide further analysis to support the proposals.

COMMENT

22 As noted in EGI Paper (10) 298, the laws included in the Consumer Law Reform in most cases are old and have not been reviewed or updated for many years. 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.

23 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 practices. 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. There is also very good recognition and understanding of the Consumer Guarantees Act and the Fair Trading Act by consumers and businesses.

24 The decisions taken with respect to the Consumer Law Reform Bill are based on the Fair Trading Act, the Consumer Guarantees Act and the Weights and Measures Act continuing.

Product Safety

25 The Fair Trading Act and the Consumer Guarantees Act (CGA) include general provisions on consumer safety. The CGA provides for consumer redress when a product is unsafe. The Fair Trading Act provides generally for product safety regulations and complements other specific product safety laws covering food, medicines, cosmetics, hazardous goods, electrical and gas appliances, and vehicles. The Fair Trading Act also provides for the Minister to issue unsafe goods notices (effectively a product ban) and to require product recalls.

26 Positive product safety outcomes rely on responsible suppliers. Occasionally there will be a product failure and a voluntary product recall will be initiated by the supplier. These work well based on good relationships between suppliers and regulators, including the Ministry of Consumer Affairs, supporting voluntary recalls.

27 There are compulsory recall powers in place. These have been used only once, many years ago. The compulsory recall powers, however, are an important

backstop available for regulators to use if a supplier does not agree to appropriate action.

28 Australia has a similar product safety framework to that in New Zealand. As part of the development of its new Australian Consumer Law there was an examination of the product safety framework and quite extensive additional product safety powers have been added to the Australian Competition and Consumer Act (the renamed Trade Practices Act). The Ministry of Consumer Affairs has considered the Australian product safety laws as part of the Consumer Law Reform.

29 Australia, similar to New Zealand, favours voluntary recalls when a product safety incident is identified. An important aspect of voluntary product safety recalls is informing consumers about the recalls. Typically, recall notices are placed in newspapers. With reduced readership of newspapers and increasing use of the internet to obtain information, I propose that the Fair Trading Act is amended to provide for mandatory notification to the Ministry of Consumer Affairs of voluntary product safety related recalls. I also propose that the product safety recalls up to two years old are listed on the Ministry of Consumer Affairs website. Requiring mandatory notification of product safety recalls will also allow for the collection of reliable data on recalls. This will provide important information when considering possible regulation of product safety and allow New Zealand to contribute accurate data to international product safety databases. These proposals align with the approach in the Australian Consumer Law which requires recalls to be advised to the Commonwealth Government of Australia.

30 With respect to unsafe goods notices and compulsory recalls, these can only be made where it appears goods will or may cause injury to a person. Australia has added to this test the situation where reasonably foreseeable use or misuse will or may cause injury. Unsafe goods notices and compulsory recalls are used only in extreme situations. In the past, there has been some difficulty with products which, whilst safe when used in certain situations, cause injury when used (or misused) in other reasonably predictable situations (eg, LPG powered air horns and very high capacity laser pointers). Having an additional power to consider reasonably foreseeable use or misuse will be a useful additional enforcement backstop. Accordingly, I propose that the Fair Trading Act unsafe goods notices and compulsory recall provisions should also cover where reasonably foreseeable use and misuse will or may cause injury to any person.

31 I am also aware of an incident where an unsafe product was recalled and then placed for sale, unchanged, on Trade Me.¹ To address the situation where a product is recalled and cannot be made safe, I propose the Fair Trading Act include provisions enabling the Minister to require a product is destroyed, subject to the Minister being satisfied that destruction is needed because the supplier has made or intends to make the product again available for sale and the product remains unsafe. I have proposed this power sits with the Minister as a check and balance to ensure it is used only when a clear need is established.

¹ The product was Christmas tree fairy lights that were electrically unsafe and had caught fire.

Monitoring of Product Safety

32 The Ministry of Consumer Affairs is responsible for providing me with advice on product safety, including on possible unsafe products and new regulations. The Commerce Commission and Customs, at the border, are responsible for enforcement of unsafe goods notices and product safety regulations.

33 The Ministry and the Commerce Commission are restricted in undertaking their product safety functions in that they can be prevented from entering premises, purchasing goods and asking for sellers' or suppliers' identification information. The Ministry cannot ask for a person to stop selling a good that has been implicated in a serious incident (when using the good as intended). (The Commerce Commission could seek an injunction under the Fair Trading Act if there is a strong suspicion there is a breach of an unsafe goods notice or product safety regulation.) Other laws related to product and food safety provide such powers to authorised officers² and the Australian Consumer Law provides such powers.

34 I propose the Fair Trading Act is amended to include similar powers for authorised Ministry of Consumer Affairs and Commerce Commission officers with appropriate checks and balances in line with other legislation. I propose these powers are available to the Commission for enforcement purposes and to the Ministry of Consumer Affairs when there is a reasonable belief an unsafe product is for sale.

Government Product Safety Policy Statements

35 In 2007, there was a product safety scare concerning unacceptable levels of formaldehyde in textiles. The Ministry of Consumer Affairs undertook an emergency investigation to determine whether there was an issue. The tools available to address any issue were to make an unsafe goods notice or to put in place regulations. Both of these tools were considered a disproportionate regulatory response to addressing the suggested problem – which the investigation found was not an issue. Both of these tools would impose considerable compliance costs on suppliers in having to determine whether clothing and textiles were within acceptable limits.

36 Instead, as a response, the Ministry of Consumer Affairs developed a Government Product Safety Policy Statement on acceptable levels of formaldehyde in clothing and other textiles. This provided clear information to suppliers without the compliance costs associated with regulations. There were, however, some questions about whether this was a tool available to the Minister given it was not provided for in the Fair Trading Act.

37 I propose that the Fair Trading Act formally provide for the issue by the Minister of Consumer Affairs of government product safety policy statements with a requirement for consultation with parties who may be affected prior to any statement being finalised. This will extend the regulatory options to deal with product safety and will provide a more formal status for any such policy statements.

² Examples of such laws are: Electricity Act 1992 (Part 2, section 6), Weights and Measures Act (section 28), Food Act 1981 (Part 3).

Consumer Information

38 The Fair Trading Act (section 27) provides for the making of consumer information standards (CIS) regulations. As with the product safety regulation-making powers, the CIS powers are wide, general powers and avoid the need for information disclosure regulation-making powers in other legislation.³ The scope of the CIS powers, however, is limited to providing for the information that is to be displayed and does not extend to specifying how that information is derived. To ensure that information is robust and accurate, it is often necessary to ensure that the source of the information is correct and consistent. While this can be achieved through official standards, occasionally the tests in official standards are inadequate or are outside the scope of the CIS regulation-making powers, or there is no official standard available.

39 The difficulty of this limitation was observed during the development of the Consumer Information Standards (Water Efficiency Labelling) Regulations and caused considerable delay. If a standard is cited in CIS regulations then the testing within that standard applies. However, the tests are not always adequate or fully relevant. Unless there are specific CIS regulation-making powers to prescribe testing, specific amendments to the cited standard's testing cannot be made. This can result in a lack of clarity for suppliers and create enforcement difficulties.

40 The product safety standard regulation-making powers include a requirement for testing of the goods (section 29(1)(b)). This allows for testing to be specifically referenced and also provides for useful consultation on testing methods by interested parties when there is no official standard to refer to. I propose that the CIS regulation-making powers are amended to similarly provide for testing related to any information disclosure requirements in CIS regulations. I also propose the Commerce Commission has similar powers to those proposed for product safety allowing entry to premises to check compliance with consumer information standards regulations disclosure requirements.

Soliciting On Behalf of Charities

41 The Commerce Committee is considering Amy Adams' Fair Trading (Soliciting on Behalf of Charities) Amendment Bill. This Bill concerns providing information to consumers when a proportion of donations is retained by third party collectors. Its aim is that consumers have better information to allow for more informed decisions on making donations to charities. I support Mrs Adams' objective that there should be more information provided to people making donations on whether a part of their donation is going to a third party collector.

42 Under the Fair Trading Act disclosure of information is provided for by way of CIS regulations, as noted above. It could be appropriate that CIS regulations are developed to provide for clear disclosure about whether the person collecting for charity is a volunteer or paid employee (of the charity or a third party collector) and requiring non-volunteers to disclose any percentage or payment being received for

³ There are five CIS regulations covering country of origin labelling of clothing and footwear, fibre content labelling of textile products, care labelling of clothing, textiles furnishings and various other household products, used motor vehicles for sale by traders, and water using products efficiency labelling.

soliciting donations. This could be by way of a label or badge worn by the collector, or a disclosure statement for telephone or internet soliciting.

43 The regulation-making powers, however, are not clear whether they extend in scope to enabling regulations on disclosure of fees or the like to third party collectors. Accordingly, I propose the CIS regulation-making powers are amended as necessary to allow for this outcome.

44 I understand Mrs Adams now proposes there should be a general prohibition in Part 1 of the Fair Trading Act on third party collectors retaining more than half of any donation collected for charitable purposes. She also supports complementary CIS regulations providing for greater disclosure related to collecting for charitable purposes. If there are changes to the Fair Trading Act it would be desirable that these are considered as part of the Consumer Law Reform Bill. I would like to seek Mrs Adams' agreement to this course of action.

Contracting Out of the Fair Trading Act

45 The Fair Trading Act is silent on whether parties can contract out of its provisions. The case law on the Fair Trading Act is clear that traders cannot contract out of their obligations to consumers under the Fair Trading Act. The courts will not give effect to clauses in contracts that seek to restrict the rights of consumers under the Fair Trading Act.

46 The case law is also clear that parties cannot excuse themselves from committing offences under the Fair Trading Act by contract. Parties are not legally capable of agreeing to contravene legislation.

47 There are cases where the courts have given effect to business-to-business contracts where the parties have agreed that they have no responsibility for representations that might have been made, or where they agree to a specific and exclusive list of representations. These clauses effectively preclude civil law remedies for conduct that might be misleading or deceptive in terms of section 9 of the Fair Trading Act, or misleading representations under section 13.

48 The Contractual Remedies Act 1979 is relevant to contracting out of remedies under the Fair Trading Act for misleading and deceptive conduct or misleading representations because it includes a test for whether the courts will give effect to clauses in contracts that purport to preclude the courts from considering representations made by the parties. The rule in section 4 of the Contractual Remedies Act is that the courts will not give effect to such clauses unless it is fair and reasonable to do so, having regard to all the circumstances of the case. The circumstances to be taken into account referred to in section 4 include the subject matter and value of the transaction, the respective bargaining strengths of the parties, and whether the parties had legal advice.

49 The Fair Trading Act is not transparent on any of these points, and there is no cross-reference between the Fair Trading Act and the Contractual Remedies Act.

50 The potential for business-to-business parties to contract out of the civil obligations in the Fair Trading Act is relatively narrow. For example, it only applies to

the direct parties to the contract, so individual directors or senior employees may still be liable for their own misleading and deceptive conduct or misrepresentations because they will not be parties to the contract. Contracting out in relation to representations that have been made is also less likely to protect parties from the consequences of misleading or deceptive conduct they engage in after the contract is entered into.

51 It would be a useful improvement, however in terms of accessibility and transparency, if the existing common law rules concerning contracting out of the Fair Trading Act, including the Contractual Remedies Act test, were codified in the Fair Trading Act. Accordingly, I propose the Fair Trading Act is amended as such.

Fair Trading Act Enforcement

52 To achieve the outcome of effective law that enables consumers to transact with confidence and that protects reputable suppliers from inappropriate market conduct, the law needs to be both enforceable and enforced. Much of consumer law enforcement is by individuals self-enforcing their rights. The Disputes Tribunal has an important role in providing low cost access to justice to assist self-enforcement. Industry dispute resolution schemes also have an important role.

53 The Commerce Commission has a major role in monitoring overall market conduct and has specific responsibilities related to enforcement of the Fair Trading Act. Previous decisions taken on the Consumer Law Reform Bill content will mean that the Commission's enforcement responsibilities are extended to cover unsolicited direct sales, unsolicited goods and services, layby sales and conduct at auctions.

54 The Commerce Commission has been very effective in enforcing the Fair Trading Act. For minor or accidental breaches of the Act it issues warning or compliance notices. Investigations of possible breaches of the Act may lead to settlement agreements or, if this approach is not possible, litigation. Litigation is taken to establish legal precedent and to establish breaches of the Act, which when established, can result in fines up to \$60,000 for individuals and \$200,000 for bodies corporate. It is also the only option for obtaining fines for lower level breaches of the Act, where fines may be under \$5,000. Three additional enforcement tools are recommended to make enforcement of the Fair Trading Act more efficient.

Court Enforceable Undertakings

55 Settlement agreements are the primary enforcement outcome. A settlement agreement is an agreement between the Commission and a party who admits some contravention of the law. The agreement will usually provide for the party to remedy the breach and change their behaviour and in return the Commission will agree not to take any further enforcement action.

56 Settlement agreements provide an efficient alternative to litigation, are significantly less expensive than court proceedings and significantly speed up the process of obtaining compensation for the victims of a breach of the Act. However, whilst settlement agreements are the predominant approach used by the Commission to get Fair Trading Act enforcement outcomes, this tool is an informal process rather than provided for in the Fair Trading Act.

57 In the Securities Act 1978 there are formal provisions for settlement agreements to be upheld by the courts if they are breached. These provisions strengthen the use of settlement agreements by clearly providing that the enforcement agency can take action if they are breached. The Australian Consumer Law also has a similar provision. The Commerce Commission is seeking similar powers under the Fair Trading Act. There are also formal provisions in the Commerce Act 1986 and the Telecommunications Act 2001 for settlement agreements with respect to regulatory undertakings.

58 In order to achieve a settlement process that is more transparent and supported formally in the Fair Trading Act, I propose the Act is amended to give the Commerce Commission the power to accept formal settlement agreements in connection to matters related to the enforcement of the Act and to apply to the court for an order requiring compliance with the undertaking or equivalent compensation.

Infringement notices

59 The Commission's enforcement tools also do not allow effective enforcement of minor breaches of the more clear-cut offences in the Fair Trading Act. Minor breaches do not cause much consumer detriment individually, but when added together could erode consumer confidence and public confidence in the Fair Trading Act.

60 Infringement notices and fines are used to enforce clear-cut breaches of infringement offences in over 20 pieces of legislation.⁴ If the Fair Trading Act included infringement offences and notices it would allow the Commerce Commission to carry out quick enforcement action for minor breaches. With the addition to the Fair Trading Act of provisions covering layby sales, unsolicited direct selling, unsolicited goods and services, and auction registration and licensing there are a range of offences that could be categorised as minor. Breaches of consumer information standard regulations are also likely to be minor in most cases.

61 Accordingly, I propose that the Fair Trading Act is amended to enable the Commerce Commission to choose to issue infringement notices and small fines for a limited number of clear-cut Fair Trading Act offences, including some of the new offences created by the Consumer Law Reform Bill. I propose that EGI gives me leave to work with the Minister of Justice to determine the exact offences and fines in accordance with guidance from Cabinet's Policy Framework for New Infringement Schemes.

62 Because infringement notices remove the right for a person to be tried and heard in a court before being fined, it is important that the process is fair and includes protections for defendants. Standard protections for all infringement notices are included in the Summary Proceedings Act 1957.

⁴ Examples of laws with infringement offences are the Motor Vehicle Sales Act, Weights and Measures Act, Land Transport Act, Resource Management Act, Building Act and Fisheries Act, among others.

Banning Orders

63 The Commerce Commission has identified some individuals who deliberately and repeatedly offend under the Fair Trading Act. Once convicted, an individual can continue to trade (and potentially re-offend) under new branding or a new company. The most common examples are scams and pro-forma invoicing. As noted, the penalty for a conviction under the Fair Trading Act is a fine of up to \$60,000 for an individual or \$200,000 for bodies corporate, but scammers' profits from unlawful activities at the expense of their victims can exceed those amounts. Some scammers would appear to consider the fine as a "cost of business". Although the number of repeat offenders is small, the consumer detriment and harm to consumer confidence is destructive.

64 A banning order can prevent the public from suffering detriment due to the ongoing misconduct of a deliberate wrongdoer or incompetent individual who continues to act unlawfully or unfairly even after they have been convicted and fined. Banning can be used as an enforcement tool against recidivist offenders who can cause significant damage from their repeat offending. It is particularly appropriate where the benefits of committing the offences are considered by the wrongdoer to outweigh the penalties available. Banning is intended as a protection mechanism for the public rather than a deterrent for would-be offenders, although banning is penal in nature.

65 I propose the Fair Trading Act is amended to enable the Commerce Commission to apply to the court to grant an order banning a repeat offender from being a director or promoter of a business or being involved in the management of a business involved in trade for up to 10 years, whether or not the business is incorporated. The court would need to be satisfied that the ban is justified in that particular case and only to the extent necessary to protect the public from being harmed by the individual's likely re-offending. I propose the banning provisions are similar to those in the Securities Act 1978.

66 A management ban will enable the individual to continue to earn a living while prohibiting them from causing detriment to susceptible consumers behind the veil of a business. I propose that banning orders only apply to individuals so as to not penalise employees (and shareholders) of the companies controlled by repeat offenders. I propose an application for a ban should only be allowed when an individual has been convicted, or was involved in the management of a company that has been convicted, of two or more offences under the Fair Trading Act within a 10 year period. Several breaches of the Fair Trading Act also show that the offender does not consider the penalties and stigma of a conviction enough to deter them from future offending.

67 I also propose that individuals who breach a banning order are guilty of an offence under the Fair Trading Act, with a maximum penalty including imprisonment and a fine to ensure that the individual can be punished effectively (say, if they are insolvent). The penalty should be in line with other similar offences in the Companies Act and the Credit Contracts and Consumer Finance Act 2003.

Maximum criminal penalties

68 The maximum penalties a court can give for committing an offence under the Fair Trading Act are currently \$60,000 for an individual and \$200,000 for bodies corporate. (The separate offence of failing to comply with a search warrant has maximum penalties of \$10,000 for an individual, and \$30,000 for bodies corporate.) These penalties were last updated in 2003.

69 With the inclusion of unsolicited goods and services, unsolicited direct sales, layby sales, substantiation, and auction regulation in the Fair Trading Act under the Consumer Law Reform Bill, a number of new offences and maximum penalties will need to be established. Accordingly, it is timely to review the entire range of penalties to ensure they are proportionate to the offences. The Fair Trading Act penalties should also be measured against penalties in other comparable legislation, such as regulation of financial advisors and resource management legislation.

70 I propose that EGI gives me leave to work with the Minister of Justice to review the Fair Trading Act maximum penalty levels for the new and current offences and determine new maximum penalty levels if necessary.

Disputes Tribunal Jurisdiction

71 Our consumer laws promote self-enforcement when a transaction occasionally goes wrong. Usually problems with a transaction are resolved between the parties. When a problem is not resolved and the parties want the courts to consider the dispute, in most instances the dispute is taken to the Disputes Tribunal for a hearing. The Disputes Tribunal has an important role in providing low cost access to justice for consumers and small businesses.

72 The Fair Trading Act, however, does not allow the Disputes Tribunal to consider civil claims under section 9 (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 were a smaller proportion of referees with full legal qualifications.

73 The former Principal Referee of the Disputes Tribunal, Judge Spiller, and the current Principal Referee, Anne Darroch, as part of the Consumer Law Reform consultation, specifically requested consideration was given to extending the jurisdiction of the Disputes Tribunal to address section 9 disputes. I met with the Principal Referee and many other Referees, who confirmed 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.

74 EGI agreed that the Ministers of Justice and Courts and I look into this matter further, in particular to consider whether the Disputes Tribunal had the capacity to consider such complex legal disputes, including financial implications. Officials have advised us following further discussions of this proposal with the Principal Referee. The Ministers of Justice and Courts and I have considered the views of the Disputes

Tribunal and officials and are satisfied that extending the jurisdiction of the Disputes Tribunal to consider civil claims under section 9 of the Fair Trading Act is within the Tribunal's capacity and will improve access to justice. Accordingly, we propose the Fair Trading Act is amended to provide for this jurisdiction.

Consumer Guarantees Act and Collateral Credit

75 Under the Consumer Guarantees Act (CGA), consumers have the right to reject goods where they fail and the failure cannot be remedied or where the failure is of substantial character (for example, if the goods are unsafe or would not have been purchased by the consumer had they known about the failure). Rejection reverts the goods in the supplier and requires the supplier to provide a refund or, if the consumer chooses, goods equivalent to those rejected (if the goods are in stock).

76 At present there is no mechanism to relieve a consumer's liability under a collateral credit agreement, arranged by the supplier, to purchase goods, in the event that goods are rejected and the supplier fails to provide redress. The consumer in this situation remains personally liable for the credit without the benefit of the goods.

77 From a consumer law and policy perspective, consumers should be confident that effective redress is available to them if their reasonable expectations about a good are not met. Consumers do not have effective redress if they remain potentially liable for goods they have rejected under the CGA.

78 The Motor Vehicle Sales Act addresses this issue by enabling the Motor Vehicle Disputes Tribunal to revert a collateral credit agreement with the vehicle dealer where the vehicle is rejected or the trader breached sections 1 through 4 of the Fair Trading Act. I propose there are similar provisions available to consumers for all situations where goods are rejected under the CGA. Specifically, it is proposed that a consumer may ask the Disputes Tribunal or courts to vest the consumer's rights and obligations under a collateral credit agreement that is arranged by the supplier, with the supplier, where the consumer has rejected the goods under the CGA, or where the consumer has been subject to conduct, by the supplier, that contravenes any provision in Parts 1 through 4 of the Fair Trading Act.

Consumer Guarantees Act and the Carriage of Goods Act

79 There has been some concern expressed on television consumer watchdog programmes about consumer rights relating to courier and other carrier services. The issue concerns a consumer's rights when a delivery service is not satisfactory. The Minister of Commerce is responsible for the Carriage of Goods Act 1979 but asked if this matter could be addressed as part of the Consumer Law Reform as it is clearly a consumer issue.

80 The CGA sets out consumer guarantees with respect to goods and services and is the primary consumer redress law. The CGA includes a guarantee that services to consumers will be provided with reasonable care and skill. This includes that the service, or any product resulting from the service, will be reasonably fit for purpose and achieve the particular result made known to the supplier before or at the time of contracting the particular service. It also includes that the service will be

completed in a reasonable time. The CGA is self-enforcing, therefore the consumer has to prove the guarantees have been breached.

81 The Carriage of Goods Act is a specific law covering goods delivered by carriers, for example, couriers and other transport firms. The Act is structured so that there can be four approaches to contracts: owner's risk; limited carrier's risk; declared value risk; and on declared terms. It provides that if a carrier uses a limited carrier's risk contract, then there is a maximum liability of \$1,500 per item. This applies on a strict liability basis. Essentially, with limited carrier's risk the Act provides that carriers must provide certain protections to users of carriers (consignees) and if something goes wrong there is strict liability to the value of the limited claim amount (maximum \$1,500).

82 The investigation of the application of the Carriage of Goods Act has found that the Act is not being implemented as intended. While the intention was to provide the contracting party with a choice of contract, it is not mandatory to offer the limited carrier's liability option. This means that consignors cannot make an informed decision on the cost of the protection or the risk they might choose to take, and can lead to consumers having lesser or no rights (guarantees) with respect to carrier services.

83 For consumers, this situation is compounded in that section 6 of the Carriage of Goods Act implicitly overrides the CGA. The difficulty for consumers is that section 7 of the Carriage of Goods Act allows for contracting out of those provisions in the Act providing for redress. In comparison, it is not possible to contract out of the CGA unless the contracting out provides for a better redress outcome.

84 A problem may arise when parties contract out of the Carriage of Goods Act. This might occur when a business uses a carrier to consign goods to a consumer. The consignee, who is the end receiver of the goods, has very few rights because they are not a party to the contract of carriage. Whilst this works for businesses where consignor and consignee have a clear and ongoing business relationship, consumer consignees are more vulnerable. The rights under the CGA of consignees who own the goods being carried and who are consumers should not be affected by contracts of carriage between carriers and consignors.

85 The Carriage of Goods Act predominantly applies to business-to-business transactions. For such transactions, there may be good reasons for allowing contracting out. Industry estimates that only about 5-10% of transactions are consumer transactions. Officials have considered the issue of appropriate redress for such transactions when they go wrong and have not identified any policy reasons why there should not be consumer protections at least as good as the service guarantees under the CGA when consumers are supplied carrier services.

86 The Carriage of Goods Act protections are through the use of limited carrier's risk contracts. For consumers, these contracts are advantageous where the goods being carried are not high value as the carrier has strict liability regarding redress. For higher value goods there may be an advantage in using another contract form, but in such cases there is no reason why the general protections of the CGA should not apply.

87 To address the issues identified with the Carriage of Goods Act for consumers either using carrier services or receiving goods delivered by carriers, I propose that carriers should be required to offer the limited carrier's liability option under the Carriage of Goods Act when they offer carriage services to any consignor. It is further proposed that if the limited liability carrier's risk option is not used, the service guarantees under the CGA should apply for the benefit of consumers when they are supplied carrier services.

88 I also propose that section 7 of the Carriage of Goods Act should specifically not allow for the contracting out of the CGA's obligations except as provided for in section 43 of the CGA.

89 I also propose the amount of the carriers' liability under the Act is increased in line with inflation since 1989 from \$1,500 to \$2,500 and that the Act provides for future adjustments by Order in Council.

90 The removal of the liability cap was not examined by officials as it has wider business implications that are outside of the Consumer Law Reform review.

Weights and Measures Act

Weighing and Measuring Instrument Accuracy

91 All weighing and measuring instruments are required to be verified for accuracy before they are used in trade. Traders also voluntarily check or reverify their weighing instruments from time to time and obtain a certificate of accuracy. This provides a defence against any measurement deficiency detected at a later date.

92 With time and use, any weighing and measuring instrument is subject to some loss of accuracy. Internationally, there are requirements for periodic retesting of instrument accuracy. Australia is looking into introducing such requirements and New Zealand is monitoring their assessment work and would look to adopt a similar approach.

93 It would be appropriate that any retesting requirements are included in the Weights and Measures Regulations 1999. I propose that the Weights and Measures Act is amended to enable the making of regulations for retesting of an instrument's accuracy. Any decisions to have regulations will require full consultation and a Regulatory Impact Statement (RIS).

94 Section 13 of the Weights and Measures Act sets out the principle that with invoices or delivery notes, the weight or measure of the goods sold must be provided. This enables the purchaser to make an independent check of the weight or measure if considered necessary.

95 There are various occasions when someone may buy goods by measure and weight from a provider with only email or telephone contact details. If the goods supplied are inaccurate with respect to weight or measure, there may be insufficient information to seek redress or for further investigation by MAPSS. I propose that the Weights and Measures Act is amended to provide for the making of regulations requiring disclosure of contact information with receipts for goods. Any decisions on specific regulations will require full consultation and a RIS.

Providing for third parties to hold the equivalent of District Standards

96 The Weights and Measures Act provides for accredited persons to test and verify the accuracy of weighing and measuring instruments. Accredited persons have working standards to undertake this function. The Act requires the working standards are tested and calibrated against District Standards or the Departmental Standard. The District Standards and Departmental Standard are held by MAPSS.

97 There is no policy reason why the equivalent of the District Standards could not be held by a company that meets appropriate IANZ and ISO requirements. Accordingly, I propose that the Weights and Measures Act is amended to provide that the Secretary may approve a person (company) to hold the equivalent of the District Standards.

Updating the Weights and Measures Act

98 Section 15(1) of the Weights and Measures Act requires that a retailer is responsible for weighing goods sold. This provision is very prescriptive and does not address where supermarkets have self-service weighing options for consumers to use. There is no policy reason that only retailers must weigh goods. Rather, it is preferable to have more principles-based law requiring retailers are responsible for the accuracy of weighing equipment used to determine the sale of their goods. I propose the Weights and Measures Act is amended to reflect this principle.

Indicators of accuracy

99 There are two further changes I propose to improve enforcement of the Weights and Measures Act. It is an offence to remove, deface or obliterate a stamp or mark depicting instrument accuracy. I propose this offence also extend to a re-verification seal.

100 I also propose amending section 15 of the Act to make it clear that the weighing instrument and the indicator of the weight must be in close proximity. This is to ensure a customer has the opportunity to see that the weighing is being undertaken without distortion, eg, with no holding down of the scale or placing additional weights on the scale surreptitiously.

CONSULTATION

101 There has been extensive consultation with stakeholders on the Consumer Law Reform including consultation on a discussion paper, stakeholder meetings, oral submissions and the release of Additional Papers. My officials and I have also met and discussed the Consumer Law Reform with a wide range of stakeholders.

102 The following government departments and agencies have been consulted: Ministries of Economic Development, Foreign Affairs and Trade, Justice and Transport, the Treasury and the Commerce Commission. The Department of Prime Minister and Cabinet has been informed.

FISCAL IMPLICATIONS

103 As noted in EGI (10) 298, there are fiscal implications associated with the Consumer Law Reform Bill. The Treasury notes that given the considerable fiscal pressures the Government is facing and its desire to return the Budget to surplus as soon as possible, funding or any other costs associated with the Consumer Law Reform should be reprioritised within the baselines of relevant agencies.

104 EGI agreed to auctioneer registration being the responsibility of the Ministry of Economic Development. It is currently the responsibility of the Ministry of Justice. When there is more information on the form and likely cost of the licensing regime a separate paper will be provided to EGI by the Ministry of Consumer Affairs in consultation with the Ministries of Economic Development and Justice and the Treasury.

HUMAN RIGHTS

105 The proposals in this paper may raise issues of inconsistency with the New Zealand Bill of Rights Act 1990, although it is anticipated that the proposals can be developed in a Bill of Rights consistent manner. These issues concern section 21 (security against unreasonable search and seizure) of the Bill of Rights Act. A final view as to whether the proposals comply with the Bill of Rights Act will be possible once the legislation has been drafted, and justificatory material is provided and considered.

LEGISLATIVE IMPLICATIONS

106 The paper proposes amending the Fair Trading Act 1986, the Consumer Guarantees Act 1993 and the Carriage of Goods Act 1979.

107 These proposals complement earlier decisions taken to have a Consumer Law Reform Bill that:

- amends the Fair Trading Act 1986, the Consumer Guarantees Act 1993, the Weights and Measures Act 1987, and the Sale of Goods Act 1908; and
- 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 [EGI Min (10) 30/18 refers].

108 A bid has been made for the Consumer Law Reform Bill to have a priority 2 on the 2011 Legislative Programme: Category 2: must be passed in the year.

REGULATORY IMPACT ANALYSIS

Quality of the Impact Analysis

109 The Regulatory Impact Analysis (RIA) requirements apply to the proposals in this paper and a draft Regulatory Impact Statement (RIS) has been prepared by the Ministry of Consumer Affairs. The RIS is currently being revised so that the Ministry can incorporate the impact analysis of the weights and measures proposals and so that the Ministry can incorporate improvements suggested by the Treasury's

Regulatory Impact Analysis Team. A final, assessed RIS will be available on 7 February 2011.

Consistency with Government Statement on Regulation

110 I have considered the analysis and advice of my officials, as summarised in the draft 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

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

RECOMMENDATIONS

112 It is recommended that the Committee (EGI)

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 the SEM agenda.
- 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, meetings, and the release of Additional Papers.

Consumer Law Reform Bill

- 5 **Note** that EGI agreed to the drafting of a Consumer Law Reform Bill on 8 December 2010 [EGI Min (10) 30/18 refers] which will:
- 5.1 amend the Fair Trading Act 1986, the Consumer Guarantees Act 1993, the Weights and Measures Act 1987, and the Sale of Goods Act 1908; and
 - 5.2 repeal the Door to Door Sales Act 1967, the Layby Sales Act 1971, the Unsolicited Goods and Services Act 1975, and the Auctioneers Act 1928.
- 6 **Note** a bid has been made for the Consumer Law Reform to have Category 2 on the 2011 Legislative Programme: must be passed in the year.
- 7 **Note** that the Minister of Consumer Affairs was invited to report back to EGI in February 2011 on outstanding matters to be included in the Consumer Law Reform Bill.
- 8 **Note** the outstanding matters cover product safety, consumer information, Fair Trading Act enforcement provisions, the Disputes Tribunal's powers under the Fair Trading Act, contracting out of the Fair Trading Act, collateral credit and the Consumer Guarantees Act, the relationship between the Carriage of Goods Act and the Consumer Guarantees Act, and the Weights and Measures Act.

Product Safety

- 9 **Note** the Consumer Guarantees Act provides that manufacturers and retailers are responsible for the safety of the products they supply and must provide redress when an unsafe product is supplied.
- 10 **Note** that when there is more than a one-off safety incident with a product this may result in a voluntary product safety recall.
- 11 **Note** the Fair Trading Act includes product safety regulation-making powers, and provides for the Minister of Consumer Affairs to issue an unsafe goods notice and to require a compulsory product recall.
- 12 **Note** there is good cooperation between regulators and manufacturers and retailers and, accordingly, these Fair Trading Act powers are rarely used, although they provide an essential backstop.
- 13 **Agree** that the Fair Trading Act is amended, as a further backstop measure, to provide the Minister may require recalled unsafe products are destroyed, subject to the Minister being satisfied that destruction is needed because the supplier has made or intends to make the product again available for sale and the product remains unsafe.
- 14 **Note** that typically voluntary product safety recalls are notified in newspapers but that there is declining readership of newspapers and more reliance on the internet and social media for information.

- 15 **Agree** that the Fair Trading Act is amended to provide for mandatory notification to the Ministry of Consumer Affairs of product safety recalls and for these to be listed on the Ministry's website for up to two years.
- 16 **Note** that unsafe goods notices and compulsory recalls can only be made where it appears a good will or may cause injury to a person.
- 17 **Note** that Australia and other countries also include the test that reasonably foreseeable misuse of a product will or may cause injury, which, if added to the Fair Trading Act provisions, would usefully widen the test for an unsafe product.
- 18 **Agree** to amend the Fair Trading Act unsafe goods notices and compulsory recall provisions to cover where reasonably foreseeable use or misuse will or may cause injury to any person.
- 19 **Note** there are situations when it is useful for the government to provide guidance on acceptable product safety rather than put in place regulations, for example, the Government Product Safety Policy Statement on Acceptable Levels of Formaldehyde in Clothing and Textiles (which was strongly supported by industry affected by allegations in 2007 of high formaldehyde levels in clothing as a better alternative to regulation).
- 20 **Note** it would be useful to formally provide for Government Product Safety Policy Statements in the Fair Trading Act with requirements for the Minister of Consumer Affairs to formally consult with affected parties prior to making any such statement.
- 21 **Agree** to amend the Fair Trading Act to provide for the Minister of Consumer Affairs to make a Government Product Safety Policy Statement with an obligation to consult with parties likely to be affected, along the lines of the consultation requirements for making consumer information standards and product safety regulations.
- 22 **Note** the Ministry of Consumer Affairs, responsible for providing advice on unsafe products, and the Commerce Commission, responsible for monitoring and enforcement of product safety regulations and unsafe goods notices, are restricted in undertaking product safety functions as there are not specific enforcement-type powers in the Fair Trading Act, for example, rights of entry on to premises.
- 23 **Agree** to amend the Fair Trading Act to provide for:
- 23.1 the Minister to authorise named Ministry of Consumer Affairs and Commerce Commission officers to enter premises during normal working hours, purchase goods, and ask for sellers' or suppliers' identification information;
 - 23.2 the Minister's authorisation of Commerce Commission officers is for the purposes of monitoring and enforcement of unsafe goods notices and product safety regulations;
 - 23.3 the Minister's authorisation of Ministry of Consumer Affairs officers allows the use of the powers as above in 23.1 only when there is a reasonable belief an unsafe product is for sale;

- 23.4 to allow a Ministry of Consumer Affairs' authorised officer to ask for a person to stop selling a good that has been implicated in a serious incident (when using the good as intended);
- 23.5 the above powers to be subject to appropriate checks and balances in line with other legislation and the Bill of Rights Act.

Consumer Information

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

Contracting Out of the Fair Trading Act

- 30 **Note** the Fair Trading Act is silent on whether parties can contract out of its provisions and, although the common law and the Contractual Remedies Act 1979 set out a number of limits to contracting out, these are not transparent to consumers and small businesses.
- 31 **Agree** that the existing common law rules concerning contracting out of the Fair Trading Act, including the Contractual Remedies Act test, should be codified in the Fair Trading Act.

Fair Trading Act Enforcement

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

33 **Note** that there is no formal provision in the Fair Trading Act for settlement agreements in comparison to the Securities Act 1978, the Commerce Act 1986, and the Telecommunications Act 2001, which weakens the effectiveness and enforcement of settlement agreements.

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

- 34.1 the Commerce Commission may accept a written court enforceable undertaking in connection to a matter related to the enforcement of the Fair Trading Act, similar to sections 69J and 69K of the Securities Act;
- 34.2 the Commission may apply to the court for an order requiring a party to an undertaking to comply with a term of the undertaking, pay money to the Crown (not exceeding the financial gain the person obtained by breaching the undertaking), and/or compensate others for loss or damage caused by the breach;
- 34.3 a party to an undertaking and the Commission may agree to alter or withdraw an undertaking.

35 **Note** that there are several repeat Fair Trading Act offenders that cause serious detriment to consumers and are not deterred by the penalties under the Act.

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

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

- 37.1 Allow the court to ban an individual from being a director or promoter of a business engaged in trade, or being involved in the management of a business engaged in trade (whether or not the business is incorporated), for up to 10 years subject to conditions as necessary.
- 37.2 Applications can only be made when an individual has been convicted, or was involved in the management of a company that has been convicted, of two or more offences under the Fair Trading Act within a 10 year period.
- 37.3 The court can order a ban where it is satisfied that the ban is justified in that particular case and only to the extent necessary to protect the public from being harmed by more of the individual's offending.
- 37.4 Applications for banning orders can be made to the District Court only by the Commerce Commission.

- 37.5 When deciding whether to ban an individual the District Court can hear evidence from the Commerce Commission, the defendant and other people that are connected with the proceedings (for example, other enforcement entities or people affected by the individual's offending).
- 37.6 Appeals against the District Court's decisions can be made to the High Court.
- 37.7 Banned individuals can apply to the Court for leave to participate in activities prohibited by the ban.
- 37.8 Breaches of a banning order are an offence, the maximum penalty of which will include imprisonment and a fine in line with similar offences in the Companies Act 1993 and the Credit Contracts and Consumer Finance Act 2003.

38 **Note** that there is currently no efficient enforcement tool for minor breaches of the clear-cut provisions in the Fair Trading Act.

39 **Agree** that the Fair Trading Act should specify a limited number of infringement offences and provide for the Commerce Commission to issue infringement notices for minor breaches.

40 **Invite** the Minister of Consumer Affairs in consultation with the Minister of Justice to determine those matters to be included as infringement offences and the appropriate penalty levels.

Fair Trading Act Offences and Penalties

41 **Note** that with the incorporation of a number of new provisions into the Fair Trading Act it is necessary to establish some new offences

42 **Note** the Fair Trading Act maximum penalties were last updated in 2003.

43 **Invite** the Minister of Consumer Affairs, in consultation with the Minister of Justice, to review the maximum penalty levels in the Act and determine new maximum penalty levels if necessary.

Disputes Tribunal Jurisdiction

44 **Note** a considerable amount of enforcement of the Fair Trading Act is through the Disputes Tribunal but the Disputes Tribunal can only consider a limited range of allegations of misleading and deceptive conduct, and not allegations of misleading and deceptive conduct generally, which is a fundamental principle of the Act.

45 **Note** that following consideration of submissions from the Principal Referee of the Disputes Tribunal and reports from the Ministry of Justice and Ministry of Consumer Affairs, the Ministers of Justice, Courts and Consumer Affairs recommend extending the jurisdiction of the Disputes Tribunal to examine allegations of misleading and deceptive conduct.

46 **Agree** to amend the Fair Trading Act to provide for the Disputes Tribunal to consider alleged breaches of section 9 of the Fair Trading Act.

Consumer Guarantees Act and Collateral Credit

47 **Note** that consumers do not have adequate redress in the event that goods purchased on credit are rejected under the Consumer Guarantees Act 1991 (CGA) (for example, because of a substantial failing) and the supplier fails to provide redress, meaning the consumer remains responsible for a credit contract although no longer the owner of the goods.

48 **Note** that the Motor Vehicle Sales Act enables the Motor Vehicle Disputes Tribunal to vest motor vehicle collateral credit agreements with the vehicle trader if the vehicle is rejected or the trader contravenes the Fair Trading Act.

49 **Agree** that provisions be included in the CGA which enable the Disputes Tribunal or courts to vest a consumer's rights and obligations under a collateral credit agreement that is arranged by the supplier, with the supplier, where the consumer has rejected the goods under the CGA, or where the consumer has been subject to conduct, by the supplier, that contravenes any provision in Parts 1 to 4 of the Fair Trading Act.

Consumer Guarantees Act and the Carriage of Goods Act

50 **Note** that the CGA provides a statutory guarantee of due care and skill with respect to services, but the consumer has to prove that this guarantee has been breached.

51 **Note** that the Carriage of Goods Act provides four approaches to contracts that may be offered: owner's risk; limited carrier's risk (intended default option); declared value risk; and on declared terms.

52 **Note** that the limited carrier's risk is capped at \$1,500, and is a strict liability risk (meaning that the consumer or business does not have to prove fault with care or skill).

53 **Note** that the practice under the Carriage of Goods Act is not always to offer limited carrier's risk meaning that consignors cannot make an informed decision on the cost of protection or the risk they may choose to take.

54 **Note** that consumers can have lesser or no rights (guarantees) with respect to carrier services that come under the Carriage of Goods Act because the Carriage of Goods Act implicitly overrides the CGA regarding loss or damage and also allows for businesses and carriers to contract out of the Act.

55 **Agree** that carriers should be required to offer the limited liability carrier's risk option under the Carriage of Goods Act when they offer carriage services to any consignor.

56 **Agree** that if the limited liability carrier's risk option is not used, the service guarantees under the CGA should apply for the benefit of consumers when they are supplied carrier services.

57 **Agree** that the carrier's liability for loss or damage to goods through the CGA service guarantee should not be restricted by a contract of carriage under the Carriage of Goods Act unless the contract of carriage imposes a stricter liability on the carrier, or provides a more advantageous remedy to the consumer than is otherwise available under the CGA.

58 **Agree** to amend the Carriage of Goods Act so that it specifically does not allow for the contracting out of the CGA's obligations except as provided for in section 43 of the CGA.

59 **Note** that the carrier's risk liability under the Carriage of Goods Act was set in 1989 at \$1,500.

60 **Note** that removal of the liability cap has not been examined as it has wider business implications that are outside of the Consumer Law Reform review.

61 **Agree** that the amount of the carrier's liability under the Carriage of Goods Act should be increased in line with inflation from \$1,500 to \$2,500, and future increases should be able to be made by Order in Council.

Weights and Measures Act

62 **Note** the Weights and Measures Act is very prescriptive law that regulates accuracy of weighing and measuring instruments and needs updating in several areas to provide for new retailing and supplier approaches, for example, supermarket self-checkout.

63 **Agree** to amend the Weights and Measures Act:

- 63.1 to enable the making of regulations for retesting of a weighing or measuring instrument's accuracy;
- 63.2 to provide that persons offering goods for sale (eg, retailers) are responsible for the accuracy of weighing equipment used to determine the sale of their goods;
- 63.3 to add an offence to remove, deface or obliterate a stamp or mark depicting reverification;
- 63.4 to require that the weighing instrument and indicator of the weight of a good must be in close proximity so that the consumer can see both at the same time, if desired.

64 **Note** the Weights and Measures Act provides the Secretary (Chief Executive of the Ministry of Economic Development) only may hold a District Standard, which is the working standard for calibrating weights and measures.

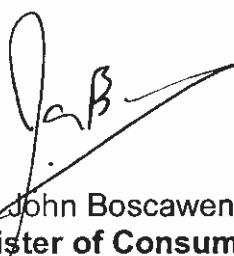
65 **Agree** to amend the Weights and Measures Act to provide that the Secretary may approve a person (company) that meets appropriate IANZ and ISO requirements, as defined in regulations, to hold the equivalent of the District Standard and that this can be used in the same manner as a District Standard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

Next Steps

- 66 **Invite** the Minister of Consumer Affairs to issue additional drafting instructions to the Parliamentary Counsel Office for the Consumer Law Reform Bill covering the recommendations above, drawing Parliamentary Counsel Office's attention to the detailed Additional Papers that discuss the general principles behind the recommendations.

Publicity

- 67 **Agree** to the publication of this Cabinet Paper, the corresponding Minute and the Regulatory Impact Statement on the Ministry of Consumer Affairs website, at an appropriate time.

A handwritten signature in black ink, appearing to read 'J. Boscawen', with a long horizontal stroke extending to the right.

Hon John Boscawen
Minister of Consumer Affairs

Date signed: 3/2/11.