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OFFICE OF THE MINISTER
OF CONSUMER AFFAIRS

The Chair
Cabinet Economic Growth and Infrastructure Committee

Consumer Law Reform Bill: Additional Decisions

Proposal

- 1 This paper proposes the Economic Growth and Infrastructure Committee (EGI) agrees to:
 - a) include some additional changes to the Fair Trading Act 1986 in the Consumer Law Reform Bill, and
 - b) amend some decisions taken on changes to the Carriage of Goods Act and Consumer Guarantees Act 1993.
- 2 EGI's agreement is sought to enable officials to recommend the proposed changes to the Commerce Committee.

Executive Summary

- 3 The Consumer Law Reform Bill is currently before the Commerce Committee. It amends the Fair Trading Act 1986, the Consumer Guarantees Act 1993, the Weights and Measures Act 1987 and a number of other laws.
- 4 Some 90 submissions have been made on the Bill and about 60 oral submissions heard. Several issues arising from the submissions and consideration of the Bill require further policy decisions.
- 5 In the First Reading speech of the Bill, the Minister of Consumer Affairs invited submissions on and asked the Commerce Committee to consider whether the Fair Trading Act should include provisions on unfair contract terms and unconscionability, not currently in the Bill. The Commerce Committee has given an informal indication that it would favour including unfair contract terms and unconscionability provisions in the Fair Trading Act. I recommend including unfair contract terms provisions. I do not think the case for unconscionability provisions is sufficiently made out.
- 6 The Commerce Commission in written and oral submissions has requested it has compulsory interview powers under the Fair Trading Act similar to such powers it has under the Commerce Act 1986. The Commerce Committee has informally indicated general support for giving such powers to the Commission to assist its Fair Trading Act enforcement. I have considered the Bill of Rights Act 1990 implications of such a power and on balance consider it to be a justified extension of the Commission's powers.
- 7 The Consumer Guarantees Act provides consumers with significant statutory protections. by implying certain guarantees into almost all sales by traders to consumers. The major exceptions that exist at the moment relate to sales by auction and competitive tender. Cabinet previously agreed to limit that exception by applying the Consumer Guarantees Act to all such sales, save that the guarantee of acceptable quality would not apply to

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second hand goods sold at a conventional auction. After further consideration, I have concluded that there is insufficient justification for this limited exemption and it is likely to cause distortion in the market for secondhand goods, particularly cars. Accordingly, EGI is asked to rescind its original decision and agree that the Consumer Guarantees Act will apply to all sales between traders and consumers.

- 8 EGI also agreed to amend the Consumer Guarantees Act and Carriage of Goods Act to provide better consumer protections when goods are lost or damaged by carriers. There has been a significant negative reaction to the proposals in the Bill to achieve better protection. Following consideration of submissions and consultation with key industry parties it is recommended the Committee rescind previous decisions amending the Carriage of Goods Act carrier obligations and instead agree to amend the Consumer Guarantees Act to provide that goods transported by a carrier have the ordinary acceptable quality guarantee extended to the point where they are delivered. This will make the supplier responsible to the consumer for the carriage of goods where they have contracted to arrange this as part of the sale.
- 9 EGI is also asked to agree not to proceed with a Law Commission recommendation to have a mandatory requirement for telemarketers to use a Do Not Call register. There is not sufficient evidence to require such a requirement.

Background

- 10 In December 2010 and February 2011, Cabinet made a number of decisions to update and strengthen consumer laws [EGI Min (10) 30/18, CAB Min (10) 45/8, EGI Min (11) 1/12, CAB Min (11) 4/5, LEG Min (11) 7/9, EGI Min (11) 7/13 and CAB Min (11) 4/5 refer]. Those decisions were incorporated into the Consumer Law Reform Bill, which is currently before the Commerce Committee.
- 11 The Bill amends the Fair Trading Act 1986, the Consumer Guarantees Act 1993, the Weights and Measures Act 1987, the Carriage of Goods Act 1979, the Sale of Goods Act 1908, and the Secondhand Dealers and Pawnbrokers Act 2004. It also repeals the Auctioneers Act 1928, the Door to Door Sales Act 1967, the Layby Sales Act 1971, and the Unsolicited Goods and Services Act 1975 and incorporates the matters covered in those Acts into an amended Fair Trading Act and a new Auctioneers Act.
- 12 The policy objectives of the Bill are to have modern consumer law that:
 - a) protects suppliers and consumers from inappropriate market conduct,
 - b) sets out clearly consumer protections and rights and enable consumers to transact with confidence, and
 - c) is easily accessible to businesses and consumers affected by it.
- 13 The Bill also aligns New Zealand's consumer law with the Australian Consumer Law, as appropriate, in accordance with the Government's single economic market agenda.
- 14 The Bill was introduced to Parliament on 20 April 2011 and had its First Reading on 9 February 2012. The Bill was then referred to the Commerce Committee. The Commerce Committee has considered 90 written submissions and had four days of oral hearings (covering some 60 oral submissions). Submissions raised a number of areas in relation to which further policy decisions are needed.

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Comment

- 15 The Consumer Law Reform Bill adds to the Fair Trading Act a number of new provisions. These relate to matters covered by other existing laws, as follows:
- a) unsolicited goods and services, currently covered by the Unsolicited Goods and Services Act,
 - b) layby sales, currently covered by the Layby Sales Act,
 - c) uninvited direct sales, currently covered by the Door to Door Sales Act, but extended to also cover telemarketing,
 - d) auctions conducts, currently covered by the Sale of Goods Act and the Property Law Act.
- 16 There are also new provisions on making unsubstantiated representations, extended warranties and product safety. Submitters on the Bill have raised various questions about the detail of the new provisions on these matters. Any potential amendments to the Bill arising from those submissions fall within the scope of Cabinet's existing policy approvals.
- 17 In the First Reading speech of the Bill, the Minister of Consumer Affairs invited submissions on and asked the Commerce Committee to consider whether the Fair Trading Act should include provisions on unfair contract terms and unconscionability, not currently in the Bill. Adding such provisions is within the overall scope of the Bill. The Australian Consumer Law has unfair contract terms and unconscionable conduct provisions. Including provisions on unfair contract terms and unconscionability was considered by EGI in December 2010 but on the advice of the then Minister of Consumer Affairs, Hon John Boscawen, was not progressed. A number of submitters have commented on adding such provisions to the Bill, as discussed in detail below, and EGI is asked to consider these views and adding to the Bill unfair contract terms provisions.
- 18 The Commerce Commission is the agency responsible for monitoring and enforcement of the Fair Trading Act. In its submission on the Bill, the Commission has asked for a number of other provisions that are included in the Australian Consumer Law to be added to the Fair Trading Act. The Commerce Committee has given informal indication it would support including one such provision, compulsory interview powers. How compulsory interview powers would work is set out below and EGI is asked to consider adding to the Bill the Commerce Commission having compulsory interview powers.
- 19 EGI is also asked to reconsider previous policy decisions, as a result of submitters to the Bill raising concerns with the Bill's proposals to amend the Consumer Guarantees Act concerning exemptions for auctions and the Carriage of Goods Act regarding consumer rights for goods lost or damaged by a carrier,.

Unfair contract terms

- 20 Many traders use standard form contracts for everyday transactions with consumers, as well as in business-to-business transactions. Standard form contracts are efficient - they are virtually never individually negotiated and the transaction cost of using them is very low. However, while standard form contracts are efficient, the fact that their terms are practically non-negotiable creates the opportunity for traders to prepare contracts that include terms that advantage themselves, to the unexpected or unfair detriment of the other party.

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- 21 There is a wide range of terms which are common in the “fine print” of standard form contracts which appear to be unfair. Unfair contract terms typically provide for the supplier to exercise a right or make a change to a central term of the contract that goes beyond protecting the legitimate interests of the supplier, without the customer or consumer having a corresponding right. Some rights of suppliers under standard form contracts enable the supplier to manage problematic behaviour by a few customers, and these terms would not be unfair contract terms.
- 22 Some examples of unfair provisions in standard form contract provisions that the Commerce Commission and Motor Vehicle Disputes Tribunal referee have advised are:
- A telecommunications company increased a customer's monthly broadband service plan price from \$35 to \$40 six months into a two year contract. The company relied on a term permitting unilateral price increases. The company insisted that a significant termination fee would be charged if the customer cancelled their contract due to the increased price of the plan.
 - A "Rent to own" scheme included terms in the contracts to the effect that the consumer did not purchase the property but was granted a right to occupy the property under a 30 year instalment agreement. The occupiers had to pay for any repairs that the investor companies said needed doing. Also if the occupiers failed to meet a payment at any time in the 30 year period, the agreement could be terminated without compensation or the consumer gaining any interest in the property.
 - A company leased water filters to the lessee for a period of two years for a minimum price of \$15/week. The contract included a clause requiring the lessee to exercise a right of purchase or to cancel within seven days of the end of the lease. If the lessee failed to purchase or cancel, the contract automatically rolled over for a further period of two years on the same terms.
 - Wide-ranging authorisation to the trader, any financier, credit ranging agency, manufacturer or distributor to obtain "any information from any person whatsoever about the finance, standing and credit worthiness of the purchaser". It is likely unfair that a purchaser be obliged to authorise a manufacturer or distributor to obtain credit information when they are not a party to the agreement or providing finance.
 - An agreement to obtain a written acknowledgement from any person whom the car is subsequently sold that the odometer reading may be incorrect and an agreement to indemnify the trader and the importer of the vehicle for direct, indirect or consequential loss or damage arising out of a failure to do so.
- 23 Consumer laws in Australia, the United Kingdom and other jurisdictions provide for an enforcement agency to challenge what appear to be unfair standard form contract terms. It is only standard terms that can be challenged, not the price or main subject matter of the contract.
- 24 Submitters to the Consumer Law Reform Bill are divided on whether unfair contract terms provisions should be included in the Fair Trading Act. Opposed to such provisions are predominantly private business and business representatives whose main arguments are that the case for intervention has not been made, concern about the courts being able to change contract terms and that unfair contract terms provisions could cause significant uncertainty and expense (with costs being passed onto consumers). These same concerns were outlined to EGI in December 2010, and weighing up these arguments against those in favour, the Minister of Consumer Affairs at that time, Hon John Boscawen, recommended against including unfair contract terms in the Bill as introduced.

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- 25 Submitters in favour of unfair contract terms provisions are consumer organisations, the Motor Trade Association, the Commerce Commission, the Disputes Tribunal, the Motor Vehicle Disputes Tribunal and the Banking Ombudsman. The Small Business Advisory Group previously indicated support. (Small businesses are subject to many of the unfair contract terms that affect ordinary consumers, e.g. telecommunications contracts, rental cars, security monitoring.) The submitters in favour argue unfair contract term provisions would increase the transparency around risk allocation in standard form contracts and create more efficiency and competitive markets.
- 26 A regulatory intervention allowing an enforcement agency to challenge what appear to be unfair terms is only justifiable if it can be established that there is a reasonably significant market failure with standard form contracts . As noted, the Commerce Commission, the Disputes Tribunal and the Motor Vehicle Disputes Tribunal consider unfair contracts terms provisions are needed and have provided examples of unfair terms in contracts. They argue that the current lack of a mechanism under which consumers can challenge unfair contract terms leads to an underreporting of such clauses and their effects.
- 27 The Australian Commonwealth Government included unfair contract terms provisions in the Australian Consumer Law in 2010 based on a report by the Australian Productivity Commission that considered the case for such provisions. The Australian Productivity Commission uncovered largely anecdotal evidence of a problem of between 5-15% of consumers being detrimentally affected by unfair contract terms but still considered the case was made for unfair contract terms provisions. Given the similarity between the New Zealand and Australian marketplace, it is likely that a similar analysis for New Zealand would reach the same conclusions. The unfair contract term provisions in the Australian Consumer Law are enforced by the Australian Competition and Consumer Commission with a regulatory compliance approach as opposed to a strict enforcement approach.
- 28 Conventional contract theory is based on the principles of freedom and sanctity of contract and an aversion to overriding contract terms. However, in the case of standard form contracts, the underlying assumption of conventional contract theory that both parties knowingly and willingly consent to the terms of the contract is often not valid. Such contracts are generally not expected to be read or understood by consumers. Often the contracts will be offered on a “take it or leave it basis” in circumstances where there is a significant inequality in bargaining power. “Click-box” internet contracts are a modern example of standard form contracts where the traditional assumptions of contract law, that the party will carefully consider each contract condition, are unlikely to be operating.
- 29 The fact that consumers are unlikely to read or understand terms in standard form contracts indicates that there is market failure in this area, whereby consumers take on much greater risk than they might do in an efficient market. There is little or no incentive for businesses to compete on their standard terms and conditions because consumers do not typically choose between product or service providers based on the minutiae of the contracts offered. The ineffectiveness of competition is also a justification for a legal or regulatory intervention for the long term benefit of consumers.
- 30 The relevant features of the unfair contract term provisions in Australia are:
- They only apply to consumer contracts that are standard form contracts,
 - The unfair contract term protection does not apply in relation to the upfront price or main subject matter of the contract,
 - Private persons affected by the unfair contract terms can seek remedies in the Courts, as well as the Australian Competition and Consumer Commission,

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- The unfairness test requires a significant imbalance in the parties' rights and obligations under the contract, that the particular term not be reasonably necessary to protect the interests of the supplier, and that it causes detriment to the consumer,
 - In determining whether a term is unfair, the Court must take into account the extent to which the term is transparent and clear in the contract, and the context of the contract as a whole, and
 - The supplier has to prove that an allegedly unfair contract term is reasonably necessary to protect its interests.
- 31 It is proposed the Fair Trading Act is amended to include unfair contract terms provisions in Part 1 that are modelled on the Australian Consumer Law unfair contract terms provisions, with the modification that the enforcement powers are limited to the Commerce Commission rather than allowing any affected party to bring a claim and remedies include injunctions and striking down the use of particular clauses in standard form contracts. The standard form contracts that would be covered would include financial markets contracts, and insurance contracts.
- 32 The Australian Consumer Law provisions are expressed as only applying to consumer contracts, but they in fact apply to consumer goods and services purchased by anyone, including businesses. The unfairness test will not be met by most businesses, but there are likely to be situations where small and medium enterprises could show the terms of standard form contracts are unfair.

Unconscionability

- 33 Unconscionability is a long-standing approach by the courts to provide a just outcome for people who are vulnerable and have been taken advantage of. Unconscionability applies where courts consider it unfair or inequitable (or "against good conscience") to allow a party to enforce its contractual rights against another party who is vulnerable (and that vulnerability is known to the other party) and is detrimentally affected by an oppressive bargain. Contracts which appear to be enforceable under normal legal principles will not be enforceable if a court decides they are unconscionable.
- 34 The case law tests applied by the courts for the unconscionability remedy to be available are very difficult for claimants to meet, so the usefulness of the remedy is limited. In Australia, the Australian Consumer Law has unconscionability provisions that specifically address the case law limitations.
- 35 EGI previously decided not to include unconscionability provisions in the Bill [EGI Min (10) 30/18 refers]. As noted, in the First Reading speech for the Bill, the Minister of Consumer Affairs invited the Commerce Committee to give consideration to the possible inclusion of unconscionability provisions in the Fair Trading Act. Submitters are divided on this issue along the same lines as for unfair contract terms.
- 36 Having considered the issues further, I support the initial decision not to include unconscionability provisions in the Consumer Law Reform Bill. There is not a sufficiently well-defined problem to justify such a change to the Bill, and including an unconscionability remedy in the Fair Trading Act modelled on the Australian Consumer Law would be overly open to subjective assessments and disagreement before the courts. There is a qualitative difference between regulating contract terms through unfair contract term provisions, and attempting to regulate conduct through unconscionability. The changes proposed in the up-coming Credit Contracts and Consumer Finance

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Amendment Bill will also go a significant way towards dealing better with oppressive, including unconscionable, conduct in the consumer credit market.

Commerce Commission compulsory interview powers

- 37 The Commerce Commission has been effective in enforcing the Fair Trading Act. However, investigations under Part I of the Fair Trading Act (relating to misleading and deceptive conduct, false representation, and unfair practices) are often complex and, as a consequence, the gathering of evidence can take a significant amount of time.
- 38 In the first instance when undertaking an investigation the Commission will approach the trader and seek information on a voluntary basis. However, there have been a number of situations where seeking a voluntary interview has proven to be insufficient and an interview has not taken place due to prevarication by the proposed interviewee. As well, some people who volunteer to be interviewed restrict the scope and content of the interview to such an extent that it renders the interview next to useless.
- 39 If the Commission is not able to obtain information on a voluntary basis, it currently has access to two statutory tools when investigating offences and gathering evidence under the Fair Trading Act. These are-
- a) obtaining a search warrant under section 47 of the Act,
 - b) requiring a person to supply information or documents under section 47G of the Act.
- 40 The exercise of a search warrant is a significant intrusion on an individual's liberty and can result in a significant disruption to business operations. In light of this, the Commission uses the power to seek a search warrant sparingly. Information requests made under section 47G have been known to result in responses that are either too narrow or too wide in scope to be useful. The lack of context in relation to written material can also make it difficult to understand.
- 41 On a number of occasions obstructive behaviour of the kind referred to above, combined with the limitations around the exercise of existing compulsory powers, has resulted in substantially increased litigation preparation time and costs for the Commission (as extra time and resources have to be spent trying to collect or contextualise evidence). The costs of litigation are recovered from a limited pool of assets held by the offender that are available to meet the Commission's costs and compensate affected consumers. Delays in the investigation process present a direct harm to the consumers who have suffered as a result of the behaviour that led to the investigation. It can also further reduce the pool of assets available as compensation due to the possibility of offending businesses going in to liquidation or receivership during the time that elapses while evidence is gathered.
- 42 The Commission has indicated that the ability to undertake compulsory interviews of individuals who are potentially involved in, or aware of, offending under the Fair Trading Act would -
- a) expedite the gathering of evidence and the time needed before prosecutions can be brought, and
 - b) plug the gap that exists between the limitations of requesting voluntary interviews and the significant consequences of issuing search warrants.
- 43 The Commission presently has compulsory interview powers available in relation to investigations of potential breaches of the Commerce Act 1986 and the Credit Contracts and Consumer Finance Act 2003. It has reported that the power has proved effective, with

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the threat of its use causing many traders to provide information voluntarily. Compulsory interviews are used in approximately 20% of Commerce Act investigations. The Financial Markets Authority, which fulfils a similar market regulator role to the Commission, also has compulsory interview powers available under the Financial Markets Authority Act 2011.

- 44 There has not been consultation on including compulsory interview powers in the Fair Trading Act for several years. There was a negative reaction to the last consultation in 2006 on giving the Commission such powers, including from the Legislative Design Committee. The Commission, however, has made a compelling case, especially with regard to voluntary interviews and cooperation increasingly proving insufficient. Accordingly, it is proposed the Fair Trading Act is amended to provide the Commerce Commission with compulsory interview powers subject to the conditions discussed below.
- 45 While less disruptive than undertaking a search of an individual's premises, compulsory interview powers are still intrusive and as such need to be cast in a way that is reasonably justifiable in a free and democratic society under the New Zealand Bill of Rights Act 1990. This means only allowing their use in circumstances where it is both necessary and proportionate to the sale of the societal harm at stake. As such, interview powers under the Fair Trading Act should be available only in relation to investigations of the significant offences set out in Part 1 of the Fair Trading Act.
- 46 Failure or refusal to comply with a requirement to attend a compulsory interview, or knowingly providing misleading or deceptive responses to questions during a compulsory interview, would need to be made a new offence. Logically the existing offence provided by section 47J of the Act, which relates to failure to adequately respond to a section 47G information request, should be extended. The maximum fine provided by this section is \$10,000 for an individual or \$30,000 for a body corporate. These are the same figures as the comparable offence provision in the Commerce Act.
- 47 Compulsory interview powers in the Fair Trading Act should include a protection against self-incrimination. It is proposed this aligns with the general privilege against self-incrimination in the Financial Markets Authority Act 2011 or the "use immunity" in section 106 in the Commerce Act. (A "use immunity" protection means that, while the individual must still answer a question that is potentially incriminating to them, their answer cannot be used against them in a prosecution. However, the protection will not exist in circumstances of perjury or where the person has refused to answer questions at the interview (a matter that should be made an offence under section 47J of the Fair Trading Act)).
- 48 It is also important that a compulsory interview power is used appropriately and responsibly. I understand the Commerce Commission use their compulsory interview powers under the Commerce Act in a reasonable way and that it is standard practice for them to advise a person being interviewed of their right to representation.

The Consumer Guarantees Act and Auctions

- 49 The Consumer Guarantees Act provides significant statutory guarantees to consumers when obtaining goods and services from traders. This includes the guarantee as to title of goods and that goods are of acceptable quality, including safe and fit for purpose. Goods sold by auction and competitive tender are currently exempted from the guarantees.

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- 50 In December 2010, EGI agreed to amend the Act to remove the exemption for sales by auction and competitive tender except for the acceptable quality guarantee for sales of secondhand goods by a registered auctioneer. This decision is reflected in the Consumer Law Reform Bill and means it will be clear that consumers buying goods from traders selling on internet auction sites such as Trade Me will be protected by the Consumer Guarantees Act. The policy intent of the limited exemption was to maintain auctions as a means to have an “as is where is” sale.
- 51 Traders, especially car dealers, in submitting on the Consumer Law Reform Bill have raised various concerns about how these decisions will affect their business. The concerns raised show that there is not good understanding of how the acceptable quality guarantee in the Act works. They have also highlighted that the limited exemption could:
- a) lead traders to choose to sell by auction rather than by internet sales sites in order to avoid their Consumer Guarantees Act responsibilities. This is despite submissions from motor vehicle traders and credit providers who sell repossessed items indicating they invariably receive a better price on Trade Me due to the larger market. If these traders sell by auction (for a lower price) this would lead to consumers getting a lower price for traded-in cars and having a greater remaining debt outstanding if items are repossessed,
 - b) create an unfair market advantage for auction providers,
 - c) create practical difficulties with establishing whether some goods are second-hand (for example, goods from retail stores which were damaged in the Christchurch earthquake),
 - d) create complexity for consumers. The Consumer Guarantees Act is self-enforcing legislation and thus relies on consumers knowing and enforcing their rights.
- 52 It is most desirable to have consumer law that is mode of sale neutral. It is accordingly proposed that the Consumer Guarantees Act applies to all sales from suppliers in trade to consumers. For older secondhand goods, goods that are sold after a fire sale or earthquake and other types of goods where an “as is where is” sale would seem suitable, the guarantee of acceptable quality in the Consumer Guarantees Act is sufficiently flexible that vendors selling such goods will not be held to unrealistic standards of quality provided that they are upfront about the goods they are selling. The guarantee of acceptable quality is a sliding scale based on the expectations of a reasonable consumer taking into account all aspects of the sale. A reasonable consumer will have lower expectations about very old vehicles, items which have been repossessed and items that may have been damaged. Suppliers of these items will not be held to unreasonable standards of quality as a consequence of being subject to the guarantee of acceptable quality.
- 53 The Consumer Guarantees Act acceptable quality guarantee would be improved if the nature of the supplier and the context in which they came to have the goods is included in the factors for determining acceptable quality. This will go a considerable way to addressing concerns of liquidators, insolvency practitioners and also used car traders.

Carriage of Goods

- 54 Currently, the operation of the Carriage of Goods Act and the Sale of Goods Act disadvantages consumers who receive goods by post or courier. This occurs because, under the Sale of Goods Act, risk in the goods passes to the consumer when they are dispatched by the supplier. However, the consumer’s only direct contractual relationship is

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with the supplier rather than the carrier. Accordingly, consumers find it difficult to access a remedy if goods are damaged in transit.

- 55 The Consumer Law Reform Bill sought to remedy this position by making carriers subject to a guarantee under the Consumer Guarantees Act requiring them to exercise reasonable skill and care in the carriage of goods. To mitigate the effects of this guarantee on the industry, the Bill allowed a limited degree of contracting out in certain circumstances.
- 56 Despite these protections, submissions from the carriage industry were universally opposed to the proposals in the Bill. In summary, the carrier industry argued that the new rights would open up indeterminate and unquantifiable contingent liabilities that they are in no position to cover. They also believe that consumer consignees will have difficulty establishing who in the supply chain actually breached the reasonable care and skill guarantee. This would render the guarantee of little practical value.
- 57 The Bill requires amendment to address those concerns, while still improving protections available to consumers. This would be addressed by the supplier bearing the risk of damage or loss in transit by:
- a) including a new guarantee in the Consumer Guarantees Act to the effect that, where a supplier arranges for the goods to be delivered, those goods will be delivered when agreed or, if not agreed, then in a reasonable time, and
 - b) providing that the acceptable quality guarantee under the Consumer Guarantees Act will apply from when the goods are actually received by the consumer.
- 58 This proposal would be supplemented by a new provision stating that claims against carriers for loss or damage of goods that they carry are to be determined under the Carriage of Goods Act and not the Consumer Guarantees Act.
- 59 These changes to the Bill would not affect the existing position of carriers, but would place additional responsibilities on suppliers. This is a risk that many suppliers already accept at the moment. In addition, the provisions of the Carriage of Goods Act and the contractual relationship between suppliers and carriers will provide them with some means of managing that risk. Certainly, they will be in a better position to do so than consumers.

Alignment of the Consumer Law Reform Bill and Financial Markets Conduct Bill

- 60 The Financial Markets Conduct Bill mirrors aspects of Part 1 of the Fair Trading Act that are most relevant to market conduct. That Bill carves financial products and services out of the equivalent provisions of the Fair Trading Act. The Consumer Law Reform Bill is amending the Part 1 provisions in relation to unsubstantiated representations and, if the Committee agrees, unfair contract terms. These provisions also are relevant to financial products and services.
- 61 The Financial Markets Conduct Bill is currently before the Commerce Committee. It should maintain its alignment with the Fair Trading Act. If the Financial Markets Conduct Bill is enacted before the Consumer Law Reform Bill then amendments to the new Financial Markets Conduct Act would appropriately be made by way of Supplementary Order Paper to the Consumer Law Reform Bill.

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Do Not Call register provisions in the Consumer Law Reform Bill

- 62 Last year, the Law Commission completed a review of the Privacy Act 1993. Recommendation 116 of their final report was that Consumer Affairs initiate policy work to include provisions in the planned consumer law reform (now the Consumer Law Reform Bill), to give the Marketing Association's Do Not Call Register a statutory basis.
- 63 The Do Not Call register is a list of phone numbers of people who do not wish to receive marketing calls (sales of goods and services). The scope of the Register does not include unsolicited calls about other activities like research and electioneering, and the Law Commission did not intend for these activities to be affected. Rather, the Law Commission wished to raise its profile of the Do Not Call Register, increase its usage and sustainability, as well as align New Zealand with overseas practice (where government run do not call registers are becoming common).
- 64 Consumer Affairs officials advise that any form of regulation of the Do Not Call Register is likely to be complex and could lead to increased costs for the Crown. Most marketers already comply with the Do Not Call Register, evidenced by a low number of complaints to the Marketing Association. While government agencies receive numerous complaints about scam calls, given their unlawful nature, scam calls would not be deterred by a statutory basis for the Do Not Call Register.
- 65 In the absence of clear evidence on unsolicited calling and evidence of problems around compliance with the Do Not Call Register, a mandatory requirement that telemarketers use the Marketing Association's Do Not Call Register is not justifiable. Consumer Affairs will maintain a watching brief on the Do Not Call Register and on unsolicited calling.

Consultation

- 66 The following departments have been consulted: The Treasury, Ministry of Business, Innovation and Employment (Economic Development) and Ministry of Justice.

Financial Implications

- 67 As noted in EGI(10) 298 and EGI(11) 9, the Treasury has advised 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 Bill should be reprioritised within the baselines of relevant agencies.
- 68 The Commerce Commission will have an expanded enforcement role as a result of the Consumer Law Reform Bill amendments to the Fair Trading Act, including new unfair contract terms provisions. Funding of the Commission's Fair Trading Act enforcement activity is under its General Markets appropriation. The Commerce Commission uses its discretion to determine where it focuses its enforcement activities and any extra Fair Trading Act enforcement costs will be met through existing baselines of this appropriation.

Human Rights

- 69 The proposal in this paper relating to compulsory interview powers in the Fair Trading Act could raise issues of inconsistency with the Bill of Rights Act 1990. By their nature, compulsory interviews represent an intrusion by the state on individual liberty.

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- 70 Many of the rights implications of compulsory interviews can be substantially mitigated by the design of the interview power and the conduct of the entity that uses it. A general privilege against self-incrimination or a use immunity protection, as proposed, serves to protect the interviewee's right against self-incrimination. In relation to a similar power under the Commerce Act 1986, the Commerce Commission's policy is to advise interviewees of their right to have a lawyer present.
- 71 To the extent that compulsory interviews still represent an infringement of Bill of Rights Act rights, they are reasonably justified in a free and democratic society. This is on the basis of the societal interest in effective enforcement of the Fair Trading Act. I am confident that compulsory interviews are necessary to achieve this.

Legislative Implications

- 72 These changes affect the Consumer Law Reform Bill which is under consideration by the Commerce Committee.

Regulatory Impact Analysis

- 73 The Regulatory Impact Analysis (RIA) requirements apply to the proposals in this paper. A Regulatory Impact Statement (RIS) was considered by EGI on 8 December 2010 which addressed a range of consumer law reform issues including unfair contract terms, unconscionability and the application of the Consumer Guarantees Act to auctions. A further consumer law reform RIS was considered by EGI on 9 February 2011. Both these two RISs are referenced in the Consumer Law Reform Bill. Attached is a supplementary RIS prepared by Consumer Affairs, Ministry of Business, Innovation and Employment (MBIE), which discusses the proposal for compulsory interview powers.

Quality of the Impact Analysis

- 74 The MBIE Regulatory Impact Analysis Review Panel has reviewed the RIS prepared by Consumer Affairs and associated supporting material, and considers that the information and analysis summarised in the RIS meets the quality assurance criteria.

Consistency with Government Statement on Regulation

- 75 I have considered the analysis and advice of my officials, as summarised in the attached Regulatory Impact Statement and the Regulatory Impact Statement of 8 December 2010. 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

- 76 There will be no publicity on these changes as the Consumer Law Reform Bill is currently before the Commerce Committee. It is proposed this paper and the regulatory impact statement are published on the Consumer Affairs website after the Commerce Committee has reported back on the Bill.

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Recommendations

- 1 **Note** the Commerce Committee is currently considering the Consumer Law Reform Bill, which modernises and adds a number of new consumer protections to the Fair Trading Act 1986, the Consumer Guarantees Act 1993 and the Weights and Measures Act 1987.
- 2 **Note** that as a result of matters raised in the submissions and consideration of the Bill by the Commerce Committee a number of further policy decisions are needed.

Fair Trading Act Unfair Conduct Amendments

- 3 **Note** that on 13 December 2010 Cabinet agreed not to include unfair contract terms provisions in the Fair Trading Act and directed Consumer Affairs to revisit this issue in three years' time [CAB Min(10)45/8 and EGI Min(10)30/18 refer], but on the request of the Minister of Consumer Affairs, the Commerce Committee has examined whether the Act should be amended to include provisions on unfair contract terms in standard form contracts, which is a consumer protection included in the Australian Consumer Law.
- 4 **Note** many business and business representative submitters, oppose including unfair contract terms provisions in the Fair Trading Act on the basis that there is not enough evidence of a problem and compliance cost considerations.
- 5 **Note** consumer organisations, enforcement agencies and small business representatives support including unfair contract terms provisions in the Fair Trading Act in recognition that standard form contracts cannot be negotiated and where they contain terms that are unfair this undermines their efficiency and competitive markets.
- 6 **Agree** to recommend that Cabinet rescind the decision referred to in paragraph 3 above, and instead:
 - 6.1 **Agree** to amend the Fair Trading Act to include additional provisions on unfair contract terms in standard form contracts, and
 - 6.2 **Agree** the provisions are modelled on the Australian Consumer Law provisions but with enforcement of these provisions and the remedy that the courts may strike out an unfair term in a standard form contract only through the Commerce Commission, and also provision for the Commerce Commission to obtain from the Court an injunction against the use of specified unfair terms by particular suppliers.

Fair Trading Act Enforcement: Compulsory interview powers

- 7 **Note** the Commerce Commission, which is the responsible regulator for the Fair Trading Act, is finding increasingly that voluntary interviews for complex investigations of serious offences under Part I of the Fair Trading Act are often proving ineffective, increasing the costs and time for collection of evidence.
- 8 **Agree** to amend the Fair Trading Act to provide for a power to compel a person to attend an interview for the purposes of investigating an offence under Part 1 of the Act (including misleading and deceptive conduct, false representations, bait advertising, pyramid selling schemes) with:
 - 8.1 An offence for obstructing a compulsory interview modelled on the existing equivalent provision in the Commerce Act 1986, and
 - 8.2 A self-incrimination protection modelled either on the "use immunity" protection in the Commerce Act or the general privilege against self-incrimination in the Financial Markets Authority Act 2011.

In Confidence

Consumer Guarantees Act and Auctions

- 9 **Note** the Consumer Guarantees Act provides consumers obtaining goods from traders with a statutory guarantee as to title and what a reasonable consumer considers acceptable quality of the goods, taking into account factors such as safety, representations and whether the goods are secondhand.
- 10 **Note** that on 13 December 2010 Cabinet agreed to amend the Consumer Guarantees Act to remove the exemption for sales by auction and competitive tender except for the acceptable quality guarantee for sales of secondhand goods by a registered auctioneer [CAB Min(10)45/8 and EGI Min(10)30/18 refer].
- 11 **Note** the limited exemption was to provide an avenue for “as is, where is” sales but following the consideration of submissions:
- 11.1 A limited exemption could have unintended consequences of creating consumer confusion and promoting sales by registered auctioneers over other sales mechanisms such as Trade Me type internet auctions,
- 11.2 The acceptable quality guarantee under the Consumer Guarantees Act is sufficiently flexible to cover sales where the trader has only limited knowledge of the quality of the goods, provided the trader declares this, but
- 11.3 The acceptable quality guarantee would be improved for sales of goods by a liquidator or through an insurance sale by adding as a consideration that is taken into account the nature of the supplier of the goods and the context in which they came to have the goods.
- 12 **Agree** to recommend that Cabinet rescind the decision referred to in paragraph 10 above, and instead:
- 12.1 **Agree** to amend the Consumer Guarantees Act to delete the exemption for goods sold at auction and competitive tender (thus the Act will apply to all sales by sellers in trade to consumers), and
- 12.2 **Agree** to amend the Consumer Guarantees Act to provide in the factors for determining acceptable quality, the nature of the supplier and the context in which they came to have the goods.

Carriage of goods

- 13 **Note** that that on 14 February 2011 Cabinet agreed:
- 13.1 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,
- 13.2 If the limited liability carrier's risk option is not used, the service guarantees under the Consumer Guarantees Act should apply for the benefit of consumers when they are supplied carrier services,
- 13.3 The carrier's liability for loss or damage to goods through the Consumer Guarantees Act service guarantee should not be restricted by a contract of carriage under the Carriage of Goods Act unless the contract of carriage imposes a stricter liability on the carrier, or provides a more advantageous remedy to the consumer than is otherwise available under the Consumer Guarantees Act, and
- 13.4 To amend the Carriage of Goods Act so that it specifically does not allow for the contracting out of the Consumer Guarantees Act obligations except as provided for

In Confidence

in section 43 of the Consumer Guarantees Act [CAB Min(11)4/5 and EGI Min(11)1/12 refer].

- 14 **Note** submitters recognise the problem of consumers not having remedies in the current law in respect of lost or damaged goods sent by carrier but have raised persuasive concerns about the workability of the amendments in the Consumer Law Reform Bill.
- 15 **Note** that a simpler and more direct way to provide the appropriate protections for consumers is to add a new guarantee to the Consumer Guarantees Act.
- 16 **Agree** to recommend Cabinet rescind the decisions referred to in paragraph 13 above and instead:
- 16.1 **Agree** to amend the Consumer Guarantees Act to add a new guarantee that when suppliers arrange shipping of goods the goods will be received when agreed, and
- 16.2 **Agree** to amend the Consumer Guarantees Act to provide the acceptable quality guarantee will apply when the goods are actually received by the consumer.

Alignment of the Consumer Law Reform Bill with the Financial Markets Conduct Bill

- 17 **Note** the Financial Markets Conduct Bill currently before the Commerce Committee, replicates key provisions of Part 1 of the Fair Trading Act.
- 18 **Note** the Consumer Law Reform Bill will amend Part 1 of the Act to provide for unsubstantiated representations and, if EGI agrees as above, for unfair contract terms.
- 19 **Agree** to amend Part 2 of the Financial Markets Conduct Bill to provide for unsubstantiated representations and, if EGI agrees as above, for unfair contract terms, in order to maintain alignment with Part 1 of the Fair Trading Act, as being amended by the Consumer Law Reform Bill.

Law Commission Recommendation for Statutory Mandated Do Not Call Register

- 20 **Note** that the Law Commission, in its Report "Review of the Privacy Act 1993", recommended the government consider including provisions in planned consumer law reform to give the Marketing Association's Do Not Call Register a statutory basis.
- 21 **Note** that most marketers already use the Do Not Call Register and there are a low number of complaints to the Marketing Association.
- 22 **Agree** that a mandatory requirement that telemarketers use the Do Not Call Register cannot be justified due to the lack of evidence about the issues with the status quo.
- 23 **Invite** the Minister of Consumer Affairs and Minister of Justice to write a joint letter to the Law Commission advising this decision, and that the government will maintain a watching brief on unsolicited calling by telemarketers.

Next Steps

- 24 **Direct** officials to include the decisions in this paper in the Departmental Report to the Commerce Committee on the Consumer Law Reform Bill.

Hon Simon Bridges
Minister of Consumer Affairs

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