27 March 2012

Clerk of the Committee
Commerce Select Committee
Select Committee Office
Parliament Buildings
WELLINGTON

SUBMISSION on
Consumer Law Reform Bill

Introduction

1. Thank you for the opportunity to make a submission on the Consumer Law Reform Bill. This submission is from Consumer NZ, New Zealand's leading consumer organisation. It has an acknowledged and respected reputation for independence and fairness as a provider of impartial, and comprehensive consumer information and advice.

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2. We wish to appear before the committee to speak to our submission.

Summary

3. Consumer NZ welcomes the introduction of the Consumer Law Reform Bill. We strongly support provisions in the bill that will enhance consumer protection. In particular, we support amendments to regulate extended warranties, strengthen controls on uninvited direct selling, remove the "auction exclusion" in the Consumer Guarantees Act, improve product safety provisions and extend the jurisdiction of the Disputes Tribunal.

4. We also support amendments to improve enforcement of the Fair Trading Act. However, we believe these proposals need to be strengthened further. In line with the powers given to the Australian Competition and Consumer Commission, we would like to see the Commerce Commission given the ability to issue substantiation notices. We would also like to see the Commission

given powers to issue infringement notices for a broader range of offences and maximum penalties increased for breaches of the Act.

5. The omission from the bill of a ban on unfair contract terms is a significant gap. Unfair terms and conditions create the potential for significant consumer detriment. They also have a "deadening" effect on competition, limiting the ability of the consumer to exercise choice and reducing the market pressures on suppliers to deliver quality goods and services. We strongly urge the Committee to recommend regulation of unfair contract terms to ensure consumers can participate confidently in the market.

6. Our submission also identifies other areas where we believe the Committee needs to recommend amendments to legislation to strengthen consumer protection and ensure our laws remain effective. We comment on these areas in more detail below.

Clause by clause analysis: Subpart 1 - Fair Trading Act 1986

Clause 5 New section 1A inserted

7. We support the addition of a new purpose statement to the Fair Trading Act.

Clause 7 New sections 5C and 5D inserted

8. We support the addition of a "no contracting out" rule to the Fair Trading Act. The clause clarifies that suppliers cannot contract out of the Act in their dealings with consumers.

Clause 8 Heading to Part 1 substituted

9. We support the substitution of new heading "Unfair conduct" to Part 1 of the Act.

Clause 9 Unsubstantiated representations

10. We support the introduction of a prohibition on unsubstantiated representations. As a basic tenet of consumer law, we believe traders should be required to substantiate their claims. We are therefore in favour of amending the Fair Trading Act to prohibit unsubstantiated representations.

11. Unsubstantiated claims are increasingly common. The growth of environmental claims (e.g., "environmentally friendly", "green", "sustainable") is one illustration. Companies frequently charge a premium for "green" products. However, it is often extremely difficult for consumers to know what they are getting for their money as companies are not required to substantiate their claims.

12. Our own testing continues to identify products sold with claims we believe are unsubstantiated. In February 2012, we reported on a $3000 vacuum cleaner advertised as a "World Class Indoor Environment Management System". The cleaner was promoted as reducing "asthma and allergies", being of "superior design" and "outstanding quality". Despite its high price, our test found this product scored no better for carpet cleaning than a $100 vacuum cleaner.

13. In the absence of a clear requirement for suppliers to substantiate product claims, the law effectively places the onus on consumers to prove whether claims are valid. The type of independent testing required to prove whether a claim is genuine may cost thousands of dollars and is beyond the means of the

average consumer. In our view, the costs of substantiating product claims should fall on the person making the claim. Any claim that cannot be substantiated should be prohibited.

Substantiation notices

14. While we support the proposed ban on unsubstantiated claims, we believe there is also a strong case to give the Commerce Commission specific powers to issue substantiation notices. Such notices would give the Commission the power to require a supplier to provide information and/or produce documents that are capable of substantiating or supporting a claim.

15. Substantiation notices would provide a simple, cost-effective mechanism to help determine whether claims are valid. We note that the Commission currently has powers to require information or documents to be supplied (section 47G of the Fair Trading Act). However, we believe a specific provision for substantiation notices would significantly assist enforcement of the Act.

16. The Ministry of Consumer Affairs has previously recommended the introduction of substantiation notices. In its 2006 review of consumer law, it stated:

> *...substantiation notices are an accepted consumer policy enforcement tool in all of the international comparison jurisdictions. They also place the onus of proof of claims on the trader, not the enforcement agency. Currently, the Commerce Commission is required to prove that claims cannot be substantiated. Such investigations can be very resource intensive.... It is likely that such labour intensive investigations generally could be avoided if the Commission was able to require businesses to substantiate their claims.*

17. In our view, substantiation notices would provide the Commission with a useful preliminary investigation tool and also reduce investigation costs. The responsibility for demonstrating that a claim is valid should fall on the supplier, not on the consumer or the Commerce Commission. Specific substantiation notice provisions would help to ensure costs fall where they should.

18. We believe reputable businesses will already have information on hand to support their claims and will be making it available to consumers as a matter of course. These businesses will benefit from substantiation notice provisions as there is a far greater likelihood any competitors who make unsubstantiated claims will be held to account.

19. Substantiation notice provisions will support the Act's purpose to contribute to an environment in which trading is fair, and consumers and businesses can participate confidently. Measures that require suppliers to only make claims capable of being substantiated will also assist in increasing effective competition.

Right to commence proceedings

20. Clause 9 (new section 12A(4)) proposes that only the Commerce Commission can commence proceedings in relation to unsubstantiated claims. We consider it would also be appropriate to enable consumers to commence proceedings for breaches of section 12A. The Disputes Tribunal should therefore have jurisdiction to hear section 12A matters.

Recommendations

- *Add powers for the Commerce Commission to issue substantiation notices to section 47G.*
- *Provide for consumers to commence proceedings for breaches of section 12A.*

Clause 10 False or misleading representations

21. We support the amendment to section 13(i) to clarify that the prohibition described includes representations relating to a condition, warranty, guarantee, right or remedy under the Consumer Guarantees Act 1993.

Clause 11 Unsolicited goods and services

22. We support amendments to the regulation of unsolicited goods and services. The existing provisions of the Unsolicited Goods and Services Act 1975 are awkward and long overdue for reform. As a general principle, we believe consumers should not be liable for goods and services they have not sought. The law should reflect this principle.

23. Consumer NZ regularly receives complaints from members about companies demanding payment for unsolicited goods. Members also report receiving letters threatening that the amount will be passed on to a debt collection agency if not paid. Requests for the company to cease sending the goods are ignored in many cases.

24. The most concerning cases we are aware of have involved invoices for unsolicited goods being sent to elderly consumers suffering from impaired judgment. In one case, repeated requests from the family to the company to refrain from billing for the material were ignored. The company only stopped after our intervention.

New section 21A(1)(b)

25. While we support the amendments, we are concerned that the proposed 10-working-day period within which the sender can collect unsolicited goods (new section 21A(1)(b)) is unreasonable. Our main concern is that it places an unwarranted onus on the consumer to allow the sender access to their property to collect the good.

26. In our view, if a trader chooses to send unsolicited goods then those goods should be regarded as an unconditional gift to the consumer. The consumer should not be under an obligation to give the trader access to their property to collect the item. Our preference is for the Fair Trading Act to follow the approach adopted in the UK whereby unsolicited goods are treated as a gift.

27. The UK approach is straightforward and reflects the principle that consumers should not be liable for goods and services they have not sought. It also removes the potential for the sender to seek to pressure the consumer into purchasing an unwanted item, a situation that may arise where the sender is given the right to collect the good.

28. We cannot see a sound case for providing suppliers of unsolicited goods with the right to collect the good from the consumer's home. Suppliers already have multiple channels to promote their goods and services. If they choose to send unsolicited goods, the costs of and responsibility for the goods should fall on them.

Unsolicited credit and debit cards

29. We believe the Fair Trading Act should also include specific provisions prohibiting suppliers from sending unsolicited credit and debit cards. Similar provisions are contained in the Australian Consumer Law and we believe they are also warranted here.

Recommendations

- *Reword section 21A as follows:*
  (1) If a person, in trade, sends or delivers unsolicited goods to another person (person A), person A—
  (a) is not liable—
  (i) to pay for the goods; or
  (ii) for any loss of, or damage to, the goods.
  (2) For the avoidance of doubt:
  (a) unsolicited goods sent to person A are deemed to be an unconditional gift;
  (b) all interests that any other person had in the goods are extinguished;
  (c) no action may be taken by any person for the recovery of the goods from person A.
  (3) In this section and section 21C, unsolicited goods means goods that have been sent or delivered to person A without any request for those goods having been made by, or on behalf of, person A.

- *Insert new subsection in section 21A*
  (1) A person must not send a credit card or a debit card, or an article that may be used as a credit card and a debit card, to another person except:
  (a) pursuant to a written request by the person; or
  (b) in renewal or replacement of, or in substitution for the card or article.

Clause 12 Consumer information standards

30. We support the amendment to section 27.

Clause 13 Product safety

31. We support the introduction of sections 30A and 30B which provide for the minister to issue product safety policy statements.

Clause 14 Unsafe goods

32. We support the introduction of subsection (1A) to section 31 of the Act.

Clause 15 Product recalls

33. We strongly support proposals to improve regulation of product recalls. International trends show product recalls are increasing and New Zealand is not immune from this trend. Consumer NZ maintains an online database of product recalls. In the 10 months to November 2011, we recorded 20 voluntary recalls of unsafe children's products, almost double the rate for 2010. Strollers, car seats, highchairs, bikes, clothing and toys were among the products recalled.

34. Legislation currently does not require companies to notify authorities when products are voluntarily recalled. This is a major gap which needs to be addressed. We therefore support the introduction of section 31A to require suppliers to notify the ministry of voluntary recalls of unsafe and potentially unsafe goods. Responsible suppliers should be doing this as a matter of course.

35. We also support the requirement for the ministry to publicise recalls on an internet site. However, we believe recall notices should be publicly available for at least 10 years rather than the two years specified in section 31A(4)(a). Once products are on the market, they may remain in circulation for a considerable time. Nursery furniture, for example, may be bought second-hand some years after it was manufactured. Recall notices should therefore be publicly available for more than the two years proposed.

Recommendation

- *Reword section 31A(4)(a) to require recall notices to be publicly available for at least 10 years from the date on which the voluntary recall was issued.*

Clause 16 Compulsory product recall

36. We support the introduction of subsections 1A and 1B to section 32 to require a supplier to take action if the reasonably foreseeable use of a product will or may cause harm.

37. We also believe the Act should be amended to give the minister the power to initiate a product recall where the supplier fails to undertake a compulsory recall. Where the supplier fails or is unable to act (for example, because the company has gone into liquidation), the minister should have the power to initiate a recall to ensure unsafe or potentially unsafe products are removed from distribution.

Recommendation

- *Add powers to section 32 to enable the minister to initiate a product recall where the supplier fails to act.*

Clause 17 Product safety officers

38. We support the introduction of provisions for product safety officers and suspension of supply notices. We believe there is a strong case for expanding investigative powers when dealing with product safety issues. In our experience, there is a tendency for suppliers to minimise the gravity of a product safety problem. We therefore consider powers for product safety officers to enter trade premises and issue suspension notices are appropriate.

39. Our own testing has identified products on the market that present a safety risk to consumers. These products have included unsafe electrical goods, laundry powders containing high levels of corrosive mineral salts, and cosmetics containing ingredients banned or restricted for use. When we have notified the supplier of the problem, the response has often been less than satisfactory. In some instances, no efforts have been made to remove the goods from sale. We therefore support measures to improve monitoring and enforcement.

Clause 18 Subpart 1 - Layby sales

40. We support the inclusion of layby sale provisions in the Fair Trading Act. Our records show problems with layby sales continue to arise. Typical problems include establishment and high administration fees being charged, unreasonable cancellation policies, and failure to provide refunds when a layby sale is cancelled. Most of the complaints we receive concern sellers refusing to refund money or only offering store credit when a layby sale is cancelled.

41. We agree legislation should require the supplier to provide a written layby sale agreement to the consumer (new section 36C). In addition to the details

required by section 36C(2), we believe the agreement should include information on the extent of any fees that may apply on cancellation and how these are to be calculated. We note that section 7(d) of the Layby Sales Act currently requires the seller to provide an estimate of selling costs when a statement is provided. We would like to see similar information included in the layby sale agreement. At a minimum, the agreement should state how any cancellation fees will be calculated

42. We also believe the agreement should specify whether the goods have been set aside for the consumer. New section 36G allows the supplier to cancel the agreement if the goods are no longer available. If the seller does not intend to put the goods aside when the agreement is formed, this should be disclosed to the consumer. It is reasonable for consumers to assume that the goods they are paying for will be available once the final payment has been made. If the goods are not going to be put aside, it should be made clear in the agreement.

Establishment fees

43. For the avoidance of doubt, we believe the Act should stipulate that no "establishment" or "service" fee can be charged when a layby sale agreement is formed. We are aware that some retailers are "front loading" non-refundable service fees on to layby agreements. We believe this is inconsistent with the intent of the Layby Sales Act, which allows the seller to recover costs only if the consumer cancels the agreement. We would therefore like to see the Fair Trading Act state clearly that "service" or other administration fees cannot be charged when the agreement is made.

Depreciation costs

44. The Layby Sales Act currently provides that no depreciation charge applies if an agreement is cancelled within one month of the date of sale or where a sale involves non-specific goods. We would like to see these provisions carried over into the Fair Trading Act to ensure consumers have no less protection than they currently enjoy.

Recommendations

- *Require lay-by sale agreements to also provide an estimate of any cancellation charge, and specify whether the goods have been set aside.*
- *Clarify that establishment fees (or similar) cannot be front-loaded onto layby sale agreements.*
- *Carry over provisions from the Layby Sales Act that prohibit depreciation charges if an agreement is cancelled within one month of the date of sale or where a sale involves non-specific goods.*

Clause 18 Subpart 2 - Uninvited direct sales

45. We strongly support the provisions relating to uninvited direct sales. We receive regular complaints about door-to-door sales and the high pressure tactics employed by salespeople using this method of selling. Often those targeted are vulnerable consumers. The Door to Door Sales Act provides limited protection and is overdue for reform.

46. Door-to-door sales and other forms of uninvited direct selling create situations where consumers may be pressured into making purchasing decisions they may not otherwise have made. We have previously reported on the high pressure sales tactics used to sell expensive vacuum cleaners (>$3000) door-to-door. In one recent case, a salesperson accompanied the consumer to a cash machine so she could withdraw money to pay for the vacuum.

47. Given the continued use of direct selling methods, legislation needs to ensure there are sufficient safeguards to protect vulnerable consumers from undue sales pressure. In our experience, little appears to have changed since the 1962 Moloney committee reported:

> *We are told that they are known literally to force their way over the doorstep, to remain in the house for as long as six hours at a time...keeping up a hypnotic flow of persuasive sales talk... It is said that in persuading people to enter into heavy financial commitments, the terms of payment or of 'trade-in' allowances are deliberately misstated, and the figures on the order form or agreement concealed for omitted until the customer's signature has been obtained.*

Cooling-off period

48. We strongly support the proposal to give consumers the right to cancel a sale agreement regardless of the method of payment. Our preference is for a cooling-off period of 10 working days, rather than the 5 working days proposed. We believe 10 days would be a sufficient period for consumers to consider their purchasing decision and seek advice from family or others if required. Cancellation of the sale agreement should also cancel any related credit contract.

49. We draw the Committee's attention to the 10 working day cooling-off period adopted in the Australian Consumer Law. We also note that Australian law provides additional rights to cancel an unsolicited direct sales agreement if the supplier contravenes requirements relating to:

    - permitted hours for negotiating an unsolicited consumer agreement,
    - disclosing their purpose and identity, and
    - ceasing to negotiate on request.

    A three month cancellation applies in these cases. A six month period applies if the supplier contravenes requirements to inform the consumer of the termination period. We recommend the Committee considers including similar protections in the Fair Trading Act.

Regulation of hours

50. We believe there are grounds for regulating the hours when direct marketers may call on consumers. We have received complaints about marketers door knocking after 7.30pm during winter months. We believe consideration should be given to restricting the hours when marketers can call to reasonable daylight hours. The Australian Consumer Law provides a useful model. It stipulates:

    A dealer must not call on a person for the purpose of negotiating an unsolicited consumer agreement, or for an incidental or related purpose:
    - at any time on a Sunday or a public holiday; or
    - before 9 am on any other day; or
    - after 6 pm on any other day (or after 5 pm if the other day is a Saturday).

Recommendations

- *Provide for a 10-day right to cancel an uninvited direct sales agreement.*
- *Regulate the hours when direct marketers may call on consumers.*

Clause 18 Subpart 3 - Extended warranties

51. We strongly support the provisions relating to extended warranties. Our mystery-shopping surveys continue to find extended warranties are promoted with misleading information about consumers' legal rights. We believe regulation of how these warranties are sold is long overdue.

52. In most cases, extended warranties are an expensive form of protection compared with the guarantees consumers have already under the Consumer Guarantees Act (CGA). Consumers are effectively paying for protection they are already entitled to under law.

53. Retailers risk breaching the law if they try to sell an extended warranty by claiming the consumer would have no comeback without one. Despite this, in our 2012 mystery shop retail staff routinely told us we needed an extended warranty to ensure we would have cover. Several sales staff told our mystery shoppers that if they did not buy an extended warranty, their only recourse would be to contact the manufacturer if anything went wrong with the product. Only one out of the six retail stores visited mentioned the CGA.

54. The results show little has changed since our 2007 mystery shop of appliance retailers. Our 2007 investigation found the stores rarely informed consumers about their CGA rights and some staff misled shoppers about the protection that the Act provides.

Identification of benefits

55. In addition to the disclosure proposed in new section 36T, we believe extended warranty agreements should clearly state what benefits the warranty provides above the rights and remedies in the CGA. Where suppliers advertise extended warranties (either in printed material or online), they should also be required to disclose this information.

Recommendation

- *Require extended warranty agreements and related advertisements to state what benefits the warranty provides above the rights and remedies in the CGA.*

Clause 18 Subpart 4 - Auctions

56. We support the majority of the provisions relating to auctions in new sections 36V to 36ZC. However, we do not support proposals to allow vendor bidding in auctions (new section 36ZA). We would like to see clear rules prohibiting the seller bidding in an auction of their property. We can identify no advantage in allowing vendor bidding to continue. The practice distorts the sales process and undermines consumers' ability to trade confidently.

Recommendation

- *Prohibit vendor bidding in auctions.*

Clause 21 Jurisdiction of Disputes Tribunals

57. We support extending the jurisdiction of the disputes tribunals to enable them to hear section 9 matters. The exclusion of section 9 from the tribunals' jurisdiction is unwarranted and we can see no reason for it to continue. The tribunals are the most accessible forum for consumers to take disputes about goods and services and we believe it is appropriate that they should be able to consider section 9 matters.

Clause 22 Offences and orders

58. We support the introduction of penalties for contravention of Part 4A. However, we believe the proposed maximum penalties of $10,000 for an individual and $30,000 for a body corporate have been set arbitrarily low. Further, no justification has been advanced for reducing the penalties for contravention of Part 2 and we do not support this change.

59. Our preference is for the maximum penalties for breaches of Parts 1 to 4A to be set at the same level. The courts can determine the appropriate penalty in any particular case taking into account the seriousness of the offending. For minor breaches of the Act we believe infringement notices provide a more appropriate enforcement mechanism.

Recommendations

- *Set maximum fines for breaches of Parts 1 to 4A at the same level.*

Clause 23 Infringement notices

60. We support the introduction of provisions enabling the Commerce Commission to issue infringement notices to suppliers for failing to comply with:
    - a suspension of supply notice
    - a consumer information standard
    - disclosure requirements relating to layby sales, uninvited direct sales and extended warranties.

61. However, we believe the Commission should have powers to issue infringement notices for a broader range of offences than those proposed. Infringement notices provide the ability for the enforcement agency to take action where there is a clear breach of the law without the expense of mounting court action to secure a prosecution.

62. At present, the Commerce Commission may issue warning letters where breaches of the Fair Trading Act have occurred. In many cases, we believe an infringement notice would be more appropriate. A financial penalty would encourage compliance and send a clear message that breaches of the Act are not acceptable.

63. Instances where the Commission has issued warning letters but where an infringement notice may have been a better option include those listed below:

    - Resene Paints received a warning for alleging a paint was free from volatile organic compounds (VOCs) when it contained low levels of VOCs.
    - Foreno Tapware was warned for alleging brass used in tapware prevents the migration of lead when there was no evidence to support the claim.
    - Comvita New Zealand was warned for representing Comvita Olive Leaf Complex as "the Nature of New Zealand" when the product was made in Australia.
    - Inghams Enterprises was warned for alleging its chicken products contained no GM ingredients when the animals' feed contained up to 13 percent GM soy.

64. We note that the Australian Competition and Consumer Commission (ACCC) has powers to issue infringement notices for false and misleading representations as well as for a wide range of other offences including:

    - unconscionable conduct

- referral selling
- harassment and coercion
- multiple pricing and component pricing
- unsolicited credit/debit cards
- pyramid selling
- certain requirements for itemised bills and proof of transaction
- certain product safety requirements (e.g., mandatory reporting requirements, selling goods that do not comply with mandatory standards, export of unsafe goods)
- failure to respond, or providing false or misleading information in response to, a substantiation notice

We would like to see similar powers available to the Commission to assist enforcement of the Fair Trading Act.

65. We also believe the maximum $1000 fine payable under an infringement notice is too low and will be an insufficient penalty for the offences proposed. It is possible that some retailers may see a $1000 fine as insignificant and continue offending. We believe the Committee needs to consider raising the maximum fine. In our view, it should be set at a level that deters suppliers from breaching the Act and better reflects the costs to the Commerce Commission of taking enforcement action.

66. By way of comparison, the penalty amount associated with an infringement notice in Australia in most cases is fixed at AU$6600 for a corporation (or AU$66,000 for a listed corporation) and AU$1320 for an individual for each alleged contravention. We consider fines here should be at least comparable with those that companies face across the Tasman. Examples of infringement notices issued by the ACCC include the following:

- three infringement notices totalling $19,800 were issued to clothing retailers David Lawrence, Jigsaw and Marcs stores for misleading consumers about their legal rights to a refund or replacement;
- three infringement notices totalling $19,800 were issued to furniture retailer Furniture Galore for misleading consumers about savings on sale items;
- two infringement notices totalling $13,200 were issued to True Solar for misleading advertising about the energy output of its solar panels.

Public warning notices

67. We also consider the Commerce Commission should be given the power to issue a public warning notice to alert consumers to a suspected breach of certain provisions of consumer law. The ACCC has recently been given this ability as part of the review of Australian consumer law. The ACCC may issue a public warning notice where:
- it has reasonable grounds to suspect that the conduct may constitute a contravention of a provision of the law,
- it is satisfied that one or more other persons has suffered, or is likely to suffer, detriment as a result of the conduct, and
- it is satisfied that it is in the public interest to do so.

68. The ACCC may also issue a public warning notice where a person refuses or fails to respond to a substantiation notice and it considers it to be in the public interest to issue the notice. Two public warning notices have been issued by the ACCC since August 2010.

Recommendations

- *Provide for the Commission to also issue infringement notices for false and misleading representations and other Fair Trading Act offences.*
- *Increase the maximum fine payable under an infringement notice.*
- *Consider introducing provisions for public warning notices.*

Clause 26 Enforceable undertakings and management banning orders

69. We support the introduction of provisions for enforceable undertakings. As the Ministry of Consumer Affairs has noted, prosecution through the courts is extremely resource intensive. Court enforceable undertakings provide a less expensive alternative and are used effectively in other jurisdictions. We therefore support their use as an enforcement option under the Fair Trading Act.

70. We also support the introduction of provisions for management banning orders. We believe such orders are warranted in the case of individuals who repeatedly breach the Act. At present, individuals convicted under the Act are still able to trade, often setting up a new company to do so. Giving the Commerce Commission the ability to apply to the District Court for a management banning order is an appropriate option in these cases.

Clause 27 Offences (consequential)

71. We support the amendments to section 47F

Clause 28 Authorised employees

72. We support the introduction of new sections 47K and 47L. However, we believe the Committee should consider extending monitoring and enforcement powers for authorised employees to cover all offences for which infringements notices can be issued.

Subpart 2 - Consumer Guarantees Act 1993

Clause 34 New section 1A inserted

73. We support the addition of a new purpose statement to the Consumer Guarantees Act.

Clause 36 Gas and electricity

74. We support the amendment to clarify that electricity and gas retailers are responsible to consumers for the CGA guarantee of acceptable quality.

Clause 37 Collateral credit agreements

75. We support the introduction of new section 23A. In situations where the consumer exercises their CGA rights to reject an item, and that item was purchased on credit, we believe the right to cancel should apply to both the purchase agreement and the credit agreement. We therefore support giving the court and the Disputes Tribunal the power to order that the rights and obligations of the consumer under a collateral credit contract vest in the supplier when the consumer rejects the goods.

Clause 38 Carriage of goods

76. We support the introduction of subsection 2 to section 40.

Clauses 39-40 Auctions

77. We strongly support the repeal of section 41(3) which excludes auctions and competitive tenders from the provisions of the CGA. The exclusion has been a windfall for the growing number of traders who use auction websites and has also provided a loophole for traders to exploit. Several cases before the Motor Vehicle Disputes Tribunal have involved traders falsely claiming cars had been sold by auction to avoid their CGA obligations.

78. The Commerce Commission has also prosecuted motor vehicle dealers who have set up false auctions with the intention of evading the CGA. In 2006, an Auckland car dealer was fined $48,000 for misleading customers about their CGA rights. Two other dealers were prosecuted in 2007 for similar offences involving fake tenders.

Exception for second-hand goods and used cars

79. While we strongly support repealing section 41(3), we do not support the introduction of new section 41A to exclude second-hand goods and used cars sold at auction from the guarantee of acceptable quality. We believe any supplier selling via auction, whether this is a traditional auction or an online auction, should be subject to the CGA. Creating a two-tier system for auctions is undesirable and unnecessary.

80. Given the CGA already covers goods sold by second-hand dealers, we do not see any difficulty extending this coverage to second-hand goods and used cars sold via auction. Suppliers of second-hand goods and used cars can readily provide disclosure to consumers about an item's known faults. This is provided for in section 7 which states:

> *Where any defects in goods have been specifically drawn to the consumer's attention before he or she agreed to the supply, then notwithstanding that a reasonable consumer may not have regarded the goods as acceptable with those defects, the goods will not fail to comply with the guarantee as to acceptable quality by reason only of those defects.*

81. No credible justification for providing special treatment for second-hand goods and used cars sold at auction has been advanced and we urge the Committee to reject the proposal. We believe it will be unnecessarily cumbersome to create a separate regime for these goods and inconsistent with the purpose of the Act.

Identification of professional traders

82. To reduce the risk of suppliers attempting to avoid their obligations under the CGA, we would like to see a specific requirement for professional traders selling via auction to disclose their status to consumers. This is particularly important in sales forums, such as online auctions, where both individual consumers and professional traders are listing goods for sale. Requirements for suppliers to disclose their status would enable consumers buying at auction to identify when they have CGA rights.

Recommendation

- *Do not proceed with new section 41A.*
- *Require professional traders selling via offline or online auction to disclose their status to consumers.*

Clause 41 Gas and electricity

83. We support the intent of new section 46A to provide retailers with a statutory indemnity from lines companies in respect of payments made to consumers for CGA breaches. We support the Electricity and Gas Complaints Commissioner being given the power to deal with disputes relating to the allocation of liability under the indemnity.

Subpart 3: Weights and Measures Act 1987

Clause 46 Purpose

84. We support the introduction of a purpose statement to the Weights and Measures Act.

Clauses 47-55

85. We support the introduction of provisions allowing the consumer to weigh, measure or count goods at point of sale. We also support requirements for suppliers to have certificates of accuracy for weighing and measuring equipment.

86. We support the introduction of new offence and infringement notice provisions. However, we believe the scale of infringement fees warrants review. The fees are very low, ranging from $200 to $500 depending on the offence. Penalties should be increased to provide a stronger incentive to comply with the Act.

Recommendation

- *Review the level of penalties payable under the infringement notice provisions*.

Subpart 4 - Secondhand Dealers and Pawnbrokers Act 2004

Clause 57 Interpretation

87. We support the amendment of the definition of secondhand dealer to clarify that people who sell personal possessions are not caught by the definition.

Clause 58 Secondhand dealer engaged in business to be licensed

88. We support the amendment to section 6(3) to remove the reference to "for the purpose of trade".

Subpart 5 - Carriage of Goods Act 1979

Clause 60 Other remedies affected

89. We support the introduction of subsection 6(2) to provide that nothing in subsection 1 limits the liability of the carrier or the remedies available to the consumer under the CGA. Consumer NZ has received complaints from members about goods being damaged or lost during transit. The Carriage of Goods Act does not provide sufficient protection in these situations and often means consumers are left in a position where they have no recourse.

90. The current situation where carriers can effectively contract out of the CGA is an anomaly. We cannot see any reason why carriers, as suppliers of a service, should be able to avoid responsibilities that other service suppliers have as a matter of course. We agree with the Ministry of Consumer Affairs' analysis that

there are no policy reasons why carriers should be subject to lesser obligations to carry out work with reasonable care and skill than other service providers.

Clause 61 Contracting out

91. We support the introduction of new subsections 7(2) and 7(3) to make it clear that nothing in the section entitles the parties to contract out of the CGA in respect of the rights of a consumer. We also support the introduction of new subsection 7(4).

Clause 62 New section 8A inserted

92. New section 8A represents a compromise. We recognise that the intention of allowing carriers to offer contracts for "carriage at limited carrier's risk" or at "declared value risk" is to enable the carrier to arrange insurance cover for a quantified sum. We accept that including the value of the goods in the contract for carriage will minimise the potential for disputes around compensation in the event the goods are damaged in transit.

93. We note that the $2000 limit proposed for contracts offered at limited carrier's risk is below the limit recommended in the Ministry of Consumer Affairs' additional paper on the Carriage of Goods Act. The ministry recommended the limit be increased to $2500, an amount adjusted for inflation since the limit was set in 1989. We suggest $2500 is more appropriate.

8. Part 2: Auctioneers

94. We support proposals for the registration of auctioneers and the introduction of record-keeping obligations.

Vendor bidding

95. We disagree with proposals to allow vendor bidding in auctions (clause 77(2)(g)). As previously submitted, we would like to see clear rules prohibiting the seller bidding in an auction of their property. We can identify no advantage in allowing vendor bidding to continue. The practice distorts the sales process and undermines consumers' ability to trade confidently.

Other matters

Unfair contract terms

96. The Ministry of Consumer Affairs has previously recommended introducing a ban on unfair contract terms to the Fair Trading Act. Consumer NZ strongly supports this recommendation and we are disappointed it has not been included in the bill. Unfair terms create a significant imbalance in the relationship between the supplier and the consumer. We believe there is sound justification for amending the Act to prohibit them.

97. Our research has found examples of unfair terms in standard form contracts for various services including contracts for electricity supply, telecommunications, gym membership, home security and medical alarms. Appendix 1 provides examples of some of the terms we have identified.

98. Standard form contracts are seen as an efficient way for businesses to transact with consumers. However, they provide little or no opportunity for a consumer to negotiate or amend terms. In practice, the consumer is presented with a pre-written contract on a "take it or leave it" basis. Consumers effectively have

no choice other than to sign the contract if they want to proceed with the purchase.

99. We are not opposed to standard form contracts. However, the tendency for some industries to include unfair terms in these contracts is a problem that needs to be addressed. Unfair terms that privilege the supplier over the consumer create the potential for significant consumer detriment. Terms which penalise the consumer (but not the supplier) for terminating a contract early also have a "deadening" effect on competition. They effectively limit the ability of the consumer to exercise choice and limit the market pressures on suppliers to deliver quality services.

100. In jurisdictions where unfair terms have been regulated, there is evidence that legislation has been successful in improving the operation of the market and the outcomes for consumers. In Victoria, where unfair contract terms have been regulated since 2003, Consumer Affairs Victoria has worked with several sectors (e.g., health and fitness centres, mobile phone providers, vehicle hire businesses) to improve standard form contracts and remove unfair terms.

101. Several submissions on the Ministry's Consumer Law Reform Discussion Paper argued that amending the Fair Trading Act to regulate unfair terms would impose a significant cost on businesses. We have not seen any evidence to justify this. Given many businesses use only one or two standard form contracts, the costs of revising these contracts is not likely to be great. It is also difficult to justify retaining unfair terms on the basis that it is too costly to remove them.

102. Rather than imposing costs on business, we believe amending the Act to prohibit the use of unfair terms will enhance competition and provide good businesses with more opportunities to "win" customers. Businesses which offer a consistently good service are rewarded by customer loyalty and do not have to rely on unfair terms to prevent customers from "switching". For example, we are aware that some gyms advertise "no minimum contract" terms and provide for consumers to cancel at any time without penalty.

103. Our preferred approach is to regulate unfair contract terms on a similar basis to Australia. We strongly support the Commerce Commission being given the power and resources to police unfair terms. The Commission's responsibilities should include providing guidance to industry on fair standard form contracts. It must also have the power to request unfair terms be removed to ensure compliance with the Act.

104. We also support the Disputes Tribunal having the jurisdiction to declare terms in standard form contracts to be unfair. This would provide consumers with an avenue to seek redress when a dispute arises and cannot be resolved with the supplier. The Tribunal should also have the power to rule that unfair terms are not binding on the consumer.

Oppressive conduct

105. The Ministry of Consumer Affairs' Consumer Law Reform Discussion Paper sought comment on including a prohibition on unconscionable conduct in the Fair Trading Act. We are disappointed this proposal has not been included in the Bill. Our preference is for the broader concept of "oppression" used in the Credit Contracts and Consumer Finance Act (CCCFA) to be adopted. The definition of oppression in the CCCFA is broader than that of unconscionable

conduct. It therefore creates the opportunity for remedies to be available in a wider range of circumstances and has the potential to enhance consumer protection. We believe the Committee should consider these options further in order to ensure legislative changes result in the best possible outcomes for consumers.

All inclusive pricing

106. We believe there is a strong case for adding provisions relating to "all inclusive pricing" to the Fair Trading Act. The Australian Consumer Law prohibits suppliers from representing a component of the price without also prominently specifying the single figure amount that the consumer must pay to obtain the good or service. The total price must be specified at least as prominently as the most prominent of the other components of the price.

107. Similar provisions are warranted here. The Commerce Commission has stated pricing issues remain the most common source of fair trading complaints that it receives. Consumer NZ also regularly receives complaints relating to the advertising of airfares, accommodation, vehicle hire, booking fees, and GST. Complaints typically arise where the prominent price displayed excludes other significant costs of purchase. These costs may be hidden in the small print or, when goods are purchased online, only revealed near the end of the booking process.

108. Price is a key factor in consumers' purchasing decisions and frequently the prime basis on which the decision is made. Where advertising obscures the total costs of a good or service, consumers can be misled into making decisions they would not otherwise have made. This kind of advertising is increasingly common. Additional charges can be hidden or not revealed until the time the purchase is made. We believe suppliers should be required to disclose the full purchase price upfront. We recommend the Committee consider the Australian approach as a useful model.

Penalties

109. The criminal and civil penalties in the Fair Trading Act have not been revised for some time. We believe there is a strong case for raising the maximum penalties in line with those adopted in Australia. Maximum penalties that apply in Australia are AU$220,000 for individuals and AU$1.1 million for a body corporate. In comparison, the Fair Trading Act penalties are $60,000 for an individual and $200,000 for a company.

110. For larger companies, the current $200,000 penalty may provide little deterrent to breaching the Act. It may also be an insufficient penalty for the consumer detriment resulting from the breach. We believe harmonisation with Australia is warranted given the number of companies that operate on both sides of the Tasman. We also believe increasing the penalties will help encourage compliance with the Act.

Enforcement of the CGA

111. The CGA is "self-enforcing" legislation. However, the effectiveness of the Act depend on consumers being well informed about their rights and having the ability to enforce them. Research by the Ministry of Consumer Affairs shows many consumers are not aware of their CGA rights. We have also found retailers often have a poor understanding of their obligations under the Act.

112. Better information and education are clearly needed. However, we believe there is a case for giving the Commerce Commission an enforcement role. We also believe penalties should be introduced for companies that fail to comply with the Act. We would like to see the Committee consider these issues in more depth during its deliberation on the bill.

Thank you for the opportunity to make a submission on this bill. If you require any further information, please do not hesitate to contact me.

Yours sincerely

Sue Chetwin
Chief Executive

Appendix : Examples of unfair contract terms

Example 1: Electricity contracts

1. In August 2011, we reviewed the domestic supply contracts of 15 electricity companies. We found the majority of contracts contained unfair terms and conditions. This is despite efforts by the Electricity Authority, and previously the Electricity Commission, to encourage companies to improve their supply contracts.

2. Examples of clauses that we consider unfair include:

- clauses that hold the consumer liable for the company's billing errors;
- clauses that give the company the right to determine how to refund money it owes the consumer (e.g., if the consumer has been overcharged);
- clauses that give the company the right to charge a fee to refund money owed to the consumer;
- clauses that give the company absolute discretion on whether to accept meter readings provided by the consumer. These clauses mean the consumer may be required to pay an estimated bill for significantly more electricity than has actually been used.

Example 2: Gym membership contracts

3. Overseas research shows unfair terms have been particularly problematic in gym membership contracts. We regularly receive complaints from members about this type of contract. Common complaints relate to contract terms which provide for the automatic renewal of membership, penalise the consumer heavily for terminating a membership early, and allow the supplier to vary the services provided, including the location where those services are supplied.

4. Gym contracts often give the supplier broad rights to change or terminate the contract. However, the rights available to the consumer can be extremely limited and costly to exercise. These contracts create a significant imbalance in rights where the supplier faces no penalty if a change of circumstances means services need to be altered; if the consumer's circumstances change and they wish to alter their membership, there can be a significant financial penalty to pay.

Example 3: Mobile phone contracts

6. Examples of potentially unfair contract terms are also evident in standard form contracts used for mobile phone services. Common examples include terms which allow the supplier to unilaterally alter service delivery at any time. A standard form contract used by one provider states:

> *We reserve the right to change, modify, advance, suspend or remove the services we provide you from time to time. We will notify you of any changes directly or via our website, so please check the website regularly.*

7. While the supplier reserves the right to change or stop services at any time, the consumer faces potentially large financial penalties if they fail to fulfill any of the contract terms. It may be appropriate for the supplier to retain the ability to change a contract in particular circumstances (e.g., where technological changes necessitate alterations to the way services are delivered). However, where unilateral change clauses are necessary, they should be drafted so there is a balance between parties' rights.

8. New South Wales Commissioner of Fair Trading Lyn Baker has stated that clauses which allow unilateral variation should be narrowly and clearly drafted and set out the specific circumstances in which a variation may occur. Baker says there should be a requirement to give the consumer reasonable notice of the change and the consumer should be able to cancel a contract without penalty if the changes do not suit.

Example 4: Home security contracts

9. Standard form contracts used by security companies also contain terms which we believe are likely to be considered unfair in other jurisdictions. As with gym membership contracts, contracts for security services (such as alarm monitoring) often contain automatic "roll-over" clauses hidden in the fine print.

10. The supplier will also frequently reserve the right to terminate the agreement immediately if the consumer breaches any of the contract conditions. However, the consumer does not have reciprocal rights to cancel if a breach is committed by the supplier.

11. While security contracts typically include penalties that can be incurred by the consumer, we have not seen any contract that provides for penalties against the supplier for breaching terms and conditions or varying service provision. It is much more likely that the contract will attempt to limit the supplier's liability for service delivery or require the consumer to accept that service levels will vary.

12. In some circumstances, the consumer may be able to rely on the Consumer Guarantees Act to pursue a case against the supplier for failing to take reasonable care in providing the contracted services. However, this will only provide a remedy after the fact. The inherent unfairness of the contract terms remains.