

## **Q & A for Consumer Law Reform Decision Announcement**

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- 1 When are the changes to consumer laws expected to be in place?
  - a My aim is to have a Consumer Law Reform Bill introduced to Parliament before the middle of the year and for the Bill to be passed this year, with it taking effect as soon as practicable after that.
  
- 2 What laws does the review cover?
  - a The review covers the Fair Trading Act 1986, the Consumer Guarantees Act 1993, the Weights and Measures Act 1987, the Door to Door Sales Act 1967, the Layby Sales Act 1971, the Unsolicited Goods and Services Act 1975 and the Auctioneers Act 1928.

It also covers the Carriage of Goods Act 1979 and the Sale of Goods Act 1908.
  
- 3 What prompted the Review?
  - a The review contributes to the Government's commitment to better regulation: less regulation. Better regulation means reducing the burden imposed by outdated or poorly conceived or poorly implemented regulation. Effective and relevant consumer laws promote competition and provide consumer and business confidence. Most of the consumer laws covered in the review are older than 20 years and had not been reviewed for many years.
  
- 4 Will consumers be confused by all the changes?
  - a The fundamental aspects of the Fair Trading Act, the Consumer Guarantees Act and the Weights and Measures Act are not changing. These laws are based on sound principles and are effective and well understood.

While the less well known laws are changing, the consolidation and updating of the laws should make them more accessible and easier to understand.
  
- 5 Won't getting rid of the Door to Door Sales Act 1967, the Layby Sales Act 1971, the Unsolicited Goods and Services Act 1975 and the Auctioneers Act 1928 leave consumers unprotected?
  - a The consumer protections in these laws will be incorporated into the Fair Trading Act and the laws are being repealed. Some enhancements to the protections are being made. Definitely no consumer protections will be lost.
  
- 6 What are the key changes that will be made to the consumer laws?
  - The addition of purpose clauses to the Fair Trading Act, Consumer Guarantees Act and Weights and Measures Act;

- The inclusion in the Fair Trading Act of provisions providing for a general prohibition on making unsubstantiated claims;
- The addition of principles-based layby sales provisions, unsolicited direct sales provisions and unsolicited goods and services provisions to the Fair Trading Act;
- The inclusion of a registration regime for auctioneers and auction conduct provisions in the Fair Trading Act;
- The removal of the exemption in the Consumer Guarantees Act for sales by auction and competitive tender (by traders), except the acceptable quality guarantee for sales of secondhand goods by a registered auctioneer (ie sales by traders using Trade Me type internet auctions will be covered by the Consumer Guarantees Act);
- Requiring disclosure for extended warranties that indicates what the warranty provides above the statutory guarantees of the Consumer Guarantees Act;
- Providing that electricity and gas distribution and transmission companies are suppliers who must meet the acceptable quality guarantees for electricity and gas;
- Amending the definition of “trader” in the Secondhand Dealers and Pawnbrokers Act to clarify that “evidence to the contrary” may include that the goods were purchased or acquired for personal use and are being sold as they are no longer required.
- Enhancing regulation of unsafe products by giving the Minister the power to act when a product will or may cause injury and giving product safety officers additional powers, including the power to purchase goods.
- Enabling more effective enforcement of the Fair Trading Act with infringement offences, banning orders and allowing the Disputes Tribunal to consider disputes about misleading and deceptive conduct.
- Fixing problems with the interaction between the Consumer Guarantees Act and credit contracts, and the Consumer Guarantees Act and the Carriage of Goods Act.

## **The Fair Trading Act**

### 7 Unsubstantiated claims –

- q. What is an unsubstantiated claim?
- a. An unsubstantiated claim is one that is made about a good or service without there being any basis for the claim. For example, if a claim is made that a fertiliser increases root growth by at least 50%, the person making the claim should have undertaken appropriate scientific testing to justify making that claim and not just made a wild guess. If there is not

sufficient justification for making the claim it would be an unsubstantiated claim.

A claim made deliberately that is incorrect could be a misrepresentation which is already an offence under the Fair Trading Act.

- q. What if a claim is unsubstantiated but true?
  - a. Claims should only be made with some form of justification and not pulled out of thin air. Consumers rely on claims made and should not have to “chance it” that the claim may be right. It is unfair on other businesses if a competitor makes a claim without substantiation when the other business has gone to the expense of proper testing before making claims.

## 8 Layby sales –

- q. What is changing for layby sales?
  - a. All layby sales will require a written agreement. The agreement will need to spell out the conditions under which the seller can cancel the layby (including the requirement to refund any instalments paid) and any termination fees payable by the consumer if the consumer cancels the layby.
  - b. Layby sales will be redefined as a sale where three or more payments are made. A sale with two payments can still be a layby but only if it is specified in the agreement.
  - c. The existing rules around passing of risk, seller liquidation and preferred creditor status will be maintained.

## 9 Uninvited Direct Sales –

- q. What is changing for uninvited direct sales?
  - a. The provisions will cover all door to door and telephone selling regardless of whether cash, credit card or credit is used.

The current Door to Door Sales Act only provides protections for consumers purchasing on credit which is arranged by the seller, i.e. not credit card purchases.

To deter “enticement” practices used to circumvent the current legislation, the provisions will also cover situations where the consumer has not invited the trader into their home for the purpose of entering into negotiations for supply of goods or services. For example, situations where a trader uses a competition to gain access to a consumer for the purpose of selling.

Traders will have to provide a written and verbal statement of a consumer’s rights, for transactions of \$100 or more, which includes the

consumer's cancellation rights and detail about how to cancel the agreement.

10 Auctions –

q. How will auctioneers be regulated?

a Auctioneers will have licensing and registration requirements, broadly similar to those of the Secondhand Dealers and Pawnbrokers Act and the Motor Vehicle Sales Act. This is a registration (negative licensing) system.

Exemption criteria for fundraising/charity auctions will be provided as well as for auctioneers licensed under the Real Estate Agents Act and Motor Vehicle Sales Act.

q. Who will establish and manage the registration regime?

a The Ministry of Economic Development will appoint a registrar to establish the administration regime for auctioneer registration.

q. What are the auction conduct requirements?

a The conduct requirements for auctions will include the principles from the Sale of Goods Act, the Property Law Act and the Auctioneers Act to provide that auctions are conducted in a transparent manner.

Persons attending auctions should know when vendor bids are being made, that vendor bids cannot be made in “no reserve” auctions and that vendor bids should not be represented in post-auction advertising relating to the pass-in price of the property being auctioned.

q. What classifies as an auction?

a A modern definition will be included in the Fair Trading Act. The definition will cover the sale of goods, land and services of any kind, to the highest bidder. The definition will apply to any process commonly known or understood to be an auction where bidders can participate in real-time and includes auctions conducted over the internet, telephone, in person or any other means.

11 Unsolicited Goods and Services –

a Recipients will not be liable to pay for goods or services they did not order.

b A recipient's liability for unsolicited goods will be reduced. Unsolicited goods will become the recipient's after 10 working days – currently the recipient must look after unsolicited goods for up to three months.

c It will still be an offence to invoice someone when the sender or service provider knows they have no right to be paid.

12 Extended Warranties –

- q. What information will be required for extended warranties?
- a. Information will need to be provided with extended warranties that indicates what benefits the warranty provides above the statutory guarantees provided in the Consumer Guarantees Act and of the cooling-off period.
- q. How will consumers be able to use information provided?
- a. A minimum 7 working day cooling-off period will be established for extended warranties. This will give consumers with the opportunity to read and understand the warranty and cancel it and receive a full refund.

13 Regulation of unsafe products –

- q. With the reasonably foreseeable use test, what happens with items like knives and power tools?
- a. The reasonably foreseeable use test aims to catch products that will or may cause injury when used in a way that is predictable but is not the intended use. The aim is not to target products such as knives and power tools but to catch products like laser lights, which have been used in attacks on air planes, cars and ferries but are actually intended to be used for astronomy. The test would be subject to other factors such as, the risk of harm, the extent to which the product can be made safe and the extent to which the potential risks are understood by consumers.
- q. The Minister has already issued a Government policy statement about formaldehyde levels in clothing. Why does a provision need to be included in the Fair Trading Act to allow them?
- a. Product safety policy statements are beneficial because they provide guidance without regulating the industry. This provision would make this tool clearly available to the Minister.
- q. Why are additional powers required for product safety inspectors?
- a. It has come to the attention of the Ministry of Consumer Affairs through numerous cases that the powers available to product safety inspectors are not sufficient to allow them to carry out their work monitoring product safety issues in the market. They have considerably fewer powers than product safety officials in other countries and officers under other legislation (such as the Food Act for example). The additional powers will make it easier for product safety officers to monitor the sale of unsafe products.

14 Enforcement of the Fair Trading Act –

- q. What extra powers is the Commerce Commission being given to help it enforce the Fair Trading Act?
  - a. The Commerce Commission currently enforces the Fair Trading Act using a mixture of tools like civil remedies, criminal prosecutions and informal compliance and warning letters. As well as these tools, the Commerce Commission will now be able to
    - i Enforce undertakings it has accepted from traders who admit they broke the law (that typically provide for the trader to compensate for the damage they caused.)
    - ii Issue infringement notices and small fines for a limited number of clear-cut offences that are not worth taking to court
    - iii Ask the court to ban individuals who are repeatedly committing Fair Trading Act offences from managing a business to prevent them from continuing to reoffend and injure consumers.
- q. Will the bans put on individuals prevent them from being able to earn a living?
  - a. No. The courts will only be able to ban people from managing a business. The person will still be able to be employed by another company or do something else. Also, for a person to be banned they must have committed two or more Fair Trading Act offences within 10 years, and be likely to do it again. A banned person will be able to apply to the court to have the ban lifted in some situations.
- q. Will the Commerce Commission be handing out infringement notices and fines left, right and centre?
  - a. Infringement notices will only be available for a limited number of clear-cut offences, like not having the correct information on a Consumer Information Notice. For less serious offences the Commission will be able to give out informal warnings, and for more serious offences the Commission can take the person to court. The Commerce Commission will need to decide for itself when it uses infringement notices and the other tools. As with other infringement fines, such as speeding tickets, there will a number of safeguards to ensure the power is not abused.
- q. Why is there a need for the jurisdiction of the Disputes Tribunal to be extended?
  - a. The Disputes Tribunal is an accessible forum for consumers to use to get their complaints heard and resolved. The fee levels are lower than the courts system. The Disputes Tribunal can hear disputes about misleading and deceptive conduct in relation to goods, services and employment under the Fair Trading Act (sections 10, 11 and 12) but they are unable to hear claims regarding misleading and deceptive conduct generally

(section 9). Most, if not all, consumers are unaware of the Tribunal's inability to hear these claims, and so they continue to lodge the claims only to later find out that the Disputes Tribunal cannot hear them.

- q. Will Disputes Tribunal referees be able to handle section 9 claims?
- a. The Tribunal's referees have the skill and experience to deal with claims under sections 10 to 12 of the Fair Trading Act, and there is no reason why they should also not be given the power to hear claims under section 9, especially as around 80% of the Disputes Tribunal's referees are legally trained and qualified. Allowing the Tribunal to hear section 9 claims would not increase their workload to unmanageable levels, and would be beneficial to consumers in allowing them to be able to resolve their claims under section 9 at a much cheaper cost.

15 Are any changes being made to Consumer Information Standards?

- a. The Fair Trading Act allows the Government to make consumer information standards regulations about information given to consumers, for example about labelling about the care of clothes, but the provisions do not allow for the regulations to specify what tests should be used to decide what information is given to consumers. The ability to include testing requirements will be added to the existing powers.

### **The Consumer Guarantees Act**

16 Auctions –

- q. How will auctions of secondhand goods work?
- a. All goods sold by traders to consumers via auction will be covered by the Consumer Guarantees Act, even secondhand goods. However, if secondhand goods are sold via a registered auctioneer the trader will not be liable for the guarantee of acceptable quality. Goods sold by consumers won't be covered either.
- q. What does this mean for TradeMe style auctions?
- a. Traders selling goods through an online auction process, such as TradeMe, will be covered by the Consumer Guarantees Act so the consumer will have protections under the Act that they did not previously have. This applies to new and secondhand goods. Consumers selling goods on TradeMe will not be covered.
- q. Do the guarantees apply to consumer to consumer auctions?
- a. The provisions will not apply to consumer to consumer auctions. The Consumer Guarantees Act applies only to business to consumer transactions.

- 17 How does this work relate to Jackie Blue's Consumer Guarantees Amendment Bill?
- a The Consumer Law Reform Bill will address the issues raised in Jackie Blue's Bill through the auction and extended warranty provisions.
- 18 Will making electricity and gas distribution and transmission providers responsible for electricity and gas being of acceptable quality increase the overall costs for electricity consumers?
- a At present, retailers are liable for the acceptable quality of electricity or gas even though they do not have any direct control over the quality. The proposed changes will mean that the distribution and transmission providers that have control over quality associated with the distribution network are also responsible for acceptable quality under the Act.
- There is no intention to raise the bar for acceptable quality or increase the requirements on suppliers to maintain or upgrade their network infrastructure. These matters are regulated under the Commerce Act 1986.
- 19 The Consumer Guarantees Act and collateral credit agreements –
- q. What do the changes mean for consumers?
- a. The provisions will provide consumers with a means of redress to relieve the burden of credit used to purchase goods that are rejected under the Consumer Guarantees Act.
- q. How does it work?
- a. Consumers who have rejected goods that were purchased on credit arranged by the trader will be able to apply to the Disputes Tribunal to have the responsibility for the credit vested with the trader who sold them the goods. Consumer will only be able to do this where the trader has not provided an appropriate remedy.
- 20 The Consumer Guarantees Act and the carriage of goods –
- q. Why will carriers have to offer the limited liability carrier's risk option when they offer carriage services to any consignor?
- a. By being offered the limited liability carrier's risk option allows consignors to make an informed decision on the cost of protection or the risk they choose to take.
- q. What happens if the limited liability carrier's risk option is not used?
- a. The service guarantees under the Consumer Guarantees Act should apply for the benefit of consumers under the other options.

- q. Under what Act would the carrier's liability for loss or damage to goods come under?
- a. The carrier's liability would not be limited to the contract of carriage unless the contract of carriage provides a stricter liability or more advantageous remedy to the consumer than what would be available under the Consumer Guarantees Act.
- q. Can a carrier still contract out of the Consumer Guarantees Act obligations?
- a. No. The Carriage of Goods Act will be amended to ensure that the Consumer Guarantees Act's obligations cannot be contracted out of, except as already provided for by section 43 of the Consumer Guarantees Act.
- q. Why is the carrier's risk liability cap being increased to \$2,500?
- a. The cap was set in 1989 and has not been amended since. The increase is in line with inflation.

21 What are the guarantees under the Consumer Guarantees Act?

- a The statutory guarantees with respect to goods include guarantees as to:
  - title and the right to sell goods free from any undisclosed security interest (section 5)
  - acceptable quality (defined as fit for purpose, acceptable in appearance and finish, free from minor defects, safe and durable, to the standard a reasonable consumer would regard as acceptable having regard to the nature and price of the goods, any statements made on labels or packaging, any representation made by a supplier or manufacturer and any other relevant circumstances) (sections 6 and 7)
  - fitness for particular purposes made known by the consumer or represented by the supplier (section 8)
  - compliance with description (section 9)
  - conformance with samples (section 10)
  - reasonable price (where the price is not specified by the contract) (section 11)
  - reasonable facilities for repairs and spare parts reasonably available (section 12)

The statutory guarantees with respect to services include that the service will be

- Carried out with reasonable care and skill (section 28)

- Reasonably fit for purpose and of a nature and quality that it can reasonably be expected to achieve the desired result (section 29)
- Completed within a reasonable time and reasonable price (where the price is not specified by the contract) (sections 30 and 31).

22 What are the remedies under the Consumer Guarantees Act?

- a The Act's guarantees are self enforcing. The consumer is responsible for seeking redress.

For goods, depending on the fault, the supplier is required to refund, repair or replace the goods. If the breach of guarantee is substantial then the consumer can reject the goods (and seek either a refund or the supply goods of an identical or superior type) or, if the substantial fault is repairable, require the supplier to remedy the fault. More information is available on the Ministry of Consumer Affairs' website.

### **The Weights and Measures Act**

23 What is being changed in the Weights and Measures Act?

- a The Weights and Measures Act has been found to be working very well and is widely recognised. However, a few minor aspects of the Act need updating to take into account new approaches by retailers and suppliers, such as supermarkets. Briefly these are
- i Providing that retailers are responsible for the accuracy of the weighing equipment,
  - ii Adding an offence for people who deface a reification stamp, and
  - iii Allowing for the Government to authorise companies to verify their own measuring equipment in accordance with an approved standard.

### **Matters not progressed - Unfair Contract terms / Unconscionability**

24 Why are unfair contract terms provisions not proceeding?

- a New Zealand has few recorded examples of unfair contract terms, and introducing a prohibition would lead to increased uncertainty around whether contracts were valid, particularly amongst businesses which rely heavily on standard form contracts. There is mixed evidence on whether a prohibition on specific terms considered "unfair" would have any real effect, or would just encourage contracts to be worded differently, but with equal effect. The incentive to amend contracts in an attempt to reduce the potential for unfairness imposes a compliance cost on businesses and consumers for little or no benefit. Similar provisions have recently been introduced into Australian law, and the Ministry of Consumer Affairs will monitor the impact of these, reporting back on the Australian experience.

- 25 Why are unconscionability provisions not proceeding?
- a While there is currently no evidence unconscionable contracts are a significant problem, including a prohibition may have led to a considerable period of uncertainty as the courts determined test cases to set limits around its application. Existing case law already includes significant protection for consumers, and there was considerable concern that adding unconscionable conduct provisions to the Act would add little more, while compromising freedom of contract.
- 26 Unfair contract terms and unconscionability conduct provisions have been touted as a solution to curbing negative lending behaviour, loan sharking - what will come in their place?
- a The Ministry of Consumer Affairs is conducting a review of our credit legislation, the Credit Contracts and Consumer Finance Act, and alternate and appropriate solutions will be investigated through this process.