

Summary of Submissions on the Discussion Paper
Review of the Redress and Enforcement
Provisions of Consumer Protection Law – International Comparisons

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Introduction

The Ministry of Consumer Affairs (MCA) is reviewing the effectiveness of the redress and enforcement provisions in the Fair Trading Act 1986 (FTA) and the Consumer Guarantees Act 1993 (CGA) as part of our ongoing monitoring of our legislation in order to assess how effective it is in practice in achieving desired outcomes.

As part of the review, MCA released a discussion paper Review of the Redress and Enforcement Provisions of Consumer Protection Law- International Comparisons (the discussion paper) in May 2006. The discussion paper compared the redress and enforcement provisions in the FTA and the CGA with those found in the consumer protection legislation in other similar jurisdictions. The comparison suggested that the approach taken by New Zealand's consumer protection legislation is consistent with legislation in other similar jurisdictions.

Whilst there were no significantly different approaches taken in the overseas legislation there were some differences in the provisions that may be worth considering for adoption. The advantages and disadvantages of adopting these provisions into New Zealand's consumer protection legislation were considered in the discussion paper.

This report provides a summary of the views expressed in submissions received on the Ministry of Consumer Affairs' discussion paper. Twenty-seven¹ submissions were received on the discussion paper. Fourteen were from business and business groups and associations (the business group). Four were from consumer organisations and community law centres (the consumer group) and 8 were from a range of parties including lawyers, consumer complaints ombudsmen and the Commerce Commission.

As a general comment business groups and associations tended not to see the need to amend the Fair Trading Act 1986 (FTA) to provide for the additional redress and enforcement provisions outlined in the discussion paper for possible adoption. Half of the submissions in this group considered that self-regulation is the way forward. They commented that there is a very strong incentive for businesses to comply with consumer protection legislation simply to protect the image of the business (or the brand name) and that the issues raised in the discussion paper are not significant enough to justify additional regulation. Submitters from this group considered the paper treated business with suspicion, there was not enough evidence of a problem, some of the proposed amendments would increase compliance costs and that more regulation can constrain the performance of business. Concerns were also raised about extending the powers of the Commerce Commission.

On the other hand, consumer organisations and community law centres supported the proposals. They particularly supported the proposal to prohibit unfair terms in consumer contracts. Generally, they supported the other proposals on the basis that

¹ One of these submissions was a staff member from the Consumer Services Branch in Alberta Canada. This submission has not been included within the summary. Another submitter said that they had no comment to make on the discussion paper.

they would help the Commerce Commission to do its work more effectively and this would get better outcomes for consumers².

The Commerce Commission fully supported all the proposals except the unfair terms in consumer contracts prohibition. Although the Commission identified some problems with the unfair terms in consumer contracts prohibition, they did admit that such a provision could positively contribute to their ability to stop misleading behaviour quickly.

The comments made in the submissions are outlined below by reference to the seven tools that were identified for possible adoption following from the comparison of New Zealand's consumer legislation with similar overseas legislation:

A prohibition on unfair terms in consumer contracts;

The ability to seize and warn the public of potentially unsafe products;

- Cease and desist orders which would prevent a trader from continuing with alleged misconduct;
- Substantiation notices which would place the onus of truth on those making claims (not the Commerce Commission);
- Court enforceable undertakings which could be used if a business contravened the terms of a settlement with the Commerce Commission;
- A strengthening of the Commission's interview powers so that they could require a person to answer questions and give evidence; and
- Banning orders which would prevent recidivist offenders from supplying goods and services either for a set period of time or indefinitely.

The addition of any of the above tools to New Zealand's consumer protection regime would require amendments to the FTA.

Summary of Submissions

Unfair terms in consumer contracts prohibition

Just under half of the submissions, including nine of those from the business group did not support the proposed prohibition on unfair terms in consumer contracts. Concerns were raised that such a proposal would be unworkable and that it would contradict the Credit Contracts and Consumer Finance Act 2003. Some were

² The submissions from the Consumer Group were more limited in their coverage than many of the other submissions. For example, only two of the submitters from the consumer group commented on the proposals relating to product safety warning notices and powers of investigation, cease and desist orders, substantiation notices and banning orders. Only one submitter from this group commented on the court enforceable undertakings proposal.

concerned about both the compliance and commercial costs associated with this proposal. Some submitters thought amending the legislation was a heavy handed way of dealing with this issue and that an educative approach would be more appropriate.

Other comments included that such an amendment would create uncertainty and that defining a term as unfair would be subjective and therefore problematic. One submitter commented that there would need to be guidance in the legislation as to what an unfair term is and that MCA would need to clarify whether the prohibition applied to both standard and negotiated terms. It was suggested by another submitter that prohibiting oppressive conduct may be an option but that there would be a problem fitting either this or the proposed prohibition into the FTA as it does not define a consumer.

Several of the submitters wanted more information on the scale of the problem. One submitter stated that there is little evidence of a problem and that MCA should not legislate for laziness – that people should not expect things to be put right if they do not read contracts before signing.

Two submitters commented that if there is a problem with contracts in a particular sector then this should be dealt with on an industry basis and not in a general way. Others commented that rather than prohibiting unfair terms, businesses should be able to compete with another business to provide a more competitive offer.

Another submitter stated that there was no need for this prohibition and that as CGA guarantees are non-contractual, consumers rights to remedies are not affected by the terms of a contract. This submitter stated that in their view there is nothing in the legislation that would inhibit MCA or the Commerce Commission working with industry groups to develop standard terms.

The proposed prohibition on unfair terms in consumer contracts was supported by all of the consumer groups. One submitter stated that the prohibition should apply to both standard and negotiated terms in contracts so that the disparity in the bargaining power between a trader and a consumer was recognised. Another submitter considered that there should be a provision in the FTA that prohibits unfair terms generally and allows any person to apply to the court for civil remedy in the event of a breach. In addition, they stated that a further provision should be added to the FTA that specifically identifies a range of unfair terms that, if included in a contract, amounted to a criminal offence. This submitter requested special protection for vulnerable consumer groups, such as the elderly, those with mental illnesses or those who do not have English as a first language. Examples were provided of a range of contracts considered to contain unfair terms.

One submitter noted that as part of any consideration of prohibiting unfair terms in consumer contracts, MCA needs to consider the penalties that would apply to such a contravention – and noted the penalties available in the Victorian Fair Trading Act (which prohibits unfair contract terms) are low.

Difficulties with enforcing an unfair terms in consumer contracts prohibition were raised by the Commerce Commission. They pointed out that it would take some time to establish legal precedent as to what is unfair and that it is possible that many

terms that appear to be unfair may not meet the objective standard of being unfair. However, the Commission stated that such a provision could positively contribute to their activities by enabling them to stop misleading behaviour quickly and therefore reducing consumer detriment. The Commerce Commission stated that for this proposal to be successful that they should be able to decide if and how they investigate a possible breach and that they should not be required to investigate each complaint as occurs in the United Kingdom.

Product safety warning notices and powers of investigation

Most of the submitters did not support the proposal to amend the FTA so that an authorised person could seize potentially unsafe products during an investigation and allow for the issuing of warning notices. Concerns were raised by submitters that the proposal would give the Commission too much power and would mean that thorough investigations would not be carried out. The costs to business and the damage to a business' reputation (or brand), particularly if it was later found that the product involved was safe were raised as potential problems with this proposal. Some submitters from the business group said that it is in the best interests of businesses to comply with voluntary recalls. They asked how many businesses refused to cooperate with voluntary recalls and questioned what harm is being reduced if a refusal to comply with a voluntary recall request is not a common occurrence.

A submitter, who did not support the proposal, suggested that the Commission should be given the powers to seize product samples for the purposes of testing and investigation.

Two of the submitters from the consumer group commented that they supported the proposal on the basis that it would provide pre-emptive protection for consumers and because the current process leading to the issuing of an unsafe goods notice takes time and can be frustrated by reluctant (in a non-pejorative sense) or uncooperative traders.

Other submitters who supported this proposal did so in principle and suggested that such a proposal should apply to unsafe services as well as to goods or on the proviso that there were sufficient threshold levels applied before warning notices were issued or goods were seized.

Two other submitters commented that if such powers were to be enacted then there would need to be safeguards.

The Commerce Commission considers that there is merit in having search warrants so that potentially unsafe products can be seized. They submitted that if any search warrant power was to be granted that Commerce Commission employees should be authorised to do so by the Commission and not by the Minister of Consumer Affairs (as proposed in the discussion paper). Additionally, the Commission submitted that if the Minister was given the power to issue warnings to the public regarding potentially unsafe products that the Commission should also have the same power with regard to the mandatory product safety standards under the FTA (which they enforce).

Cease and desist orders

As with the product safety and warning notices proposal, some submitters from the business group considered that this proposal would give the Commission too much power and would mean that thorough investigations would not be carried out. They raised concerns about the costs to business of this proposal particularly if it was later found that the behaviour of the business did not contravene the FTA.

Some submitters considered that injunctions should be used rather than cease and desist orders and several viewed cease and desist orders as regulatory overkill. A submitter who did not support this proposal suggested that before this proposal is advanced that further analysis should be done to identify the circumstances where cease and desist orders could be used. They also noted that the cease and desist process available under the Commerce Act has not been used (though since the submission was made the Commission has used the provision).

Cease and desist orders were supported by two submitters in the consumer group. They claimed that there is a need to quickly stop traders acting against the interests of consumers and that they had experienced situations where multiple complaints were received regarding a single trader. Such complaints continued even while the trader's conduct was being investigated. One of these submitters commented that consumer confidence is reduced if consumers think the regulator is doing nothing.

Other submitters that supported this proposal did so on the basis that such orders were for a specific activity or practice and that traders were given the right to claim costs if they were subsequently found not to have breached the Act or if the Commission was found to have been excessive in their management of risks to consumers.

Another submitter who supported cease and desist orders, considered that the power should only be available as a last resort to prevent continuation of conduct that has already been held by the court to breach the FTA and that such powers should only be available to the Commission on application to the court.

The Commerce Commission said that cease and desist orders would enable them to act quickly to stop illegal conduct. They indicated (by way of examples) that there is increasing evidence that suggests businesses are choosing to continue contravening the legislation despite the Commission commencing legal action against them.

Substantiation notices

The substantiation notices proposal was supported by nearly half of the submitters. One submitter claimed that the person making a representation should be able to substantiate their claims. Submitters from the consumer group said that many of the complaints that they receive relate to information presented at the point of sale and that businesses should have to substantiate all representations. Another considered that substantiation notices would act as a significant deterrent to traders making unsubstantiated claims in their advertisements and that the ability of traders to substantiate is a basic tenet of consumer protection law. Three submitters considered that there should be some penalty or process available for failure to substantiate or failure to provide a response.

Those submitters that did not support this proposal were concerned because of the criminal sanctions available in the FTA and because they considered that the proposal would require them to prove that they were innocent, which is contrary to their rights under natural justice. Submitters stated that if suppliers were required to substantiate product characteristics that they will be reluctant to purchase new products or to purchase from new traders. Concerns were raised about the costs associated with proving claims and once again some submitters thought this proposal would mean that the Commerce Commission would not be required to conduct thorough investigations.

The Commerce Commission submitted that those making claims about products have (or should have) all the relevant information that is needed to validate the truth of the claims made. Substantiation orders would shorten the amount of time needed to investigate claims and also the amount of court time needed to hear such cases. They also claimed that such a provision would help protect the market share of honest traders and could also reduce the level of detriment to consumers resulting from unsubstantiated claims.

Court Enforceable undertakings

The court enforceable undertakings proposal was supported by about one third of submitters including one from the consumer group. The proposal was considered to be a practical, sensible, effective efficiency measure by one submitter. Another submitter considered this proposal to be an essential amendment. They said that this proposal will give consumers the satisfaction that other consumers will not experience the same problem and that being able to enforce settlement undertakings would encourage traders to improve their practices.

Five submitters commented that they did not favour court enforceable undertakings. Some thought that non-compliance with the terms of a settlement are enforceable in court while others considered that given settlements are contracts they can be enforced under contract law and therefore a specific provision in the Fair Trading Act was not needed.

The Commerce Commission supported this proposal and claimed that such a provision would lead to quicker, more effective settlements, reduce court time and increase compensation for affected consumers. They also considered that such a provision would make their settlement process more powerful and flexible.

Compulsory Interview

Compulsory interview powers, with provisos, were supported by about one third of the submitters. One submitter supported this proposal on the basis that voluntary participation should be tried first. This submitter recognised that there would be serious risks for those under investigation if the FTA was amended so that the Commission was provided with the ability to conduct compulsory interviews (as well as court enforceable undertakings) and stated that individuals under investigation would need to be given appropriate warnings and be given the opportunity to seek legal advice.

One submitter from the consumer group commented that the Commission should be given compulsory interview powers because it would enable the Commission to understand information at an earlier stage in an inquiry and in so doing enable them to complete investigations with increased efficiency. The submitter considered this would be beneficial to consumers because there would potentially be quicker decisions and redress.

Just under a third of the submitters did not support this proposal and were concerned that this power could be misused and that the Commission would use this power rather than trying to work co-operatively with the business concerned. Concerns were also expressed about Bill of Rights, civil liberties, employment law issues, immunity protections and any further issues arising in the context of a criminal statute. One submitter questioned whether the proposal would really add to the Commission's powers.

The Commerce Commission considers that the ability to compulsorily interview people would provide them with an investigative tool of considerable value. They claim that such a provision would minimise honest trader and consumer detriment by stopping offending behaviour more quickly and that such a power would reduce the number of search warrants used. The Commission stated that while such a power would not be used frequently, it would enable them to fully investigate a small number of cases which at present cannot be satisfactorily resolved.

Banning Orders

The proposal to ban recidivist offenders was supported by one third of submitters provided that this power was used for serious recidivist offenders only. One submitter stated that an effective deterrent is needed for recalcitrant offenders.

Banning orders were endorsed by two submitters in the consumer group. One stated that the provision should be all embracing. The other commented that a consumer's grievance is increased if they discover that a trader has a history of breaching the legislation and that in such a situation their confidence in transacting and in the regulator is reduced.

Other submitters suggested that rather than banning, the penalties available for repeat offenders should be increased (for example, for the second offence the maximum penalty available would be doubled, for the third offence the maximum penalty available would be trebled etc) and that rather than banning orders (as well as some of the other proposals) that public shaming through newspaper or website notices was a better option.

About one quarter of submitters did not support banning orders.

The Commerce Commission supported this proposal. They are concerned that the FTA does not have enforcement measures that can deal effectively with recidivist offenders. They consider that such a provision would reduce the amount of trader detriment that results from the behaviour of regular and deliberate offenders.

Legislative differences that could be considered for adoption

The discussion paper also included a number of other provisions that MCA identified from the international comparison analysis but did not propose to progress on the basis of current analysis. These were:

- broadening the definition of a consumer in the CGA;
- industry codes of conduct;
- super complaints;
- formal cautions; and
- unconscionable conduct.

Submitters were, however, asked if they had any comments to make on these provisions. In general, submitters were generally not in favour of these other provisions.

Broadening the definition of a consumer in the CGA

There was no support for broadening the consumer definition in the CGA. One submitter claimed that there was no evidence available that suggested that the way that a consumer is defined in the CGA disadvantages a small business.

Industry codes of conduct

Ten submitters commented on provisions relating to industry codes of conduct in the consumer protection legislation. Several indicated general support for self regulation rather than specifically saying why they wanted the codes of conduct prescribed in regulation.

Two submitters did not support providing for industry codes of conduct in the FTA. One said that neither MCA nor the Commerce Commission should have a role in endorsing codes while the other said that while they appreciate the value of industry codes of conduct, they do little to assist consumers dealing with difficult suppliers or manufacturers. They stated that MCA's time would be better spent on consumer and trader education.

The Commerce Commission considered that some positive benefits could accrue from the Industry Codes of Conduct proposal. They had some reservations, however, because they consider that such codes may give a false sense of security to traders and that codes can transfer the risk from traders to consumers. They also said that codes can limit innovation and that the Commission may have to take on the role of an approval authority as well as an enforcer, which could hinder their ability to take legal action. Concern was also expressed that industry may rely on the Commission as enforcer of all the codes, which would have resource implications.

Super complaints

A submitter from the consumer group supported the super complaints proposal and suggested that the test that should be used to determine whether this proposal was progressed should relate to the standing and quality of the work of the consumer organisation. Another submitter considered that a super-complaints and a class actions system was unnecessary under the private remedies regime of either the CGA or the FTA. They stated that if a large number of consumers are affected by the same trader and subsequently a few consumers are successful in their claims (and those successes are well publicised), then the trader will have an incentive to settle claims by other consumers similarly affected. This submitter considered that there is a role for MCA in coordinating claims and in publicity of this kind as it did in the past.

The Commerce Commission considers that if the super complaints proposal was to go ahead that this would be an entirely new function. Concerns were raised that their enforcement priorities may be overwhelmed by such a proposal and that there is a risk that the Commission would be dictated to by other agencies, which would threaten their independence. It was also noted that the Commission takes on issues with widespread impacts.

Unconscionable conduct

One business submitter supported a prohibition on unconscionable conduct in relation to small to medium sized enterprises (not consumers). Two of the submitters from the consumer group supported the unconscionable conduct proposal. One recognised, however, that if the unfair terms in consumer contracts prohibition proposal was progressed that the number of potential unconscionable conduct cases would decrease. Unconscionable conduct provisions were not supported by another submitter on the basis that they would appear to add nothing to existing legal and equitable rights.

The Commerce Commission had no firm view on the unconscionable conduct provision and suggested that further work be done on this proposal.

Next Steps

The submissions received have provided valuable input into MCA's work reviewing the redress and enforcement provisions of consumer law. Many of the 'implementation' issues raised in the submissions are matters that MCA had itself identified and work is underway to determine how best to address them.

MCA thanks all those who made submissions. We welcome any feedback on this summary and any further comments from interested parties. Comments can be sent to enforcement-review@mca.govt.nz or to Enforcement Review, Policy Unit, Ministry of Consumer Affairs, P O Box 1473, Wellington.